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### Mapping the rules on posting and short term migration of third country nationals

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# Mapping the rules on posting and short-term migration of third country nationals (TCNs): the legal framework and practice in the Netherlands

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## Introduction and general part

This country report is the Dutch contribution to the ETUI project 'national law on short-term migration and posting of third country nationals' (project number 2051-103-31). Although a formal competence to determine admission conditions and rights of third country national labour migrants (hereafter TCNs) lies with the EU, as formulated in TFEU Title V (articles 67, 77-79), Member States remain solely responsible for determining the volumes of third country nationals they admit for the purpose of work.<sup>1</sup> The common policy for third countries labour migrants is limited to a number of Directives. As a result, national conditions are decisive for the admission of third country migrants.

1. The legal regime under which the third country nationals can enter the country for the purpose of short- or limited periods of work

The Dutch legislator has formulated a number of general conditions that apply to all purposes of stay.<sup>2</sup> In order to avoid too detailed reference, our focus will be on the most relevant legislative provisions related to third country labour migrants.<sup>3</sup> The main regulatory frame in the Netherlands for foreigners' rights and duties, for the admission, the stay and residence, and for permits related to the performance of work, study or other visits is formulated in one general act, the 2000 Aliens Act (*Vreemdelingenwet 2000*).<sup>4</sup> The second basic legal act is the Foreign National Employment Act 1994 (*Wet arbeid vreemdelingen 1994*, or *WAV*).<sup>5</sup> This act provides regulations concerning the access to the labour market and the employment of TCNs.<sup>6</sup> Both acts are implemented in several subordinated acts that describe the legal provisions and requirements in detail. As in other EU Member States, vacancies shall in principle be filled by job-seekers from EU countries. The country has seen a large growth in active intra-EU movers from inside the EU/EEA countries.<sup>7</sup>

In general, the Immigration and Naturalisation Service (hereafter IND) is the competent authority for the application of the TCN-regulations. The Dutch migration policy for TCNs is almost exclusively on the initiative of employers (demand-driven policy). Recruitment of TCNs is meant as a last resort; a work permit will be refused if there is sufficiently prioritised labour supply present on the labour market. Available data suggest that relatively few TCNs come for work purposes.<sup>8</sup> According to the European Commission, a net inflow of 33,000 citizens of working age came to the Netherlands from

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<sup>1</sup> According to TFEU, Title 5, article 67.2 the EU frames 'a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.' This policy is further defined in article 79.5, TFEU, which states that it is up to the Member States to determine volumes of admission of TCNs coming from third countries to their territory in order to seek work.

<sup>2</sup> [https://ind.nl/en/Pages/General\\_conditions.aspx](https://ind.nl/en/Pages/General_conditions.aspx)

<sup>3</sup> For an overview of residence permits available for work: <https://ind.nl/en/forms/3086.pdf>

<sup>4</sup> For an English translation, visit: <http://hrlibrary.umn.edu/research/Netherlands/Alien%20Act%202000.pdf>

<sup>5</sup> <https://wetten.overheid.nl/BWBR0007149/2018-01-01>

<sup>6</sup> At the time of writing, a consultation concerning a revision of the WAV was running:

<https://www.internetconsultatie.nl/wijzigingwetarbeidvreemdelingen/reacties>

<sup>7</sup> However, there is an increase of retired EU/EEA citizens and a drop in working-age inflows.

<sup>8</sup> The Netherlands belongs to the category with the lowest percentage of TCNs in the total population (4% in 2019, European Commission 2020), with a large segment of TCNs originating from Morocco or Turkey.

outside the EU/EEA countries in 2018. Short-term stay (less than 4 months) is not included in the data. In 2018, only 14.6% of all TCNs came to the Netherlands as high-skilled migrants and 7.4% as other labour migrants. Until 1 March 2020, posted workers were only registered at the SVB (Sociale Verzekeringsbank) as far as they had a A1-declaration. TCNs in general were registered at the UWV (Employee Insurance Agency). With this dispersed registration, data on posted TCNs must be treated with caution. In the period 2007-2011, some 2.3% of mobile citizens coming from another Member State were TCNs (EMN 2013).

