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The impact of new forms of labour on industrial relations and the evolution of labour law in the European union

Dutch country report

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Study for the European Parliament

Coordination:

Labour Asociados SLL Madrid and Université Européenne du Travail Paris

ITS – Radboud University Nijmegen

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Part one

General overview of state of affairs

Executive summary

1. During the eighties and nineties of the former century new, flexible forms of work came into being in the Netherlands. A basic characteristic of these new forms of work is that they deviate from the standard model of full-time open-ended contracts between an employer and an employee. The most common types of non-standard, flexible work are now: part time work, temporary work, on-call work, agency work and freelance work. The share of flexible work in the total workforce has fluctuated only slightly over the past two decades. Within the flexible segment the number of self-employed workers has increased gradually.
2. The impact of these new forms of work is particularly visible in individual employment relationships. They gave rise to a strong differentiation in the types of labour contracts, used by employers to hire workers. The greater the flexibility of the employment relationship, the lesser the protective rights of workers related to labour contract law. In case of agency work and freelance work labour contract law is stretched maximally. Freelancers usually do not have a labour contract any longer, unless they are economically dependent from one and the same client or customer.
3. The new forms of work did have less impact on collective rights of workers, like bargaining, representation, information and consultation. For a part they could be dealt with by existing institutions like trade unions, collective labour agreements, social insurance funds. For a part new institutions were developed to deal with the peculiarities of these new forms of work. In particular, the agency work was subjected to self-regulating activities of the TWA-sector. Separate employers' associations, trade union departments, collective agreements, social funds and inspection agencies were established for TWA-work in the nineties. During the past years a growing number of networks for the representation and safeguarding of interests of self-employed workers came into being.
4. As a consequence of deregulation and decentralization of labour relations the focus of social dialogue about employment, staff planning, personnel management, labour contracts, hiring and firing of workers, training, employability and mobility has shifted to the level of sectors and companies. This tendency is expected to continue in the future. At the national level macro-coordination is expected to be maintained with regard to wage policy and social security arrangements.

5. To regulate the new, flexible forms of work a new piece of legislation was introduced in Dutch labour law: the Flexibility and Security Act of 1999. This law accepts more contractual flexibility while at the same time providing more security to temporary workers, as expressed with the 3-3-3 formula: temporary work is only allowed for maximally 3 years or maximally 3 contracts with not less than 3 months in between. If these criteria are not met, the worker is supposed to have an open-ended contract. Due to this new law, TWA's now also employ a lot of workers with open-ended contracts (with the TWA).
6. In Dutch labour law a number of core rights of workers can be identified, regardless of their employment status: contractual freedom, equal treatment, protection against dismissal, minimum wage, protection against health and safety risks, information and consultation. Furthermore, facilities for training and adequate possibilities to combine work with other social positions (education, care) are considered to belong to the core of labour law. As regards law enforcement, experiences in the Netherlands demonstrate that targeted inspection projects of governmental authorities (Labour Inspectorate) can be effective. Other effective instruments are certification and inspection systems of sector agencies themselves. The TWA-sector in the Netherlands has established these kinds of self-regulating mechanisms.
7. During the past decade many efforts have gone into reforms of the social security system in the Netherlands. Dutch labour law remained relatively unaffected, apart from the Flex Act of 1999. Recently, however, the government launched new plans to change the system of employment protection in order to increase flexibility on the labour market. The existing system of dismissal permits should be abolished. It should be replaced by a system of better training facilities and more financial support for employees to make a change on the labour market. The plans are inspired by the model of a transitional labour market, with an emphasis on employment security in stead of job security.
8. The social partners are sharply divided in their evaluation of these proposals. The employers support them. In their view reform is necessary to reduce administrative burdens, further economic dynamism and keep up with global competition. The trade unions strongly oppose them. In their view, abolishment of the dismissal permit system would be a fundamental break with the tradition of employment protection. The permit system should be maintained, in order to prevent arbitrariness at the side of employers. Greater flexibility and mobility on the labour market should first and for all be stimulated with training facilities for workers. In november 2007, after a period of public and political debate, the proposals were withdrawn by the government because the coalition parties could not find a compromise.

1 Introduction

This country report is part of a EU-wide study about new forms of work and their impact on social dialogue and the evolution of labour law. The study is commissioned by the European Parliament, with the objective to assemble actual information about the state of affairs in the different member states as input for the debate on the modernization of labour law in the EU. The study is coordinated by Labour Asociados SLL Madrid (mr. Ricardo Rodriguez Contreras) and the Université Européenne du Travail in Paris (mr. Christoph Teissier and mr. Claude Emmanuel).

In this country report the state of affairs in the Netherlands is described. The report is structured according to the Work Guide, provided by the coordinators.

In the second section we give definitions, facts and figures about new, flexible forms of work and different types of labour contracts and arrangements.

The third section addresses the question of the impact of new forms of work on labour law and social dialogue. We look at their impact on individual employment relationships, on collective rights of workers and on social dialogue at the national and the sector level.

In the fourth section we focus on core rights of workers, regardless of their employment status. Furthermore, instruments for labour law enforcement are discussed in this section.

The fifth section goes into the actual reform process and debate as regards labour market policies and labour law in the Netherlands. Special attention is given to the debate about changes in employment protection, recently proposed by the government.

The final section contains the conclusions and recommendations.

This study has been conducted by ITS Nijmegen, according to the guidelines provided by the coordinators. Information was primarily derived from research, documentation and expert opinion, available to the researchers. The report was written in oktober-november 2007.

2 New forms of labour

This first section focuses on new forms of labour. We give some definitions and we describe different types of employment contracts and arrangements which are relevant for the study. Furthermore, in a separate paragraph, the issue of undeclared work is addressed.

2.1 Definitions

Employees, employment relationships and labour contracts

The Dutch Civil Code distinguishes three types of relationships connected with work e.g. three types of employment relationship:

- a ‘labour’ contract;
- an agreement to ‘contract’ work;
- an agreement to work ‘in commission’

A ‘labour’ contract is defined by the following characteristics. These characteristics were already included in the first Law on the Labour Contract of 1907, which later became part of the Civil Code. They still regulate the employment relationship in Dutch labour law:

- the employee has to do a certain job for the employer;
- he has to do it personally;
- during a certain period of time;
- in service of the employer;
- for a wage paid by the employer.

An agreement to ‘contract work’ has other characteristics. In such a relationship a contractor accepts to deliver a certain job for a certain client or a customer. The requirements of the job are usually specified before the work is done. Price and time are also specified in the contract. However, the contractor is not obliged to do the job personally. And there is no relationship of subordination with the client or customer.

An agreement to work ‘in commission’ has also different characteristics. Such an agreement is used in cases of immaterial services, which are usually less specified than material jobs. Furthermore, work in commission has the same characteristics as a

contracting agreement. There is no relationship of subordination and no obligation to provide services personally.

A crucial aspect of a labour contract as distinguished from work contracting or working in commission is the criterium of ‘subordination’, as expressed with the phrase ‘in service of’. There has to be an ‘authority relationship’ between employer and employee for a labour relationship to become established. It is not always easy to assess whether such an authority relationship is present in certain cases. Daily presence and direct supervision are considered to be important elements of a subordinative relationship. Provision of instructions by the employer is also an important aspect. But even then, it might be difficult in certain cases to decide whether or not work is done under the authority or in service of an employer. A decree of the Dutch High Court in 1997 has decided that this question should be considered from case to case on the basis of the concrete facts and circumstances of the case. Important weight should be given to the intentions of the actors involved: did they have the intention to establish a labour contract or not (Diebels, 2004)?

The question if there is a labour contract or not is important to determine which rights and obligations employers and employees have in the sphere of labour law and as regards social insurance. Employees under a labour contract usually have rights to payment also in cases of absence due to illness, pregnancy, parenthood, training. They build up pension and insurance provisions against the risks of becoming unemployed or disabled to work. Employees without a labour contract are usually not insured and have to take care of these provisions themselves.

Self-employed and economically dependent workers

Dutch labour law does not know the figures of self-employed or economically dependent worker. An employment relationship is either regulated by a labour contract. The worker is then considered to be an employee. Or it is regulated by a commercial contract. In that case the worker is considered to be an entrepreneur. There is in fact no employment relationship but a commercial relationship between an entrepreneur and his customer or commissioner. The difference is that an entrepreneur works for his own account and bears his own risks.

However, in practice, the term self-employed worker is sometimes used to describe the situation of people who work ‘under contract’ or ‘in commission’. They are entrepreneurs, in a formal sense. But actually, their position might come close to that of employees. Differences between employees and entrepreneurs are fading away. Two types of workers illustrate this tendency:

- Freelancers. They often work ‘in commission’ of a client or customer and provide specific services. One can find them for instance in sectors like research, advertising, consultancy, journalism, communication, marketing.
- Self-employed workers without personnel (zelfstandigen zonder personeel; zzp’ers). These workers are often contractors, who provide specific types of work for firms, that hire them for a certain project or a certain period of time. They can be found in sectors like the building and construction industry, engineering and installation, but also in sectors like health care (nurses, caretakers) and cleaning services.

These workers do not have a labour contract. But in practice, they might be employed as workers with a normal labour contract, with all the rights and obligations connected with it (taxes, social insurances, pensions). Dutch labour law knows the figure of a ‘*fictitious labour contract*’ to determine what their actual position is. The more their actual situation resembles that of a normal employment relationship, the more chance there is that their status will be marked as that of a normal ‘employee’. An important criteria to distinguish ‘employees’ from ‘self-employed workers’ or ‘entrepreneurs’ is the aspect of subordination. Other criteria are if the worker is permanently or only incidentally employed, if he gets paid regularly, if he works at the location of the commissioner, if he works for only one or for more commissioners, how much of his turn-over he gets from a commissioner, share of income from other sources etc.

Legally, self-employed workers are independent. However, they might be economically dependent if they only have one or a very limited number of commissioners or if they earn a large part of their turn-over from one or the same few commissioners. It occurs that firms fire workers (or that workers leave firms) and that they are hired back again as (sub)contractors or freelancers. To prevent misuse of this construction tax authorities provide special declarations which state that the contractors themselves bears the entrepreneurial risks.

Legal status of migrant workers

In the past, migrant workers from EU countries who wanted to work in the Netherlands needed a work permit. Permits were granted by the public employment office, after a check if vacancies could not be fulfilled by Dutch workers. To avoid this procedure, immigrants often registered as entrepreneurs and then hired themselves out as contractors. However, during the past years, the work permit system was gradually abolished. Since may 2007 workers of all EU countries, except Romania and Bulgaria, have free access to the Dutch labour market.

This is different for immigrants from outside the EU. They still have to get a permit if they want to work in the Netherlands. Work permits are only granted for a few months. For non- EU immigrants, registration as an entrepreneur still could be a way to bypass the system of permits. There are no data available, however, to assess if this actually occurs.

2.2 Different types of employment contracts and arrangements

An basic distinction in Dutch labour law is the difference between open ended employment contracts and other types of labour contracts, often called non-standard, atypical or flexible employment contracts. There are several types of such flexible employment contracts (Diebels, 2004). The most important are:

- fixed-duration contracts: labour contracts for a specified period of time, a specified project or a specified set of tasks; the contracts end when work is done;
- on-call contracts: labour contracts with the specification that the worker only works (and is paid) when work is actually available; the contract can be fixed or open ended;
- min-max contracts: labour contracts with a minimum and maximum number of working hours/days within a certain period of time; in fact a form of on-call work;
- temporary agency work contracts: labour contracts with intermediate agencies who posts workers at hiring companies.

Table 1 gives an overview of the development of the most common forms of flexible employment during the past decades in the Netherlands.

Table 1 – Different types of employment contracts 1992-2005

Total labour force (15-64 years of age)							
	Total number	Permanent contracts	Workforce with flexible working arrangements				Self employed
			Total contingent employment	Agency work	On-call work	Fixed-duration contracts and others	
<i>Year</i>	<i>x 1000</i>						
1992	5.885	4.859	399	100	118	181	627
1993	5.925	4.868	392	101	119	172	664
1994	5.920	4.797	425	114	126	185	698
1995	6.063	4.880	477	150	137	190	706
1996	5.456	4.911	545	191	165	190	728
1997	5.628	5.055	573	214	164	195	755
1998	5.850	5.244	606	225	186	195	737
1999	6.042	5.464	578	222	153	203	726
2000	6.116	5.584	532	195	117	221	801
2001	6.256	5.753	503	187	115	202	765
2002	6.256	5.774	482	176	100	206	779
2003	6.213	5.754	459	147	102	210	788
2004	6.116	5.646	471	155	99	217	802
2005	6.103	5.590	513	170	117	226	816

Source: Dutch Central Bureau of Statistics (CBS)

Furthermore, flexible employment contracts are used for activating labour market policies. Two forms of them are particularly relevant. Firstly, the so-called ‘work-and-learning contracts’. These are temporary contracts for younger persons, that combine (vocational) education and work in practice and lead to a recognized labour market qualification. They are used for apprenticeships, for instance. Contracts usually cover the whole period of education, which might last for 2-3 years. Youngsters go to school for 1 or 2 days a week, the rest of the time the work in the company. A second type are the so-called ‘reintegration contracts’. These are temporary contracts for long-term unemployed persons, to facilitate their labour market entry or re-entry by offering them a kind of sheltered employment. Unemployed persons can be hired directly by employers or via intermediate work agencies. Unemployed persons’ jobs are (partly) subsidized with social support funds. These jobs have to facilitate work experience and promotion of the workers from sheltered to regular jobs. They may not displace regularly paid jobs.

The limits as regards flexible contracts are set in the Flexibility and Security Act of 1999. The basic elements of this Act are expressed in a 3-3-3 formula. This formula

means that workers can only be employed temporarily for a maximum of 3 years or a maximum of 3 (temporary) contracts, with a maximum of 3 months in between each contract. Otherwise, an open ended contract is prescribed i.e. presupposed. Deviations from this formula are allowed, but only if the social partners have agreed upon them.

Greater flexibility is not only ensured by adaptations in labour contracts. Flexibility might also be ensured by adaptations in other rules governing the employment relationship. In the Netherlands regulations regarding working times are important in this regard. Recently, the law in this field, the Working Times Act, has been changed into a kind of framework act, in order to give social partners more opportunities to make specific arrangements adapted to the specific circumstances in their fields. The Act now gives certain limits for working hours and resting hours over certain time periods. Within these limits the social partners can establish specific frames and schedules adapted to the situation in their sectors and companies.

2.3 Undeclared work

Work within the framework of an employment relationship is considered to be ‘undeclared work’ if no wage taxes and/or no social insurance premiums are transferred. Employers are obliged to pay (part of) these taxes and premiums for their employees. Self-employed persons have to take care of these payments themselves.

Undeclared work (‘black work’) can take different forms. Most common forms are:

- an employer does report workers and working hours to the authorities, but he does not declare overtime work; taxes and social premiums are only transferred for regular hours; for hours in overtime no transfers take place;
- an employer does not report workers and working hours to the authorities; he does not transfer the taxes and social premiums required for these workers;
- an employer hires workers as (sub)contractors or as freelancers; normally, he is not obliged to contribute taxes and social premiums for these workers; but if there is in fact a (fictitious) labour relationship, the employer should contribute; if he does not, the work is undeclared;
- an employer hires workers from an intermediate work agency and pays contributions for taxes and social premiums to this agency; the agency however does not transfer the payments to tax department and insurance funds; work is undeclared, in that case;

- illegal work: an employer hires a worker but has no work permit from the public employment office;
- illegal work: an employer hires a worker who does not have a permit to stay in the Netherlands.

There are no reliable quantitative data available about these different forms of undeclared work. Research reveals that they occur throughout the whole economy. Certain sectors are affected more than others, for instance agriculture, horticulture, building and construction, hotel and restaurant services, personal services, health and home care services.

An important instrument to tackle undeclared work is the Law on Chain Responsibility (*Wet op de Ketenaansprakelijkheid*), applicable to all contracting and subcontracting relationships. According to this law the main contractor of a work or project can be held responsible for the contribution of taxes and insurance premiums by all the subcontractors and subsubcontractors working with him in the chain. The law stimulates main contractors to ask extra guarantees.

Furthermore, undeclared work is tackled with a system of controls and inspections. This is partly in the public, partly in the private domain.

- The government has a number of inspection services dealing with undeclared work:
 - The Economic Control Department;
 - The Fiscal Investigation Service;
 - The Inspectorate for Labour Relations.
- In several sectors employers' associations have established special units or task forces to combat undeclared work, f.i. in agriculture and horticulture. One cooperates with the tax department, the Labour Inspectorate and – sometimes – with the police. The agencies organize specific campaigns and activities to control companies and to ban bad practices. They also try to increase awareness and responsible entrepreneurship in the sector.
- Trade unions make an issue of it. Some unions have 'reporting stations' where employees can report unacceptable practices that should be tackled in their view. Unions can take action then, directly or through the agencies and the public media.

Undeclared and especially illegal work is sanctioned with severe financial penalties. Employers yet have to pay the indebted taxes and social premiums and might get a fine of 8.000 euro per worker, with an increase to 11.000 euro per worker in case of

recurrence of illegal employment. These fines were raised substantially during the past years.

The system of regulations, inspections and penalties is variously successful in different sectors. For instance, in horticulture, inspection projects of the Labour Inspectorate revealed that the number of companies that employed illegal workers decreased from 19% in 2004 to 17% in 2005 and 13% in 2006. The Inspectorate explains this decrease as a combined effect of the actions of the sectors' employers association and the inspections and high penalties of the Inspectorate itself. In the building and construction industry, controlling activities appeared to be less successful. According to studies of the employers association the volume of non-regular construction work, e.g. work conducted by non-certified contractors, doubled between 1997 and 2004. According to the association, this increase demonstrates that law enforcement by the government falls short in the sector. Furthermore, regulations themselves are too weak. It is too easy now for persons to start a business of their own without having the necessary qualifications.

In recent years the Dutch government took action against undeclared work in the personal services sector, trying to develop a regular job market for personal services, in particular household services (cleaning, shopping, baby sitting, home care, care for older people). New regulations were adopted in order to stimulate families to hire workers with regular contracts for these services. VAT-taxes for household services were lowered. Wage standards were lowered. In certain circumstances households can get a subsidy. They can call assistance from a professional to organize things. Service workers can subscribe to intermediate agencies to find placements in household. With this initiative, the government also tried to enlarge the regular job market for lower qualified unemployed persons. Thus far, experiments with these regulations showed that they do create a market for household services indeed, but that this market does not replace informal and/or irregular services entirely.

3 Impact on labour law and social dialogue

In this section we address the question what impact the new forms of labour have had on labour law and social dialogue. We do this both at the individual and at the collective level.

3.1 Impact on individual aspects of employment relationships

The rise of flexible forms of labour induced a new piece of legislation in Dutch labour law to regulate the implications of these types of work for individual employment relationships. In 1999 the *Wet Flexibiliteit en Zekerheid (Act on Flexibility and Security)*, the so-called Flexwet (Flex Act), was adopted by the Dutch parliament. The law was developed under the ‘purple’ cabinet of prime minister Wim Kok (coalition of social-democrats and liberals), in close collaboration with the social partners.

As the name indicates, the intention of the Flex Act is to balance flexibility and security of (temporary) workers. The law allows greater flexibility in temporary labour contracts at the one side, while at the other side it gives more rights to temporary workers. The law does so among others by defining limitations to contractual flexibility. It limits flexibility in 3 ways:

- workers can be employed on a temporary basis for not more than 3 years;
- workers can have not more than 3 temporary labour contracts after each other;
- periods in between successive labour contracts can not be less than 3 months.

If a worker continues to work after 3 years or gets a new contract after 3 successive temporary contracts, the (new) employment relationship is supposed to be an open ended one.

Within these limitations workers can be hired on a temporary basis. Four basic types of temporary work contracts can be distinguished: a) fixed-duration contracts; b) on-call contracts; c) temporary work agency contracts and d) freelance contracts. They have a different impact on individual aspects of the employment relationship. Rights of workers gradually decrease, as compared with those of workers with open ended contracts.

- a) Workers with fixed-duration contracts have the same rights as workers with open ended contracts, except when it comes to the rules for *dismissal*. Fixed-duration contracts simply end when contract periods are over or when projects are finished. Differences with open ended contracts are:
- dismissal permits are not required;
 - periods of notice of dismissal are not required;
 - there are no prohibitions to notice of dismissal (f.i. in case of illness);
 - trial periods can be shorter in case of a fixed-duration contract.
- Workers can not be dismissed during the contract period. Temporary and permanent workers have to be treated equally by employers as regards terms of employment and fringe benefits.
- b) For workers with on-call contracts the *periods and times of work* are usually not specified exactly in the contract. In principle, there is only the agreement that the employer ‘calls’ the workers when work for him/her is available. Only these hours are paid. In practice, employers usually define a minimum number of hours; the legal minimum is 3 hours paid work per call. They often also use work schedules to plan on-call staff capacity. On-call contracts are usually of the fixed-duration type, but also open-ended on-call contracts are possible in practice.
- c) In case of temporary agency work, the worker has a *labour contract with the agency (TWA) that deploys him*, not with the firm that hires him. The rights he has depend on the type of contract with the TWA, which again depends on the length of time he works for the TWA. During the first half year he usually has an ‘agency work contract’: there is no protection against dismissal and no right of payment when he is absent of work, f.i. due to illness. After that he might get a fixed-duration contract, with certain protections against dismissal. He also gets the right on payment in periods of absence or in periods when there is no work. He builds up training facilities, social insurance and pension rights. After 3 years the TWA has to offer him an open-ended contract, with all the rights and obligations connected with it.
- d) In case of freelance work there is *no labour contract*, but a commercial contract between a freelancer and a client. Labour contract law is not applicable. Parties are free to make arrangements about duration of work, payment of work, execution of the work, location of the work etc.. The freelancer is a kind of self-employed entrepreneur. He is not subordinated to a client or economically dependent. He has to take care himself of tax payments, social insurance premiums and pension provisions.

A freelancer might become economically dependent if he works too much for one and the same client. If this is the case, an employment relationship might come into existence and labour contract law might be declared applicable. In this case there is a so-called ‘fictitious’ labour relationship.

3.2 Impact on collective rights of workers

New, flexible forms of labour have had a clear impact on individual aspects of employment relationships. They have had less visible impact on collective rights of workers, like collective bargaining and representation, information and consultation. Two ‘types’ of impact can be distinguished:

- a) more attention for the interests of flexible workers in existing institutions;
- b) rise of new institutions covering the interests of flexible workers.

Workers with *fixed-duration contracts* have the same rights as workers with open-ended contracts. They can become members of trade unions in the sectors where they are employed. In a number of sectors, trade unions have put flexible work on the agenda and have made specific arrangements in collective labour agreements (cao’s) regarding:

- types of work temporary workers can be hired for by companies;
- maximum share of temporary work in the work force;
- maximum duration of temporary work contracts;
- fringe benefits for temporary workers;
- work health and safety instruction for temporary workers.

Trade unions have developed special services for temporary workers within their organizations, f.i. help-desks for contract issues, information services as regards terms of employment, career counselling services, services for juridical support.