For a stay of fewer than 90 days, workers need a short-stay visa. They can apply for such a short-stay visa at the Netherlands embassy in the country of origin or the country of continuous residence.

For a longer stay (more than 90 days), workers need a residence permit. They can only obtain a residence permit for the purpose of work if they have an ensured job in the Netherlands.

The standard residence permit in the Netherlands is for working in paid employment. Several permits exist for work in paid employment with specific rules (work at a foreign company that collaborates in a project or joint venture with a Dutch company; paid employment for the assembly and repair of equipment delivered by foreign companies; paid employment in the Netherlands in relation to the delivery of goods to a foreign company; work at an international group of companies and a transfer to the Netherlands as a trainee, key staff member or specialist; cultural work, journalists, work in paid employment for an international non-profit organisation in the Netherlands).

The entrance can also be based on:

- work as a researcher within the meaning of Directive (EU) 2016/801. Researchers not necessarily receive a salary; they may also receive a grant. The employer has to apply for the residence permit.
- the Blue Card intended for persons who perform highly skilled work within the EU. Specific salary and educational requirements apply (for instance a monthly wage of € 5,403 in 2020). Once entered, the residence permit makes it easier for the employee (after 18 months) to work in a different EU Member State. The employer must apply for the residence permit.

Moreover, in parallel with the single EU Blue Card (Directive 2009/50/EC), the Netherlands applies a differing national policy and strategy to attract highly-skilled migrant workers. In an assessment by the European Parliament research services that highlighted the challenge of the EU Blue Card competing with national schemes the Dutch scheme was seen as a best practice. In 2012, more than 5,500 permits were given under the national scheme and only one under the EU Blue Card scheme (Remáč 2015). After 2012, the country mainly applied its own point-based national system. In this system, a high-skilled worker of 30 years and older must earn a monthly wage of at least €4,612 (in 2020); for younger workers this is € 3,381 per month. Thus, compared to the Blue Card the salary threshold is substantially lower. The scheme requires a valid employment contract of more than three months with a Dutch employer that complies with the salary threshold. It includes incentives to attract (highly) qualified migrants with disputed tax advantages (offering a tax-free salary of 30% for the extra costs incurred when working in the Netherlands). Although either the migrant worker or the employer can apply, the scheme can be characterised as an employer-led approach that is driven by 'supply and demand': i.e., the focus is on both addressing labour shortages and on identifying third-country nationals which can add a high value to the national labour market (Martin 2015).

## 2. Existing temporary work permits/visas

The Foreign National Employment Act (hereafter WAV) requires that an employer obtains a valid work permit for all foreign workers. Such work permit is not required for employees with a nationality of one of the countries within the European Economic Area (EEA, all the countries of the European Union plus Norway, Iceland and Liechtenstein) or Switzerland. The WAV interprets the term 'employer' in a broad sense. The WAV bans employers and private individuals from allowing foreign nationals, who do not have free entry into the Dutch labour market, to perform work for them without a valid work permit. The basic requirements are threefold: a) workers must have a valid residence permit, which includes the phrase 'Employment is freely permitted. Employment

permit not required.’ b) they hold a valid passport with an officially accepted sticker for residency remarks, and which includes the remark ‘Work is freely permitted. Work permit not required.’ c) the employer has a valid work permit for the foreign worker concerned.