Workers of *temporary work agencies* can also become members of trade unions. With the rise of the number of temporary agency workers, union federations like FNV and CNV have established special departments to deal with their interests and those of other flexible workers. However, TWA-workers are usually not covered by the collective labour agreements in the sectors where they are employed. This is one of the reasons why a separate *collective labour agreement for the TWA-sector* has been concluded in the nineties between the (large) trade unions FNV and CNV and the ABU, the employers’ association of the TWA-sector. This TWA-Cao elaborates the rights and obligations of TWA-employees in many fields, like:

- job description and evaluation;
- periods of notice and dismissal;
- terms of employment;

- fringe benefits;
- holiday rights;
- sick leave provisions;
- social insurances;
- pensions;
- training facilities;
- health and safety protection.

The TWA-Cao includes a phase-system for long-term employed agency workers, which gives them more protective rights and more insurance provisions the longer they are deployed by the agency.

For a long time *freelance workers* felt out of the scope of the trade unions. They were seen primarily as self-employed entrepreneurs. However, with the rise of freelance work, some unions have developed special services for freelance workers in recent years: information services on the internet, help-desks or consultancy. Such services are for instance open to workers who have the intention to start their own business as a freelancer or subcontractor.

Apart from that, freelancers are organizing themselves more and more. Many networks have been established already, where freelancers can join to develop their business. Networks can be sectoral (building industry, media and arts), but can be cross-sectoral and cover different types of businesses. Their goals are usually commercial, but they also function as platforms for presentation and exchange of information, f.i.:

- how to start a business?
- how to find clients and deals?
- how to deal with contracts?
- how to secure insurances in the long run? etc.

Networks often have a sectoral, local or regional basis. There are no fixed institutions on national scale. The networks are fluid. The internet plays an important role in communication and coordination of these networks.

3.3 Impact on social dialogue

The new forms of labour have not really changed the basic structure of social dialogue. In the Netherlands social dialogue is located on three levels:

- The national level: Social Economic Council (tripartite) and Foundation of Labour (bipartite);

- The sectoral level: collective bargaining and collective labour agreements; sectoral social funds and sectoral insurance funds (bipartite);
- The level of companies: works councils i.e. mutual consultancy between employers and representatives of workers.

In the nineties, issues regarding flexible work have been high on the agenda of the social partners at national level (Korevaar, 2000; De Beer, 2001). The Social Economic Council (SER) has been closely involved in the development of policy and legislation in this field, f.i. the Flexibility and Security Act of 1999. During the past decade the focus has shifted from labour law to the reform of the social security system. The social partners have been involved in the development of new legislation in the field of insurances against sickness, disability to work, unemployment and support in case of long term unemployment. Furthermore, active labour market policies were a major point of attention in the SER. Recently, the issue of labour law has been put high on the SER-agenda again, with new proposals coming from the government to reform dismissal protection rights. We will discuss this issue further in the next section.

The general requirements of greater flexibility and less detailed regulations in labour law have lead to a shift of focus to decentral actors involved in social dialogue: sectoral agencies and companies. It is observed that this tendency takes three forms (Tros, 2001):

- decentralization: jurisdictions about decisions regarding labour issues are transferred from central actors to a lower level in the hierarchy;
- empowerment: central actors keep their jurisdictions, but decide to give new jurisdictions and/or facilities to actors at lower levels, f.i. as regards new issues in social dialogue;
- deconcentration: jurisdictions and decisions about labour issues at decentral level increase, apart from jurisdiction and decision-making at central level.

An analysis of developments in collective labour agreements (Cao's) in 4 important sectors (building and construction, metalelectro, food industry, banking sector) from 1982 to 2002 revealed the following tendencies. The study analysed agreements made on wages, job description and evaluation, salary systems, sickness, disability to work, unemployment, social plans in case of reorganizations, early retirement schemes, pension provisions, training, careers, work health and safety (Tros, 2001):

1. Government policy in these years can be characterized as ‘regulated decentralization’. Social partners get more and more space to make tailor-made agreements in sectors and companies. A key example is the new Working Times Act of 1996. This law has two sets of rules: a) a ‘standard rule’ setting legal standards for maximum working hours and minimum rest periods; and b) a ‘consultancy rule’ i.e. a procedural framework which allows social partners to deviate from the standard rule in mutual consultation. This makes self-regulation by social partners possible. An equal system with such a ‘double standard’ was introduced in the Working Conditions Act of 1998.
2. In issues like wage policy, social insurances and working times decentralisation is used as an instrument of socio-economic policy by the government. However, more space for decentral actors did not lead to much differentiation on sectoral level. Central coordination remained strong with regard to these issues. The spread and elaboration of job description and evaluation systems even lead to a certain degree of centralization in some sectors. Decentralisation with regard to primary terms of employment is only slightly proceeding since 2000.
3. Decentralisation tendencies are stronger as regards early retirement schemes and working times regulations. Collective agreements became more flexible in these fields, leaving more space for individual companies and workers to make tailored arrangements within frameworks of more globally defined central schemes.
4. Deconcentration tendencies are most visible in the sphere of secondary terms of employment: arrangements with regard to reorganisations, job change and job mobility, training facilities, time management, stress management, part-time work and the like. Also the arrangements regarding temporary (agency) work become the subject of decentralized negotiations at sectoral and company level.
6. Empowerment is especially the case in fields like employment policy of firms, staff planning, career management, training policy and performance evaluation. Sectoral cao’s contain rules that allow individual companies to make their own arrangements in these fields. Company cao’s contain rules that allow individual managers and workers to make tailored arrangements in individual contracts.

The general tendency is characterized as one of ‘organized decentralisation’ with regard to primary terms of employment (wages, social insurances); ongoing deconcentration with regard to staff planning, personell management and organisation policies (reorganization, social plans, part-time work, flexible work, leave of absence); and further empowerment in fields like job mobility, training, employability

and career management (Tros, 2001). It is expected that these tendencies will continue in the future.

The landscape of Cao's has been increasingly diversified during the past years. In several sectors collective labour agreements now have the character of a Cao á la carte, with all kinds of options for companies and workers. Or they have the character of a 'framework', a kind of 'window', that can be filled with different arrangements in different subsectors (Korevaar, 2000). For instance: the Cao of the health care sector is subdivided in different agreements for a.o. hospital care, mental health care, child care, youth care, care for the elderly, care for the handicapped. The Cao for the metal industry is subdivided in different agreements for a.o. automobile, technical installation, metal construction work. Works councils are playing an increasingly important role as partners of trade unions and managers in the elaboration and application of these agreements at company level. Individual employers' and employees contractual freedom has been enlarged with regard to many issues in the sphere of fringe benefits and human resource management (Koot-van der Putte, 2007; Baris & Verhulp, 2007).

3.4 Impact on national labour law

As it has been said before, the situation describe above is not directly due to the rise of new forms of labour or changes in labour contract law. Rather, it is an implication of the general trend of deregulation which is visible in Dutch social and economic policy since the eighties (Van der Heijden e.a., 1995; Scheele e.a., 2007)

With regard to national labour law, the new forms of flexible work have had a specific impact in the following domains:

- Labour contract law; the Flex Act provided new maximum standards for temporary work;
- Employment exchange law; with a new Act on the Deployment of Workers by Intermediaries, the permit system for temporary work agencies and other private intermediaries at the labour market was abolished;
- Working times; the Working Times Act deregulated rules for working hours and resting times, in order to increase flexibility at company level;

- Working conditions; in the Working Conditions Act regulations were introduced to better regulate the position of temporary agency workers as regards risk evaluation, job information, safety instruction, medical surveillance, and to better regulate work health and safety responsibilities of TWA's and hiring companies.

The Flexibility and Security Act of 1999 is an important new piece of legislation in Dutch labour law, directly related to the new forms of flexible work. It regulates a.o. the position of agency workers and, as such, it provides a legal basis for the further improvement of the position of agency workers in the collective labour agreement of the TWA-sector itself.

The other legislative measures are adaptations of existing laws, in order to keep them in pace with actual trends in economy and society towards greater flexibility of work. They are often only small adaptation. All in all, besides the Flex Act, labour law has not changed very much in the Netherlands in the past decades. Greater emphasis has been laid on the reform of social security systems and arrangements.

There are no specific regulations for subcontractors in the Netherlands. Subcontracting is considered as a commercial relationship between two independent parties rather than as an employment relationship regulated by labour law. However, to be able to make a distinction in cases where things might be confused (like f.i. economically dependent subcontractors or free-lancers) the tax authorities have designed a specific certificate. If he is able to demonstrate that he has more than 3 commissioners and that no more than a certain percentage of his turn-over is earned from one of his commissioners, a subcontractor or freelancer can get such a certificate. In that case tax authorities recognize him as being employed independently and not in some kind of (fictitious) labour relationship. He then has to pay taxes and social premiums himself.

4 Core labour rights and enforcement of labour law

In this section we go into the question of core labour rights and enforcement of labour law. Special attention will be given to the role played by ‘soft’ labour law in the Netherlands.

4.1 Core labour rights

In Dutch labour law, a number of rights can be identified, which are considered to be core rights of all workers, regardless of their employment status. They have a sound legal basis, in the Civil Code or in specific labour laws, as they have been developed during the past century in the Netherlands. They are not disputed in principle, though there is debate among the social partners about their scope, depth and concrete elaboration every now and then.

- **Contractual freedom:** a person can not be forced to do a certain job. Every person is free to choose whether or not he accepts a labour contract with an employer.
- **Equality of treatment:** every worker shall be treated equally. It is not allowed to discriminate in terms of gender, age, ethnicity, sexuality or religion. In the labour contract section of the Civil Code a special article has been included to underline this point.
- **Protection against dismissal:** workers can not be dismissed by an employer without any reason. In case of TWA-workers, however, dismissal protection during the first half years is very limited. In fact, they can be hired and fired on a day to day basis.
- **Minimum wage:** labour law sets a minimum wage for work, irrespective of sector, company, type of work, type of contract, length of service etc. The minimum is equal for all workers from 21 years on. Under that age, minimum youth wages are defined, from 16 years on, rising every year until 21.
- **Health and safety protection:** every worker, regardless of his status, has the right to be protected against the health and safety risks of the work he does. The Act and Decrees regulating working conditions have included special articles to protect agency workers and workers of contractors and subcontractors.

- Information: every worker has the right to be informed about his job, qualifications needed for the job and all things necessary for executing the job in a safe and healthy way, regardless of the employment status.
- Consultation: workers have the right to be consulted in issues regarding their job, terms and conditions of employment. The Law on Works Councils regulates representation and consultation of workers at company level. Temporary workers fall under the jurisdiction of this law. Agency workers have consultation rights in their TWA's. After 2 years they also get consultation rights in the hiring companies.

There are other rights which are debated, actually, whether or not they should be considered to be core rights of workers. We want to mention two of them:

- Training: workers should have an individual right to receive training in order to keep their qualifications up to date and to be able to adapt to new requirements in work and on the labour market. In a recent advice to the government, the Social and Economic Council has proposed to introduce an individual facility for education and training.
- Work-life balance: workers should be able to combine work with other social roles during lifetime in an adequate way. During the past years, new legislation has been introduced in labour law to guarantee this right, for instance a right to choose for part-time work and a new law on the combination of work and care.

Regulations on equal treatment particularly address vulnerable groups on the labour market, like temporary workers, older workers, immigrant workers and female workers with small part-time jobs. They run greater risks of getting unemployed or staying in precarious jobs with uncertain employment conditions.

The proposed regulations on training particularly address lower qualified workers. They run a greater risks of staying unemployed or losing their job in sectors where production becomes increasingly knowledge-intensive and qualification requirements are raised by the employers.

4.2 Enforcement of labour law

In the Netherlands enforcement of labour law is primarily a task of the Department of Social Affairs. This Department has two Inspectorates in the sphere of labour law:

- the Labour Inspectorate: primarily concerned with inspections of working conditions, occupational safety and health risks;
- the Labour Relations Inspectorate: primarily concerned with inspections of labour contracts, collective labour agreements, wages and other terms of employment.

The rules for temporary work, agency work and undeclared work are controlled by the Labour Relations Inspectorate. As far as control of working conditions is part of the inspections, teams include members of the Labour Inspectorate.

The Inspectorate uses four types of instruments:

- a) public information and education;
- b) help-desk: by phone, on the internet;
- c) reactive inspections, f.i. in case of accidents or complaints;
- d) proactive inspection projects

Inspection projects have become an important instrument during the past years. Projects usually cover specific sectors and/or specific types of work (f.i. the recycling business, cleaning services sector, work with dangerous materials in laboratories). Samples of companies and workplaces are visited and controlled by inspectors. Advantages of such projects are that capacity can be focussed on sectors with high priority and that inspections of different aspects (working conditions, labour contracts) can be coordinated.

In the sphere of labour relations, inspection projects are also a favourite instrument. In these projects, the Labour Relations Inspectorate often collaborates with specialists from the tax department, the economic control services and/or the police (illegal work).

Apart from law enforcement by the government, enforcement by sector agencies is a common practice in the Netherlands. This is a kind of self-regulation. Both employers associations as well as trade unions can play a role in systems of self-regulation. In several sectors employers and trade unions jointly participate in special initiatives to combat non-compliance and abuses, f.i. with regard to undeclared work, illegal employment, unlawful businesses etc. Employers associations can introduce systems of certification of 'good' employers. Trade unions can develop instruments to detect employers who do not comply with legal rules or standards of good practice set in the certificates. For instance, the ABU, the employers' association in the TWA-sector has established a certification systems for its members (TWA-agencies), that includes regular controls of their administration and (quality) management systems. Furthermore, there is a special agency that controls compliance with the TWA-Cao by the

associated TWA-members. An employers' association in the agricultural sector has developed a special project in collaboration with regional and official authorities to control compliance with the rules for seasonal work, agency work, employment permits and illegal work in horticulture in several regions in the Netherlands. The trade unions also participate in these initiatives.

These measures appear to be variously effective. In the TWA-sector the employers (e.g. the TWA agencies) appear to comply more with labour contract rules than employers in several other sectors, according to the Labour Inspectorate. However, this applies primarily to certified TWA agencies, who fall under the (self-)regulations of the branch. It is known that there are also many uncertified and often illegal TWA agencies active on the Dutch labour market. In other sectors non-compliance with the rules has been reduced. For instance, in horticulture, where the number of companies with illegal workers decreased from 19% in 2004 to 13% in 2006 f.i. due to intensified controls and higher penalties. In some regions, however, still over 30% of horticultural companies appeared to employ illegal workers. In still other sectors, thus far, measures appear to have had only limited effects. In the building industry, the volume of irregular (partly undeclared) production more than doubled between 1997 and 2004.

In order to increase the effectiveness of controls and inspections the government acts along several lines:

- extension of the Labour Inspectorate with more inspectors;
- efficient deployment of Inspection capacity by way of targeted inspection projects;
- focus on sectors or fields with high risks or known high levels of non-compliance;
- better cooperation between different inspection services, tax authorities, sectors etc.;
- better connections with agencies of self-regulation (NEN-committees, trade unions);

In this way, one tries to increase the chance of arrest of law offenders. Staff capacity of inspection services stays limited, however, compared to company numbers.

4.3 Role played by soft law

With the increasing decentralisation and deregulation in the sphere of labour relations and with the increasing space for social partners to make tailor-made agreements at the level of sectors and companies, the role of soft law becomes increasingly important.

As regards labour law, the instrument of ‘Code of Practice’ is especially relevant in the Netherlands. Codes of Practice contain descriptions of methods, techniques, standards and cases that can help employers to find solutions in daily practice, that fit optimally with legal prescriptions. Usually, they are developed by committees of technical and scientific experts, collaborating with representatives of employers, trade unions and the inspection services. They are formally recognized by governmental authorities (Inspectorates). All kinds of established standards (NEN, ISO) can be included in the Codes. These Codes of Practice do not have the status of a law. Employers are not obliged to follow the Codes. But they do have the status of a kind of insurance against bad practice. If employers follow the Codes, they can be sure that they do not offend the law and that they will not be sanctioned when they are inspected by the official authorities. Codes of Practice are widely applied in fields like working conditions and work health and safety. They play a minor role in the field of labour contract law.

For labour contract law instruments like collective labour agreements are more important. Cao’s also might contain soft law. For instance, cao’s can include annexes that describe systems and arrangements which are recommended to employers, without being obligatory. They can also include references to documents with good practices or common arrangements in a sector, as recommendations to employers. Probably, cao’s will become less detailed in the future and will leave more space to actors in companies to apply such kinds of recommendations.

5 Reform process and debates

This section gives a concise overview of the actual state of affairs of the reform process and debates regarding labour law. The section focuses on a recent advice of the Social and Economic Council about mid-term social and economic policy in the Netherlands, which has set the national agenda for the next years. The section further zooms in on new proposals for changing dismissal rights of workers. These proposals are at the core of the debate about the adaptation of labour law in the Netherlands, actually.

5.1 National agenda social and economic policy

Recently, the Dutch Social and Economic Council (SER; i.e. the social partners and a number of independent experts) has published an advice to the government that has set the agenda for national social and economic policy on a mid-term range, until 2015-2020. The advice defines three basic priorities (SER, 2007):

1. Strengthening the growth potential of the economy through increased productivity.
2. Development from a welfare state to an activating participation society.
3. More decentralisation and differentiation in the system of labour relations.

For the scope of this study the second and the third priority are the most relevant ones.

The second priority requires a change in labour market policies and institutions, from the viewpoint of a transitional labour market, according to the SER: 'Institutions in the field of labour market and social security should both stimulate economic dynamism as well as serve the needs for greater individual diversity in careers. The system of employment, training and income should give space to variations in life courses and transitions between work, care and education. Investment in human capital in the economic active period is a strong instrument to stimulate mobility on the labour market' (SER, 2007). This view is inspired by the model of a transitional labour market with the focus on active labour market policies and life long learning (De Gier, 2007).

The SER proposes to modernize the system of employment, work and training with a two-pillar model:

- a. The pillar of participation, addressing investments in human capital. The SER recommends to develop a coherent set of measures in the field of education, training, child care, participation in work, prevention and reintegration and tax policy. Concrete recommendations are among others:
 - to introduction an individual facility for training in the framework of life long learning;
 - to increase participation at the bottom of the labour market by specific tax measures;
 - to stimulate larger contracts of part time workers;
 - to increase participation in work of older employees by stimulating age-directed personnel policies in companies;
 - to improve the labour market position of vulnerable groups, by combating early school leave, strengthening qualification levels, supplying more on-the-job training places.

- b. The pillar of income protection, addressing social security systems. The SER has no concrete recommendations with regard to this pillar. Social security systems have been reformed already to a substantial degree in recent years, with the aim to make them more compliant with active labour market policies. The SER advises now to optimize implementation of the reforms, to improve the organizational infrastructure of the new systems and to continue improvement of the execution of the new rules.

As regards the third priority (labour relations system) the SER subscribes to the model of ‘regulated decentralization’ that has become common in Dutch labour relations during the past years. The SER pleads for a further decentralisation and differentiation a.o. by:

- furthering collective labour agreements at company level;
- less detailed regulations in collective labour agreements;
- more choice options for individual companies and workers in collective agreements;
- social innovation at company level, expressed in the formula: dynamic organisations, flexible work, smart management.

In addition, the SER pleads for maintaining the system of macro-economic coordination of wage policy. Coordination with lower levels should be done by ‘recommendations’.

The employers associations and the trade unions – both represented in the SER - unanimously subscribed to the recommendations described above.

5.2 Actual debate about dismissal rights

Against the background of this mid-term policy view, the recent debate about dismissal rights should be considered here.

Recently, the new Dutch cabinet - a coalition of the social-democrat, the Christian-democrat and a protestant-Christian party - has launched proposals to change legislation regarding the dismissal of employees (SZW, 2007). The basic intention of the proposal is to increase flexibility on the labour market by making it easier for employers to dismiss workers. When it is easier to fire workers, it is easier to hire workers, so runs the argument. This will open up job opportunities for groups now excluded from work. It will reduce the gap between those in preferred and those in precarious positions. It will also make transitions easier between work and education, work and care, work and inactivity, and vice versa.

The most important changes the government proposes are:

- abolishment of the system of dismissal permits, i.e. a preventive check on the justifications of a dismissal by the court or the public employment office;
- adaptation of the system of financial redundancy schemes; the economic calculus of extra payments to employees in case of dismissal should replace the preventive check on arbitrariness and (un)fairness of dismissals by court;
- better facilities for training of employees to strengthen their employability and increase their chances on the (external) labour market, especially in case they are threatened with dismissal; redundancy payments after a dismissal should be transferred to training measures before the dismissal;
- extra training facilities also for temporary workers, including agency workers.

The proposals of the government have aroused a lot of debate; within the coalition, within the parliament, in the media and among the social partners.

The social partners hold opposing views as regards these proposals. This became very clear when recently the Foundation of Labour (the national council for mutual consultation of the social partners) published a divided Comment on the matter, with the

employers view on the one side and at the other side the view of the trade unions (Stichting van de Arbeid, 2007).

The employers welcome the proposals and subscribe to the ratio behind them. In their view the actual rules for employment protection are not adequate any longer in the competitive global economy of today. They limit flexibility and mobility at the labour market and slow down economic growth. They lead to costly procedures, that put heavy administrative burdens upon employers, which are difficult to bear for especially small firms. Furthermore, they are ineffective and unnecessary. Many dismissals are only superfluous 'paper work', according to the employers.

The trade unions strongly oppose the proposals of the government and the viewpoint of the employers. They consider employment protection as one of the basic rights of workers. That right is now secured with the dismissal permit system, e.g. in the figure of a preventive juridical check on the (un)fairness of a dismissal. This preventive check should be maintained. The unions are not inclined to accept compromises on this point. The unions do favour the extra facilities for training, proposed by the government. Better training facilities might increase employability of workers and improve their chances to get new jobs, when dismissals are inevitable.

In november 2007, after several rounds of political consultation between the parties involved, the proposals have been withdrawn by the government. The coalition partners could not find a compromise and did not want to risk a political crisis on the issue. A committee has been establish to further investigate alternative options to get more unemployed persons back to work.

6 Conclusions and recommendations

During the eighties and nineties of the former century new, flexible forms of work came to a rise in the Netherlands. A basic characteristic of these new forms of work is that they deviate from the standard model of full-time open-ended contracts between an employer and an employee. The most common types of non-standard, flexible work are now: part time work, temporary work, on-call work, agency work and freelance work. The share of flexible work in the total workforce fluctuates slightly. From 1992 to 2006 it lies within 10-15 percent of the total workforce in the Netherlands. So, these new forms of work do exist already for quite a while. In fact, parttime work is not considered to be 'a-typical' or 'non-standard' anymore in the Netherlands. Within the flexible segment the number of self-employed workers has increased during the past years. Self-employment gets much attention in the actual debate on new forms of work in the Netherlands.

The impact of these new forms of work is particularly visible in individual employment relationships. They gave rise to a strong differentiation in the types of contracts and arrangements, used by employers to hire workers. With these arrangements employers search for the borders of existing labour law based on the concept of an 'employee'-relationship. In particular, cases of agency work and freelance work are types of work that fall outside the scope of traditional labour law. For agency work, labour law was adapted in the sense that a formula was included that an 'agency contract' has to be considered as a specific type of a 'labour contract'. For freelance work, labour law has not been adapted. This type of work is considered to be a commercial activity and is regulated by commercial law. The other types of non-standard work (parttime, fixed-duration, on-call) are regulated by traditional labour law and social security law.