The Netherlands applies a special and faster recruitment scheme for genuine employers: employers wishing to hire migrants may apply for the recognition as a sponsor. The scheme applies to foreign nationals that have a residence permit for seasonal labour, for learning while working, working in employment, working as a highly skilled migrant or a European blue card. The ‘trusted recruiter’ status is optional if certain conditions are met. The procedure is monitored by the IND. Recognised sponsors have advantages including: faster admission procedure (application decisions can be taken by the IND sometimes within two weeks); less documentation requirements (in some cases the statement of the employers will be sufficient); and the assignment of a dedicated IND contact point.<sup>9</sup>

### 3. Status in case of termination of the employment relationship

Third country workers must have an employment contract in order to receive a work permit. In general, if an employment contract leads to a work permit, the residence permit is valid for the same period as the work permit. Withdrawal of the work permit means the loss of the right to stay in the Netherlands. If a residence permit is no longer valid or has been withdrawn, the person is ordered to return to the state of origin. A return decision is a written declaration or court ruling. It states that a person is not (no longer) lawfully resident in the Netherlands. The return decision states the time frame within a person has to leave the Netherlands, the EU territory (except Ireland), EEA and Switzerland. The departure period is determined on a case-by-case basis. The standard period is 4 weeks (28 days). Failure to do so means repatriation. The EU and the third countries have formulated in most cases the conditions for a return, under humane and dignified conditions, of persons residing illegally including the promotion of their voluntary return, in Partnership and Cooperation Agreements. The Aliens Act provides in Article 14 for the granting of a temporary regular residence permit for a foreign national, for instance for a foreign national who is unable to leave the Netherlands through no fault of his own. However, this is mainly a provision for asylum seekers. For certain categories of third country workers (highly skilled migrant or work in paid employment), monthly wage criteria apply. They may not earn less than the required amount that applies. The IND will withdraw the residence permit if their salary is below the required amount.

### 4. Main social security rules applicable

As a general rule, all persons (EU citizens and third-country nationals) working in the Netherlands are treated in the same way for social security as resident Dutch nationals, provided they are legally staying in the country. There are some restrictions for those recently arrived (less than five years). The differing rules for posted workers are treated under point 12. Migrants living in the Netherlands who are not working have restricted access to social assistance benefits; after five years of residence, they are treated the same as Dutch nationals. The system of social security is composed of a) employee insurance schemes and b) national insurance schemes. The employee insurance provisions are meant for sickness pay, long-term disability and unemployment benefits. These provisions apply regardless of the nationality, with no separate eligibility conditions, differences in level of benefits, or any differentiated duration of benefits for residing third country workers. Besides, sickness and disability benefits do not require any prior periods of contribution and can be exported to third countries, based on bilateral agreements allowing exportability (see below).

Third country nationals cannot evoke periods fulfilled in their home country to qualify for unemployment benefits and nationals residing in third countries cannot claim Dutch unemployment benefits. Third country nationals on holidays still receive the unemployment benefits (abroad). However, if a person stays abroad for a longer period, the unemployment benefit is no longer paid and after six months, all remaining rights are lost if one returns.

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<sup>9</sup> See the form: <https://ind.nl/en/forms/7593.pdf>

The national insurance provisions cover the first pillar pensions, survivors and children benefits and the general health care. The old age, survivors and child benefit national insurance schemes generally cover all residents, including third country citizens legally residing in the Netherlands. Both schemes are mainly financed from contributions from insured persons and, in case of insurance schemes for employed persons, from the employers. For the old age and survivor's insurance schemes contributions, calculated as a percentage of the annual wage or income, have to be paid. The general health care insures all residents, including foreign citizens legally residing in the Netherlands, for health care provisions, regardless of their income.

And, as a fallback position, there is a system of social assistance for persons legally residing in the Netherlands who do not have sufficient means or are in danger of not having sufficient means to provide for the necessary cost of living. Such person must first claim any other insurance benefits or special social provisions available before he/she is entitled to the benefit. EU and non-EU foreigners residing in the Netherlands for less than three months and persons residing abroad cannot claim public assistance (Pennings 2020).