However, although they principally are equally treated according to labour contract law, people with (precarious) temporary contracts often have a more vulnerable position than people with open-ended contracts. In practice, they often appear to work in less convenient jobs, have less job security, less access to training and less access to career opportunities in organisations and on the labour market. In most sectors and companies they are underrepresented in trade union agencies and works councils.

For a part the interests of flexible workers could be dealt with by existing institutions like collective labour agreements and social insurance funds. This was particularly the

case for workers with contracts regulated by traditional labour law e.g. workers with open ended contracts and workers with temporary work contracts. For persons working for temporary work agencies new institutions had to be developed to deal with the peculiarities of their situation. In the nineties, the TWA-sector developed a whole new system of social dialogue including specific collective labour agreements for agency workers and specific trade union departments to safeguard their interests. For freelance workers, no collective institutions have developed yet.

To regulate flexible contracts and provide more security for flexible workers new legislation was introduced in Dutch labour contract law in the nineties: the Flexibility and Security Act of 1999. This Act limits the period that workers can be hired temporarily to a maximum of 3 years. The Act stimulated the TWA-branch to develop a new phased system of hiring workers. This system gives workers better employment protection and better terms of employment the longer they are deployed by a TWA. Besides these changes in labour contract law, in other fields of labour law – working times, working conditions – new flexible work arrangements were dealt with by only limited adaptations of existing regulations.

The Flexibility and Security Act is one of the pillars of the Dutch approach to flexicurity, as it has been developed in the nineties under the ‘purple’ government coalition of social-democrats and liberals. It provides employers more opportunities to hire workers on a temporary basis, while at the same time it sets clear limits to prevent proliferation of temporary contracts (3-3-3 formula). Furthermore it gives temporary workers more rights (dismissal protection, fringe benefits, training, pensions schemes), the longer they work for a certain employer or agency. The actual debate on flexicurity in the Netherlands focuses now on these rights of temporary workers, in particular training rights and facilities to improve their employability.

Flexible work has had an impact on social dialogue, in particular at the level of sectors and companies. Issues like employment, staff planning, personnel management, labour contracts, recruitment policy and training policy are major issues in collective labour agreements and in-company negotiations between employers and works councils. It is expected that decentralization of labour relations will continue in the future. Employers and works councils will get more space to elaborate tailor-made agreements regarding flexibility, mobility and training at sector and company level. In mutual consultation and under certain conditions they can for instance deviate from legal or sectoral standards regarding contract periods, working times, training arrangements, working conditions. Collective bargaining provides openings for such deviations. In actual practice, however, openings have been used only to a limited degree, up until now.

When individual actors in sectors and companies get more opportunities to elaborate tailored arrangements (within general frameworks), it is recommended to make a parallel effort to equip them with adequate competences and facilities to cope with these new opportunities:

- training of workers to increase employability;
- targeted training of works councils in negotiation processes;
- collaboration between trade unions and works councils;
- strengthening of the position of local union representatives;
- development of local support networks and services;
- adaptation of frames and procedures of collective labour agreements.

With the further deregulation and decentralisation in the sphere of labour relations it is expected that the role of ‘soft law’ will become more important in the Netherlands. Social partners and other agencies at sectoral and company level get more opportunities to design self-regulative systems (NEN-ISO, certification, self-inspections, Codes of Conduct, Codes of Practice), particularly in the field of working times and working conditions, but also in the sphere of labour contracts, flexible work, labour exchange services. The TWA employers f.i. have designed a certification system to protect the sector against malafide contractors. The system includes NEN-standards for administration, business processing, accountability etc. Other sectors have also developed such self-regulative arrangements.

Furthermore, it is expected that law enforcement by official authorities like the Labour Inspectorate will become more targeted and more focussed on sectors with higher risks, leaving sectors with lower risks to self-regulation. Actually, law enforcement is often still dispersed. Staff capacity of inspection services is limited. To increase efficiency more targeted methods of inspection (projects) have been introduced and relationships between different inspection services have been improved. Furthermore, inspection services strive for better cooperation with sector agencies, both at the employers and at the trade unions side. An important measure was also a sharp increase of the level of sanctioning of legal offences in the sphere of labour contract law (undeclared work, illegal employment, fraude). Fines in case of illegal employment f.i. have been raised substantially in the past years.

During the past decade Dutch labour law essentially remained relatively unaffected, however, apart from the Flexibility and Security Act of 1999. Many efforts have gone into reforms of the social security system. Recently, however, the government launched new plans to change the system of employment protection in order to increase flexibility on the labour market. The existing system of dismissal permits should be abolished. It should be replaced by a system of better training facilities and more financial support for employees to increase their employability on the labour market.

These plans are inspired by the model of a transitional labour market, emphasising employment security in stead of job security.

The social partners are sharply divided in their evaluation of these proposals. The employers support them. In their view reform is necessary to reduce administrative burdens, further economic dynamism and keep up with global competition. The trade unions strongly oppose them. In their view, abolishment of the dismissal permit system would be a fundamental break with the tradition of employment protection. The permit system should be maintained, in order to prevent arbitrariness at the side of employers. Greater flexibility and mobility on the labour market should first and for all be stimulated with training facilities for workers.

In November 2007, after a period of public and political debate, the proposals were withdrawn by the government because coalition partners could not find a compromise and did not want to risks a political crisis about the issue.

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Part Two

Experiences with flexibility and
security in the Netherlands

Executive summary

Relating flexibility and security has been a widely debated issue in the Netherlands in the nineties of the former century, due to the rise and proliferation of ‘non-standard’ types of employment, like temporary work, agency work, on-call work, freelance work and home work. The debate culminated in the introduction of a new Act on Flexibility and Security in 1999, aimed at creating a better fit between labour law and the realities of temporary work. Basic principles of the Act were already elaborated some years before in a joint Agreement of the social partners in the Foundation of Labour. The government almost integrally accepted the recommendations of the Agreement in the design of the new Act. Furthermore, the recommendations inspired the TEA sector to further develop the system of labour relations.

From empirical evaluations of the new arrangements it can be concluded that the Act has clarified uncertainties in the status of temporary workers. The new regulations enlarged the opportunities for companies to hire temporary workers and, at the same time, improved the position of temporary workers by maximizing the total duration of temporary work and the total chain of contracts. In practice, vague, unclear contracts grossly disappeared, contracts are better administrated now, there is a shift from insecure on-call contracts to fixed duration contracts. Transitions to open ended contracts are still limited, however. The new law included the possibility of sectoral deviation by mutual agreement in CAO’s. In most CAO’s social partners stayed within legal standards. In some branches they used the right to deviate from legal standards to stretch arrangements beyond what was intended. According to the employers, administrative tasks increased due to the greater complexity of the new rules. However, extra administration is often taken over by TEA’s.

The related recommendations of the Foundation of Labour further improved the rights and provisions for flexible workers, especially agency workers, by providing a framework for the establishment of better collective arrangements in the segment of temporary labour. The up-coming system of labour relations in the TEA branch further unfolded with representative organisations, social dialogue, collective negotiations and labour agreements, certification systems, collective pension schemes and other social funds. This made the TEA branch a better regulated sector. It improved the image of the branch and strengthened the position of workers vis-à-vis agencies and hiring firms.

In other sectors, flexible work has had limited effects on social dialogue and industrial relations. It was mainly absorbed through adaptations in existing (collective) arrangements and institutions. At the level of companies, social dialogue and labour relations are hardly effected. In most companies, temporary workers are seen as a kind of outsiders. They usually do not take part in representative organizations, like work councils. Work councils only take account of their interests to a limited degree. These are points that could be improved.

Besides the Flex Act, in general, labour contract law has not changed substantially. The basic defining criteria of an employment relationship are still the same as in the beginning of the 20th century when labour law was introduced. They are uniform, open criteria which still are considered to be valid by many experts. Pleas for differentiation of the labour relationship are heard, but the issue is not very high on the political agenda. A specific issue actually is how to cope with (economically dependent) self-employed workers, e.g. the question of whether or not - and if so: how - they could be covered by labour law.

1 Background of the case report

This case report contains the second part of the Dutch contribution to the EP study on the impact of new forms of labour on industrial relations and the evolution of labour law in the EU. The report is an addition to the first part, which consists of a national monograph that provides a general overview of new forms of labour and their impact on labour relations and labour regulations in the Netherlands.

Selection of the case

The objective of this report is to provide a case description of experiences with flexibility and security in the Netherlands, with the focus on labour contract regulations. There are several reasons to give a closer look to these experiences. The Dutch flexicurity approach is well known in the EU, as being one of the socio-economic policy models that tries to combine measures to increase labour market flexibility with measures to improve social security of vulnerable groups. It has attracted a lot of attention in the debates regarding the reform of welfare state regimes into more ‘activating’ participation societies. Recently, the flexicurity concept has been adopted by the EC as a major strategy to create more and better jobs in the future (EC, 2007). The approach is promoted by its supporters as a realistic option to balance economic and social interests in an increasingly competitive environment.

The flexicurity approach is disputed also, however. At the one side by right-wing liberal critics, who consider it still to be too rigid a model to meet the requirements of modern businesses. At the other side by left-wing social critics, for whom it puts employment protection and social security arrangements too much at stake. In the Netherlands, flexicurity has been put into practice now for more than a decade. Knowledge of these experiences might give practical input into the discussions at policy levels.

Focus of the case

In its recent publication ‘*Towards common principles of flexicurity*’ (EC, 2007) the Commission promotes an ‘integrated flexicurity approach’. In such an approach policies should not either increase flexibility for enterprises or security for workers but they should be designed in such a way that they enhance, at the same time, flexibility and security at the labour market. Policies must not contradict or neutralize each other

in this sense, but must be mutually reinforcing, by focussing on (labour market) transitions and skills and benefits for people to facilitate successful transitions during the life course. The Commission distinguishes four components of an integrated approach (see: EC, 2007, p.12):

- flexible and reliable contractual arrangements, through modern labour laws, collective agreements and work organization;
- comprehensive lifelong learning strategies, to ensure continual adaptability and employability of workers;
- effective active labour market policies, that help people cope with rapid change and ease transitions to new jobs;
- modern social security systems, that provide adequate income support, encourage employment and facilitate labour market mobility.

These components were also key issues in Dutch social and economic policy during the past decade. They are the constituent elements of the strategy to make labour market institutions more flexible and dynamic. They were not developed in a fully integrated way, but measures aimed at different components gradually were more connected and adjusted to one another in the development of a framework for a transitional labour market.

In this report, we focus on the first component, because contractual arrangements are a basic component, that often influences specific arrangements for further training, labour market mobility and social security. Furthermore, it is directly linked to the general subject of this study: the impact of new forms of work on labour relations and the evolution of labour law in the EU. Where this is functional, however, we will also refer to developments regarding the components of lifelong learning, active labour market policies and social security. To discuss them in detail would extend the scope of this study. They partly belong to other institutional fields, covered by other legal arrangements (education law, social security law).

2 Scope of the issue

To give an impression of the scope of the issue, some data about flexible work in the Netherlands are presented in the tables below. The data are mainly derived from a recent evaluation (in 2006) of the Dutch Flexibility and Security Act of 1999 (Knegt e.a., 2007).

Rise of 'non-standard' jobs

The number of 'non-standard' jobs, especially part-time jobs, has grown substantially during the past decades. Since the beginning of the seventies the total volume of jobs almost doubled in the Netherlands. In 1969 there were around 4,5 million jobs, in 2005 there were more than 8 million. As table 2.1 illustrates, the share of 'standard' e.g. permanent fulltime jobs sharply diminished and the share of 'non-standard' jobs strongly increased during this period. In particular, the number of part-time jobs has increased, to a level that they can be considered to be almost as 'standard' as fulltime jobs now. Most part-time jobs are open ended jobs with a fixed number of working hours, but they also can be of the fixed duration type. As the table shows, the number of really flexible jobs - e.g. jobs with no weekly or monthly fixed number of paid working hours - has grown substantially too and amounts up now to almost 1 to 10 in 2005.

Table 2.1 – Share of different types of jobs in total job volume, in 1969 and 2005

	1969	2005
Fulltime jobs	82%	47%
Part-time jobs	14%	44%
Flexible jobs	5%	9%

Source: CBS, in Knegt e.a., 2007

Different types of flexible contracts

The scope of the problem becomes even clearer when we look at persons in stead of jobs. Table 2.2 gives an overview of the estimated proportions of persons with differ-

ent contractual statuses in the total Dutch active population. The estimates are based on survey data of a representative sample of 72.805 persons between 18 and 65 years old (Knegt, e.a. 2007).

As the table shows, around one-third of the workforce has a flexible contract in 2006. Fixed duration contracts, on-call contracts and temporary work agency contracts are the most widely used types of flexible contracts. Furthermore, circa 7% of the workforce are a self-employed or freelance workers.

Table 2.2 – Share of different types of contractual statuses in total population, in 2006

Open ended contract	58,6%
Fixed duration contract	10,5%
On-call contract	6,4%
Temporary work agency contract	5,0%
Self-employed, freelance contract*	7,3%
Home worker	0,4%
Trainee, apprentice	2,4%
Holiday worker	2,0%
Other type of paid work	3,6%
No paid work, social insurance benefit	17,1%
Status not known	3,8%

* Including working partners and self-employed workers in health care sector ('*alphahulpen*')

Source: Knegt, e.a., 2007, p 27

Spread of flexible contracts across companies and sectors

Table 2.3 shows the spread of flexible labour across companies and different economic sectors, as revealed by a survey among 900 companies (Knegt e.a., 2007). As we can see in the total-column 63 percent of all companies used fixed duration contracts in 2006, 28 percent hired workers from temporary work agencies, 30 percent employed on-call workers, 14 percent hired self-employed workers and/or freelancers and 2 percent made use of home workers.

Table 2.3 – Percentage of companies working with different types of contracts, per sector (2006)

	Agriculture, Energy, Industry	Construction sector	Trade, Repair, Horeca	Transport, Communication	Services sector	Health and Care sector	Total
<i>Percentage companies with:</i>							
Permanent contracts	97,4%	100,0%	95,3%	97,8%	100,0%	98,3%	97,6%
Fixed duration contracts	60,4%	44,5%	58,3%	65,3%	74,4%	71,8%	63,0%
Temp. work agency workers	46,1%	30,8%	15,1%	38,7%	32,8%	28,0%	27,7%
On-call workers	26,6%	11,3%	37,9%	34,3%	18,9%	49,8%	30,3%
Self-employed/Freelancers	15,8%	31,3%	5,0%	18,4%	20,7%	12,9%	14,4%
Home workers	2,0%	1,9%	0,0%	0,7%	5,7%	0,2%	1,9%
Total number of companies	154	155	150	147	151	152	909

Source: Knegt e.a., 2007, p. 18

There are differences between sectors also:

- the high share of fixed duration contracts in the services sector;
- the high share of temporary agency workers in agriculture, industry and energy;
- the high share of companies with on-call workers in the health and care sector;
- the high share of companies with self-employed workers in the construction sector;
- the low share of home work in general, except in the services sector.

3 Proliferation of flexible contracts

Particularly during the eighties and nineties of the former century the use of flexible contracts proliferated in the Dutch economy. Various factors have influenced this process.

Factors influencing the use of flexible contracts

A first factor was the general structural development within the Dutch economy, with a rising share of the services sector at the cost of the industrial sector in total employment. Companies and institutes in the services sector were often more inclined to deploy persons in new flexible forms of work than companies in more traditional branches of industry, transport and trade.

A second factor were the recurring cyclical problems caused by fluctuations in the economy, especially in the beginning of the eighties and nineties. Problems caused many companies to close down or to reduce their staff. They became more careful regarding staff costs and staff planning. When growing again, they were less inclined to hire new staff on a permanent basis, but they searched for more flexible forms that made it easier to quickly adapt staff capacity to market fluctuations.

A third factor were openings made in collective labour agreements (CAO's) with regard to opportunities for employing temporary workers in companies. The phenomenon of flexible work was put on the agenda and became accepted in many branches. In many CAO's specific arrangements were made to regulate the deployment of temporary workers. Arrangements usually aimed at regulating the use of fixed duration contracts by limiting their use to certain types of work, certain occasions (f.i. replacement of workers absent due to illness or holidays) or certain periods.

A fourth factor was the rise of private intermediaries on the labour market, in particular the commercial temporary employment agencies (TEA). For a long time commercial mediation on the labour market was strictly regulated in the Netherlands, with a system of permits granted by the public employment office. However, in the mid eighties this system was abandoned. Permits were no longer needed and establishment of TEA's was left to the market. During the nineties this has led to a strong increase in the number of TEA's. In particular, in years of economic upheaval (second half of the eighties and the nineties) many new TEA's were established.

Variety of flexible contracts

With the rise of more flexible forms of work, the variety of contractual regulations increased. As indicated above, the basic and most common forms of temporary employment contracts are fixed duration contracts, on-call contracts and temporary work agency contracts. Within these basic types several sub-types can be distinguished (Diebels, 2004). Table 2.4 gives an overview of the sub-types.

Table 2.4 – Variety of flexible contracts

Fixed duration workers	a. contracts with prospect of an open ended contract b. contract without prospect of an open ended contract
On-call workers	a. contracts with guaranteed working hours b. contracts with guaranteed minimum and maximum working hours c. contracts without guaranteed working hours, but with right to refuse in case of calls d. contracts without guaranteed working hours and compulsory attendance in case of calls
Agency workers	a. agency contracts b. posting contracts c. pooling contracts d. fixed duration contracts (with TEA) e. open ended contracts (with TEA)

From the point of view of hiring companies, all these types of contracts can be considered as forms of quantitative, numerical flexibilisation e.g. as strategies to facilitate adaptations of a companies' staff capacity to market fluctuations via the external labour market. In particular, on-call contracts and agency contracts provide opportunities to realize this kind of flexibility. These types of contracts became popular among employers during the eighties and nineties.

Problems encountered

Already during the eighties, signals from various sides were received that the use of these new types of flexible contracts caused imbalances on the labour market, which were especially felt by the workers involved.

An important point, often heard from temporary workers themselves, was that they could easily be subjected to a prolonged use of temporary contracts, also in cases where their work in fact had a permanent character. This could lead to extended sequences of (short) temporary contracts, one after another, interrupted by periods of non-activity to prevent establishment of real or fictitious permanent employment relationships. Such sequences could go on for many years, with the workers all the time being temporarily employed and lacking the security and protective rights of permanent workers.

The trade unions stressed the precarious position of temporary workers, especially in cases of prolonged sequences of temporary jobs. Temporary workers were subjected to the risks of job insecurity and insecurity of income, with all kinds of related problems like limited access to social insurance provisions, less opportunities for savings and pensions, less opportunities for getting credits, loans, housing facilities etc. They strongly contested the imbalances in the labour relationships between employers and temporary workers, especially agency workers and on-call workers.

Social scientists and economists revealed the tendency of a growing segmentation on the labour market. At the one side a primary segment of 'good' permanent jobs, with much job security, good payment, good working conditions, qualified work and career opportunities. At the other side a secondary segment with 'bad' temporary jobs, often short term, with less job security, lower payment rates, bad working conditions, lower qualified work with less career opportunities. Work in the primary segment offered better employment protection and social insurance provisions than work in the secondary segment. Inequalities became harder to overcome, as segmentation tended to become structural.

Furthermore, activities of inspection agencies revealed problems with the deployment of temporary workers, in particular by unorganized labour market intermediaries. In various economic sectors malafide contractors and employment agencies were active, that misused the precarious position of temporary workers for their own benefits.

4 Measures regarding flexibility and security: Flex Act of 1999

As a reaction to the debate about these issues the government launched proposals to better regulate the new forms of flexible labour relations and to mitigate risks of excesses, especially as regards prolonged temporary work, on-call work and agency work. In the beginning of the nineties, after several years of study, the new coalition cabinet of social democrats and liberals published a report about ‘Flexibility and Security’, in which it recognized the importance of flexible work, expressed its concerns about inequalities due to the rise of flexible work and its intention to create a new balance on the labour market by at the same time improving the opportunities for the employers to hire flexible workers and improving the security of the flexible workers involved. Concrete measures were proposed to adapt labour legislation in this direction.

Agreement social partners in Foundation of Labour 1996

The proposals were sent to the social partners in the Foundation of Labour, the highest bipartite body for mutual consultation of employers and trade unions in the Netherlands. The social partners largely subscribed to the analysis of the government and reached an agreement about the reform of labour law. This agreement is known as the ‘*Agreement on flexibility and security 1996*’. It is a milestone in the debate about flexibilisation of labour in the Netherlands and laid the basis for the new *Flexibility and Security Act of 1999*.

Flexibility and Security Act of 1999

The advice of the Foundation of Labour was accepted by the government. In the new Act on Flexibility and Security of 1999 (Flex Act) the proposals of the social partners were almost integrally included. The Flex Act is a second milestone in the debate. For a part it codified a number of already existing practices, but it also introduced a number of innovations in Dutch labour law aimed at a better regulations of new forms of flexible work. The major elements of the Flex Act are (Van den Toren e.a., 2002):

1. The introduction of a ‘*refutable presumption of law*’ regarding the existence and size of an employment contract. This can be applied if no clear arrangements between an employer and an employee have been made. If an employee has worked

for at least 3 months and 20 hours a month for an employer, an employment relationship is legally supposed to exist. This article is particularly relevant for small and diffuse contracts, like in many cases of on-call work.

2. The introduction of a '*chain article*' that facilitates the use of sequences of temporary contracts but at the same time bounds sequences within clear limits. If an employee has worked for 3 years on a temporary basis or has had 3 temporary contracts after one another, without interruption of more than 3 months, a further continuation of the employment relationship will automatically transform his contract into an open ended contract. This article is also called the '3-3-3 formula'.
3. The introduction of the figure of an '*agency contract*' and the labelling of an agency contract as a special form of a '*labour contract*'. This article is especially relevant for TEA-workers. The article brings agency work under regular labour law, with all the (protective) rights and obligations applicable. However, the first 6 months of agency work are exempted from the article. In this period agency workers are still employed on a hire-and-fire basis.
4. The introduction of a '*payment exclusion article*' that limits the period for which employers do not have to pay employees if they do not work for them. This period is limited to 6 months. After 6 months employers are obliged to continue paying wages also if no work is available for employees. This article is also particularly relevant for TEA-workers. Furthermore, for on-call work it is arranged that employers at least pay a minimum of 3 hours every time an employee is called for work.
5. A modification of the rules for '*probationary periods*'. In case of temporary contracts for less than 2 years, probationary periods should be limited to 1 month instead of 2 months for open ended contracts.
6. A modification of the rules for '*notice and dismissal*' of temporary workers. Employers are given more opportunities to terminate temporary contracts during their duration. Dismissal procedures for temporary workers are shortened and simplified.

The introduction of the chain article and the agency contract plus the labelling of the agency contract as a special form of an employment relationship were real novelties in Dutch labour law. Furthermore, the Flex Act introduced another innovation: the *right to deviate* from the rules laid down in the law, if employers and employees can mutually agree to deviate and to design other rules that are better suited to the specific situation in their sector or company. Agreements can be concluded both at the level of

sectors e.g. between employers and trade unions as well as at the level of companies e.g. between employers and works councils. This right to deviate gives social partners a greater say and facilitates tailor-made arrangements. The right is a.o. declared applicable to the chain article of the Flex Act.

Further elaboration in collective labour agreements TEA-sector

Introduction of the Flex Act of 1999 implied a factual acceptance of TEA-work in the Netherlands as a regular phenomenon on the labour market. Work agency relationships were accepted as employment relationships. Agency workers became employees. Temporary employment agencies became regular employers. In this sense, observers consider the law as a milestone in the development of the TEA-branch (Van den Toren e.a., 2002).