Until 2000, the Netherlands had a system which allowed the export of most benefits, also for third country workers, except for public assistance and unemployment benefits. The Benefit Restrictions (Foreign Residence) Act) that came into effect on 1 January 2000, limits the right to export benefit for third-country nationals to countries with which bilateral agreements have been made which enable the benefit export. The Government settled agreements with most of the countries with large numbers of claimants. The conditions formulated include issues such as identity, death, civil status, family situation, work, income, address, training, detention and health position of the claimant and his/her family members (Pennings 2020). In the last decade, more changes restricted the level of benefits payable to persons residing outside the EU. For instance, for people that left, the levels of family benefits and parts of the disability insurance were adjusted to the costs of living in the third country of residence. After the contribution of at least one year, the exportability of first pillar pension benefits is always ensured, although there can be restrictions in the exportable rate, whilst only the years of residence and insurance count for the calculation (2% accumulated right per year). This applies also for nationals that have lived abroad (a reduction of 2% per year living abroad).

#### 5. Checks and formalities; any extra rules

The Netherlands works with a labour market test to seasonal workers to determine whether the labour market situation justifies the employment of third-country nationals and to verify whether the job vacancy can be filled by a domestic citizen, an EU/ EEA citizen, or a foreign citizen already available in the domestic labour market. In principle, there is a quota system for seasonal workers in place. In line with the provisions of the Seasonal work Directive (see 6), the country applies measures that facilitate the re-entry of seasonal workers from third countries. Such third-country nationals are exempted from the requirement to submit certain documents, including evidence of appropriate accommodation, health insurance, a professional equivalence and a return ticket. Employees with a residence permit for seasonal labour are not allowed to bring over family members. For formalities and checks related to the social security, see item 4.

#### 6. The EU Directives (2014/36/EU, 2011/98/EU, 2014/66/EU, 2008/115/EC, 2009/52/EC)

The Netherlands transposed the Seasonal Work Directive (2014/36/EU) in a rather neutral way. The Directive seeks to promote temporary and circular migration as a means to solve the Member States' demand for low-skilled migrants, without giving the migrants falling within its scope the prospective of integration and long-term residence in a host Member State. However, like in Malta, Luxembourg and Germany, no third-country seasonal workers have been admitted to the Netherlands so far (the authorisation was nil in the period 2017-2019). The requirements and conditions when applying for seasonal work, as well as the rights and obligations of seasonal workers are published on a governmental website in English and Dutch. In general, the

entry and stay of seasonal workers is not part of the overall migration policy. The official policy is that the country does not rely on seasonal workers from third countries and thus does not need specific policies to attract them. The idea is that seasonal labour market demands can always be met through nationals, EU/EEA citizens and third-country nationals legally residing on the territory and available on the labour market. Thus, the relevance of Directive 2014/36/EU is limited.<sup>10</sup>

The transposition of the Single Application Procedure Directive (2011/98/EU) was finalised in 2014. It led to (non-substantial) procedural changes and modifications of the Foreign National Employment Act 1994 and the 2000 Aliens Act. With reference to article 6.1 of the Directive, an additional document with information related to the employment relationship of the third-country national (such as the name and address of the employer, place of work, type of work, working hours, remuneration) in paper format, or in electronic format as referred to in Article 4 of Regulation (EC) No 1030/2002 and in point (a)16 of the Annex thereto was introduced.

Within the framework of Intra EU-mobility Directive (2014/66/EU), workers whose main residence is outside the EU can be transferred from a company outside the EU to a subsidiary within an EU Member State. In the Netherlands, the employer must apply for a Single Permit. This is a permit that entitles the foreign national to stay and work. The Single Permit combines the residence permit and the work permit. The competence lies with one authority: the IND. After receiving the application, the IND takes a decision on the basis of an advice of the Netherlands Employees Insurance Agency (UWV) about the labour market aspect. UWV examines among other things if there is no employee with a Dutch, EU/EEA or Swiss nationality that is qualified for the job.<sup>11</sup>

Directive 2008/115/EC, the so-called Return Directive, aims at ensuring an effective return of non-EU nationals with no legal grounds to stay in the EU, through procedures that respect the fundamental rights and dignity of the people concerned. The Netherlands belongs to the top EU countries in terms of annual numbers of return decisions. The main group of people subject to return are unsuccessful asylum seekers (Eisele 2020). Most parts of the Directive are irrelevant in the frame of our research.