In its advice on Flexibility and Security the Foundation of Labour recommended the TEA-branch to further elaborate and regulate the position of agency workers in special collective labour agreements. Social partners in the TEA-branch accepted the recommendations and negotiated new CAO's in the course of the nineties. Based on the CAO's new arrangements were developed which further strengthened the position of agency workers.

5 Structural reforms: collective arrangements in TEA sector

The Flex Act has had a major impact in the TEA-sector during the past decade. An important effect is that it gave extra impulses to ongoing initiatives of social partners to further regulate labour relations in the branch and to further elaborate rights and obligations of TEA's and agency workers in collective systems and arrangements (Korevaar, 2000). Self-regulation on sectoral level was expressed in several (new) institutions.

- The TEA's established an *employers association* in the branch, the Algemene Bond van Uitzendondernemingen ABU. The ABU was the first representative association in the branch and gradually organized more and more members. Actually, it represents approximately two-third of all TEA's. Later in the nineties another TEA employers association was established, the NBBU, covering a substantial part of smaller TEA's.
- The *trade unions* established separate departments for TEA workers and other flexible employees. The FNV (general trade union federation) and the CNV (Christian trade union federation) recognized flexible workers as special groups to promote interests for and appointed specialists to negotiate their terms and conditions of employment.
- Employers and trade unions negotiated a first *collective labour agreement* CAO for TEA's, the ABU-CAO. The agreement was signed by the ABU and the trade unions FNV, CNV and the Unie. The ABU-CAO was declared applicable for the whole TEA branch by the Dutch government.
- In later years several *other CAO's* were established: a CAO for members of the smaller association NBBU, a CAO for international labour market intermediaries, a CAO for workers of payroll companies and CAO's for a number of larger TEA companies. These CAO's cover only the employers and workers associated in the organizations involved.
- Later, based on the CAO's, *special social funds* for TEA workers were created, a.o. a pension savings fund for long-term agency workers and a training fund for agency workers with fixed-duration or open ended contracts with a TEA. The training fund is closely connected with the ABU. It is a bipartite fund, run by the em-

ployers and trade union representatives. It stimulates training of agency workers and facilitates courses with financial grants. The fund is financed with an annual levy on the wages of TEA's.

- The ABU introduced an special *company certification system* for TEA's. The system provides extra guarantees that TEA's are reliable companies as regards management, administration and staff policy. A certificate guarantees that a TEA complies with the rules of the CAO and contributes taxes and social insurance premiums. When working with certified TEA's hiring companies run a lesser risk of getting involved in malafide practices.
- The ABU established a special *reporting station*, where employers and agency workers can report cases of mal-practice or non-compliance with CAO-regulations.

An important innovation in the CAO was the introduction of a 'phased system' of TEA employment. This system distinguishes 4 - later 3 – phases in an agency workers 'career'. In every phase different contractual arrangements are applicable. The longer an agency worker is employed by a TEA, the better are his terms of employment and his employment protection and social insurance rights. After maximally 3,5 years he has all the rights of an open ended contractual employment relationship. We will come back on this point in the next paragraph.

These CAO arrangements for the TEA branch were inspired by the recommendations of the social partners in the agreement of the Foundation of Labour 1996 and the arrangements made in the Flex Act of 1999.

6 Results of Flex Act and TEA sector arrangements

The Flexibility and Security Act is in operation now for almost a decade. Experiences with the Act have been evaluated in 2002 (Van den Toren e.a., 2002) and 2006 (Knegt, e.a. 2007). For these evaluations research was done on the level of social partners/sectors, companies and workers. The evaluation of 2006 f.i. contained an analysis of 110 collective labour agreements (CAO's) and a survey of 900 companies and 450 (flexible) workers. We will use these studies here to here give an impression of the results of the Flex Act and TEA sectoral regulations.

We will focus on 4 elements:

- a) the presumption of existence/size of an employment relationship;
- b) the payment articles
- c) the 'chain' articles for sequences of temporary employment contracts;
- d) the subsumption of agency contracts under regular labour contract law.

The data below are primarily derived from the evaluation in 2007 by Knegt, e.a.. They give a picture of the state of affairs in 2006.

a) Existence and size of an employment relationship

In actual practice it only very rarely occurs that employees use this article to enforce recognition of existence and size of their labour contract. If workers report differences of opinion with employers about numbers of working hours (e.g. 7% of the cases), they seldom take further legal action. The article appears to have first of all a preventive function.

b) Payment articles

These articles are particularly relevant for on-call workers and agency workers. The articles are not very well complied with in practice:

- 50% of on-call workers have no arrangements in the contract regarding on-call times and minimum working hours;
- Only 25% of on-call workers does indeed get paid the minimum number of 3 working hours per call;

- For 75% of on-call and agency workers have an arrangement that they do not get paid when they do not work; in 2% of the cases the contract limits this arrangement to a 6 months; in one-third of the cases it covers a longer period.

Furthermore, social partners have used their rights to deviate from the legal standard of 6 months in several cases. In 14 of 110 CAO's social partners have extended the period that employers are not obliged to pay on-call and agency workers in case of lack of work. In the TEA sector this period is prolonged, to 1,5 year in the ABU-CAO and 2 years in the NBBU-CAO. These are the periods they work with agency contracts. In the Horeca-CAO payment is totally excluded. In other CAO's continuing payment is excluded in certain circumstances (f.i. bad weather conditions).

c) Chain articles

Social partners in several branches have also used their right to deviate in case of the chain articles of the Flex Act: the 3-3-3 formula.

- In 23 CAO's the maximum number of 3 temporary contracts is adapted, in half of the cases to a lesser number (usually: 2), in the other half to a higher and even unlimited number;
- In 30 CAO's the maximum period of 3 years is adapted, with in 13 CAO's maxima of 5-6 years or even an unlimited period;
- In 14 CAO's the maximum interruption of 3 months is adapted, usually shortened to 2 months;
- In 9 CAO's the chain articles have been excluded partly or totally.

Extension of the maxima by CAO's was also an outcome of the evaluation in 2002. It caused some concern among government and social partners then, in particular the total exclusion of the chain articles. This was clearly not the intention of the law. For the employers and trade unions in the Foundation of Labour it was a reason to send a letter to their members with the recommendation to bring sectoral agreements more in line with the legal regulations.

Data from employers and workers revealed the following outcomes on this point:

- In 35% of the cases, after having completed one or more temporary contracts, employees got no new contract, a new contract was postponed, or a new contract

was an agency contract with less job security. This is a lower percentage than in 2002.

- In 65% of the cases, after having completed one or more temporary contracts, employees did get a new temporary contract (44%) or a new open ended contract (21%). This is a higher percentage than in 2002.
- In 5% of the cases interruptions between two contracts lasted for more than 3 months. This might indicate that interruptions were planned with the intention to by-pass transitions to less flexible contracts, by breaking existing chains and starting new ones.
- In particular older flexible workers (55-plus) run the risk of getting no new temporary contract, having an interruption of more than 3 months or getting a new contract with less securities than the contract before. This also occurs in certain age categories of younger workers (30-min).

Knegt e.a. conclude that employers have used the opportunities offered by the chain article to a substantial degree. In general, from a workers' point of view, positive transitions (65%) outnumber negative transitions (35%), more than in 2002. However, still more than a third of the workers did not get the opportunity to improve their position. Especially older flexible workers and certain categories of younger workers run a risk of getting involved in long and insecure sequences of temporary contracts.

d) Subsumption of agency work under labour contract law

This article has had important consequences for the TEA sector. With this subsumption, in principle, agency work has become subjected to all the rules of regular (temporary) labour contracts, like for probationary periods, periods of notice, protection against dismissal, procedures for dismissal, chain articles and payment articles. The Flex Act, however, exempted the first 6 months, when 'normal' agency work regulations still are applicable.

Terms of employment for agency workers have further been elaborated special TEA CAO's. An important adaptation the social partners made on the Flex Act standard of 6 month was that they extended this period by introducing a phased system for agency work. In the latest ABU-CAO the system is build up in the following way:

- a first phase A, that lasts for 78 weeks, during which the agency workers is employed on an agency contract basis;
- a second phase B, that lasts for 2 more years, during which the agency worker is employed on the basis of a fixed-duration contract with the TEA;

- a third phase C, after 3,5 years, where the agency worker has gained the right of an open ended contract with the TEA.

The worker might have up to 8 temporary contracts while working in phases A and B. In the phases A and B the agency worker gradually gets more protective rights, insurance provisions and training facilities. In phase C he has all the rights and provisions connected with an open ended employment contract. Observers conclude that with these regulations the position of agency workers has been strengthened (Van den Toren e.a., 2002; Knecht, e.a., 2007).

The study of Knecht e.a. reveals some interesting data about the actual position, rights and facilities of agency workers:

- Of all 900 companies involved 46% employed TEA workers in 2004 to 2006.
- As regards payment and other terms of employment, an average of 48% of TEA workers followed the TEA-CAO, 52% followed the CAO's of the hiring companies.
- Approximately 75% of the companies know the rules that TEA workers have a right to a fixed duration contract or an open ended contract after a certain period.
- Knowledge about regulations among workers is limited. Around 50-60% of the TEA workers is not acquainted with their own rights of period of notice, pensions, payment in case of illness, social insurance benefits in case of illness.
- Transitions: 15% of TEA-workers moved from an agency contract to a fixed duration contract at the TEA, 28% got a fixed duration contract at the hiring company. 9% moved from a fixed duration contract to an open ended contract at the TEA, 20% to an open ended contract at the hiring company.
- Interruptions: in 28% of the cases relationships were ended when transition of an agency contract to a fixed duration contract was at hand. In 19% of the cases relationships were ended when transition of a fixed duration to an open ended contract was at hand.
- Training: on average 18% of the agency workers followed a training course in 2006; in 63% of the TEA's less than 10% of the agency workers followed training courses, in 9% of the TEA's this was more than 50%; the average number of training days was 4 days per worker; workers in phase B (fixed duration contract with TEA) spend twice as much days for training than workers in phases A (agency contract) and C (open ended contract with TEA): 13 versus 7 days.

- Pension schemes: almost 100% of the TEA's in the sample offered a pension arrangement to their workers; on average, 64% of the agency workers were covered by the arrangements.
- A majority of the TEA's (60%) has a positive attitude towards the Flex Act and the rules for agency contracts; however, they also point to increased costs, mainly due to more administrative requirements.

7 General conclusions regarding effects

A general conclusion can be that the Flex Act and related TEA arrangements have improved the position and terms of employment of flexible workers, especially agency workers. But in certain cases and as regards certain rules actual practice still stays behind what was intended. In several sectors limitations on the duration of temporary work, the number of contracts, the periods of non-payment in case of lay-offs are extended beyond legal standards. Employers still have opportunities to extend the duration by interrupting (chains of) contracts and starting new ones, despite the chain articles. However, as the studies demonstrate, in general positive transitions to better contracts outnumber negative transitions in the 'careers' of the workers.

The study of Knegt e.a. further comments that the rules of the Flex Act have had only minor influences on the decisions of employers to hire (more or less) TEA workers. These decisions are mainly determined by cyclical economic developments, not so much by legal regulations. In 2006, the year of evaluation, the Dutch economy started booming again. That must be kept in mind, when one interprets the outcomes.

A further conclusion is that the Flex Act indeed has increased the space for employers to apply temporary contracts as a strategy for the flexibilisation of staff capacity. However, other flexibilisation strategies have also become popular during the past decades. Most employers prefer to realize flexibility in the first place by overtime and flexible time arrangements of available staff. The liberalisation of the Working Times Act has given employers more opportunities to introduce flexible working time arrangements, like overtime, shifts in working hours, gliding time schedules or extended time frames. In several sectors, annual working times schedules are applied more and more, because they provide the opportunity to raise working hours in busy periods and reduce them in slack periods over the whole year. Another popular strategy is flexibilization of job tasks and staff qualifications. By designing broader job profiles and qualifying workers for different types of jobs, companies can employ them all-round and thus create more opportunities for adaptations to changing demands.

Both these strategies are forms of internal flexibilisation. They can partly be applied as alternatives to external strategies like hiring temporary workers from TEA's or from the labour market. However, also other external strategies have come forth in

recent years, like outsourcing of work to subcontractors, hiring of freelancers and self-employed workers and pay rolling, e.g. hiring staff capacity from specialized payroll companies who take over the employers role from the hiring company. These might also be used as alternatives for hiring workers on temporary contracts. In the next paragraph we come back to these points.

Criticism that regulations are too complicated and increase administrative burdens are heard now to a lesser degree than in the first years after the introduction of the Flex Act. Burdens for employers have increased indeed, but they are usually taken over by the TEA's. TEA's already are required to keep good records, also because of taxes and social insurance obligations. That the rules are complicated is also recognized by the government. Many TEA workers are not acquainted with the rules, probably because they are so complicated. A lesson learned by the government is that more information is needed to raise workers' knowledge. It will launch extra campaigns. But it also appeals to the TEA's to inform their workers and customers.

One other point has to be mentioned here. Some observers state that the Flex Act might also have counterproductive effects for (agency) workers, with its maximum for number and duration of agency contracts. An agency worker runs the risk of getting jobless when the maximum number of contracts has been reached or the maximum period has been expired, even if there is work available, but not of a permanent nature. In these cases, a TEA or hiring company will not be inclined to employ the worker any longer, because a new temporary contract is no option any more and a permanent contract would be too risky. One option to by-pass this situation is to extend the maximum duration beyond the legal standards. Another option is to interrupt employment for more than 3 months and start a new chain at a later stage.

8 Further influences on labour contract law

The Flex Act introduced several novelties in Dutch labour contract law at the end of the nineties. Besides the Flex Act, however, new forms of work did not have many impact on labour contract law in the Netherlands. The basic principles of labour contract law, like the definition of a labour relationship and the basic rights of employers and employees, were established already in the Labour Contract Act of 1907, which is part of the Civil Code now.

These principles have stand the test of time during the past hundred years, despite all changes in economy, society, social policy and industrial relations. Experts explain this persistence of labour law with a reference to its general and open character (Loonstra & Westerbeek, 2007). Point of departure of the original law was that it should cover all workers in all kinds of work and all kinds of relationships. There should be one uniform regulation for all workers in the Netherlands. This led to a broad definition of the ‘labour relationship’ with 5 defining criteria:

- doing work;
- on a personal basis;
- for a certain period of time;
- in service of someone else;
- compensated by a wage.

With these criteria a law could be made that covered all types of ‘wage-workers’, at the same time distinguishing them from independent or self-employed workers. Independent workers would not be covered by the law.

These general criteria, especially the criteria of ‘work’, ‘in service of’ and ‘with wage compensation’ are still the basic criteria for the establishment of a labour contract. The criterion ‘in service of’ e.g. the authority relationship between employer and employee has appeared to be mostly decisive. On the basis of High Court arrests further criteria have been developed to decide whether or not an authority relationship exists, and - thus - whether or not an employment relationship is governed by a labour contract with all rights and obligations connected to it. Case law prescribes that always the concrete circumstances and the intentions of the actors involved in the case must be taken into consideration (Loonstra & Westerbeek 2007).

During the past years, the uniform regulations of labour contract law have become the subject of a debate among law experts. De Jong (2007) f.i. states that labour contract

law has not been differentiated, despite the fact that authority relations between employers and employees have changed substantially during the past century. Differentiations in actual practice did not lead to pluriformity in law. Labour contract law still has a uniform character, with only exemptions regarding flexible (agency) workers (Flex Act). A basic principle is the distinction between employees and independent workers, with independent workers excluded from labour law. There is a growing number of self-employed workers and freelancers now, however, with an 'intermediate' status between employees and independent workers, who are not covered by labour law. They often fall between two stools, now. Thus, one might ask if the distinction still fits with actual relations and if labour law should not be further differentiated to include also the various new types of employment. Perhaps, changes in the defining criteria for an employment relationship are needed. A definition based on the level of economic dependency instead of authority relationships could be an option. This question is urgent as social risks and insurances are privatized more and more and transferred from collective to individual levels, f.i. insurances against loss of income in case of illness, insurances against disability to work (De Jong, 2007). Other experts propose possible differentiations according to criteria as level of education, level of wages or type of employer (public, private).

However, still other experts oppose differentiations. In their view, one uniform law for all workers best fits with both the protective as well as the regulative function of labour contract law. According to these experts, workers - also higher educated workers - are still legally subjected to their employers and economically dependent from their employment contract. General protective regulations for these contracts can not be missed. The existing uniform and open rules are still adequate. Differentiations in labour contract law would cause all kinds of demarcation problems and would stimulate desolidarization in labour systems and arrangements. Where differentiation is functional, it should primarily be shaped through exemptions in subarticles of labour contract law (Asscher-Vonk & Peeters, 2007).

9 Further influences on social dialogue and industrial relations

It is evident that the debates on flexibility and security have had an impact on the TEA sector in the Netherlands. The sector developed a whole new system of labour relations, including sectoral associations, collective labour agreements, collective social funds and sectoral social and economic policies. This process of self-regulation got new impulses from the Flex Act and related recommendations of employers and trade union. Establishment of the TEA sector as a collective entity (Warmerdam, 1997) also strengthened its influence at the political level.

TEA work is a better regulated phenomenon in the Dutch economy now. TEA's are generally accepted and active in almost every economic sector. Many companies use the services of TEA's. TEA's have become 'real' employers, with qualified staff, professional management and extended social provisions for their workers. They offer recruitment services, but often also education and training, reintegration, outplacement and consultancy services for small and medium sized companies, especially in the segment of qualified labour (Warmerdam, 2007b).

Further influences at sectoral level have been limited, in general. Issues regarding flexible employment contracts have been dealt with primarily in existing sectoral institutions (trade union departments, sectoral agencies, sectoral funds) and through existing arrangements (collective labour agreements). During the past years some new interest organizations for flexible workers have been established, like an 'alternative' union for TEA workers and an association of self-employed workers, but they are rather small and their influence is rather limited until now, as compared with the influence of traditional interest groups.

At company level, impacts on social dialogue have also been limited. Research demonstrates that temporary workers very rarely participate in works councils of hiring companies. Agency workers have only access to these councils after 2 years. The works councils often do not pay much attention to the interests of temporary workers, in particular TEA workers. However, several larger TEA's have established their own works councils in the mean time. In some cases they have a double representation, for permanent staff and for agency workers (Van den Tillaart e.a., 1999).

10 Further issues on national agenda

Partly related to the issue of labour law two other issues have been dominant in the debate about flexibility and security in the Netherlands during the past decades: the reform of social insurance arrangements and the development of arrangements for continuous training.

Reform of social insurances

The reform of the social insurance system has been inspired by the idea of the introduction of more activating elements in traditional insurance provisions against the risks of loss of income due to illness, unemployment, partial disability to work, early retirement. An important aspect of the reform was a partial transfer of responsibilities from the collective level to the level of individual companies and workers, with the assumption that people will be more inclined to take measures to prevent or reduce risks as they have a greater personal financial interest in controlling the costs they might bring with them. Several measures were negotiated with the social partners:

- introduction of a period of 2 years in which employers have to take salary costs of ill workers for their own account;
- obligation of employers to design reintegration plans for ill workers, in cooperation with professional health support services;
- obligation of (ill) workers to cooperate with employers and health services with regard to reintegration measures;
- more selective access criteria for income insurance provisions against (partial) disability to work;
- (re)placement and other reintegration regulations for employers and workers in case of the risks of disability to work;
- more selective access criteria for income insurance provisions against unemployment; reduction of periods of unemployment benefits;
- introduction of a new 'private market' for reintegration services; many companies in this field were established;
- extension of various subsidy schemes to facilitate reintegration of (long term) unemployed workers;
- more facilities for tailored arrangements in collective schemes, f.i. for early retirement and sabbatical leave.

Role of continuous training

At the one side, these measures are presented as measures to control and reduce social insurance costs, at the other side they are also as instruments of a more activating labour market policy. However, as regards flexibility on the labour market, the crucial role of continuous training is also stressed. Government and social partners agree that continuous training is a crucial prerequisite on labour markets where employment security increasingly becomes dependent on up to date qualifications. Social partners have already recognized this during the nineties. They incorporated training arrangements in CAO's and developed systems for further training in many branches (Warmerdam 1997). These contained a.o.:

- rights to training for workers, usually a certain number of days per year;
- obligations for employers to continue salary payment in case of training;
- regulations for reimbursement of study costs, travel costs etc. in case of training;
- an obligatory levy on total wages to contribute to a collective training fund;
- rights of workers to get reimbursements from the training fund;
- rights of employers to get subsidies from the sectoral training fund;
- facilities and subsidies for employers to develop in-company training plans;
- tools and instruments to support career planning, for both companies and workers;
- specific supply of training courses, often provided by sectoral training centres.

So, in the nineties, training was high on the agenda of the social partners. It ranked lower for a while, because debates became dominated by social security reforms. But it became an actual issue again in relationship with the discussion about adaptation of dismissal regulations. Last year, the Dutch cabinet has launched proposals to make rules for dismissal protection of employees more flexible, which would imply less 'job' security for (permanent) employees. At the same time it is stressed that 'employment' security should be extended by furthering employability of employees. Continuous training is an important element of permanent employability. Facilities for training should be extended. The proposals included a.o. extra training facilities, also for temporary workers.

The employers associations supported the proposals of the cabinet, as a necessary step in the adaptation of labour market regulations to the globalizing knowledge based society. The trade unions supported the plans for furthering training, but strongly opposed the plans to liberalize dismissal rules. In their view, combating segmentation (temporary vs. permanent workers) and exclusion (employed vs. unemployed) on the labour market should not go at the cost of protective rights of the vast majority of permanent employees (see: Dutch country report).

11 Conclusions

Overlooking the experiences we can conclude that the rise of new forms of flexible work has had an impact on Dutch labour law, in particular with the introduction of the Act on Flexibility and Security of 1999. This Act clarified some uncertainties in the legal status of temporary workers. It enlarged the opportunities for companies to hire temporary workers, while at the same time it improved protective rights and provisions for the workers involved, especially agency workers and on-call workers.

Besides the Flex Act, in general, labour contract law has not changed substantially. The basic criteria of an employment relationship are still the same as those that were defined in the beginning of the 20th century with the introduction of labour contract law. They are uniform, open criteria which still are considered to be valid by many experts. Pleas for differentiation of the labour relationship are heard, but the issue is not very high on the political agenda. A specific issue is how to cope with (economically dependent) self-employed workers, e.g. the question of whether or not - and if so: how - they could be covered by labour law.

The regulations for flexibility and security have had a clear impact in the segment of flexible work, in particular in the TEA sector. The TEA sector has established a whole new system of social dialogue and industrial relations during the past 10-15 years, which was partly inspired by the Flex Act and related recommendations of the employers and trade union federations in the Foundation of Labour. This made it a better regulated sector. It improved the image of the branch and strengthened the position of workers vis-à-vis agencies and hiring firms.

In other sectors, flexible work has had limited effects on social dialogue and industrial relations. It was mainly absorbed through adaptations in existing (collective) arrangements and institutions. At the level of companies, social dialogue and labour relations are hardly effected. In most companies, temporary workers are seen as a kind of outsiders. They usually do not take part in representative organizations, like work councils. Work councils only take account of their interests to a limited degree. These are points that could be improved.

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