The Employers Sanctions Directive (2009/52/EC) aims to combat illegal employment by prohibiting the employment of third-country nationals without a valid residence permit. It sets minimum standards for the enforcement of this prohibition against employers. The minimum standards consist of preventive measures, sanctions and private law provisions. One of the weakest parts of the Directive is the fact that a main contractor and any intermediate subcontractor are only liable, where they knew that an employing subcontractor employed illegally staying third-country nationals. The Dutch transposition in 2012 led to some modifications of the Foreign National Employment Act 1994.<sup>12</sup> It made it mandatory for an employer, who engages a legally residing third country worker, to report this in writing to a competent authority. Employers have the obligation to pay the wage according to the definition in article 2.j of the Directive ('the wage or salary and any other consideration, whether in cash or in kind, which a worker receives directly or indirectly in respect of his employment from his employer and which is equivalent to that which would have been enjoyed by comparable workers in a legal employment relationship'). Even if a migrant is staying illegally, the work contract is binding. The legislation considers neither illegal stay nor illegal work of third country nationals a (criminal) offense. Already in 1995, long before the implementation of Directive 2009/52/EC, the Foreign National Employment Act included a provision on illegally staying third country nationals' entitlement to six months back pay (article 23). The implementation did not lead

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<sup>10</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_seasonal\\_workers\\_study\\_inform\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_seasonal_workers_study_inform_en.pdf)

<sup>11</sup> In some bilateral agreements on economic cooperation with third countries, special sections are dedicated to the temporary employment of foreign managerial, commercial or technical staff-personnel in an enterprise.

<sup>12</sup> In 2020, the sanctions policy was revised; it includes a 'due diligence' and a proportionality reference: <https://wetten.overheid.nl/BWBR0043328/2020-03-31>

to additional provisions to protect migrant workers' rights. According to scholars, not much attention is paid to the actual employment conditions of illegally staying migrants. In a review of the Directive, the European Commission qualified the Dutch protection level offered to illegally employed third-country nationals as not very adequate.<sup>13</sup>

The Directive introduced chain liability (to the next intermediate contractor higher up in a layer of subcontracting) in sectors without chain liability. This can be applied in case an appeal to the direct employer is unsuccessful. Moreover, preamble 7, says that the definition of employment should encompass its constituent elements, namely activities that are or ought to be remunerated. The Dutch definition of 'employer' is broader: anyone, a company, natural person, or governmental organisation, having a migrant perform a job, irrespective of an employment contract or remuneration. This broad definition of the 'employer' had the aim to deal with situations with a chain of employers (due to agency work or subcontracting) and to fight bogus self-employment. This was challenged in a series of court cases; the courts judged that it cannot be expected of consumers and business partners, to verify at all times whether a migrant worker is employed illegally. Another problem related to liability is that in cases of breaches found at subsidiaries, these subsidiaries have to be considered as separate legal entities.

#### 7. Special rules regarding pay and working conditions

As a general rule, persons (EU/EEA citizens and third-country nationals) working and residing in the Netherlands are treated in the same way with regard to pay and working conditions as resident Dutch nationals. If specified restrictions exist, for instance years of service or waiting periods, these restrictions are equally applied for nationals and foreign workers. For third country nationals, the recognition of diplomas is not guaranteed, whilst comparable diplomas of EU citizens are recognised. Some collective agreements stipulate special provisions (for housing, travel or medical expenses) for workers not living permanently in the Netherlands (see for instance the paragraphs on temporary agency workers from third countries).

All employees are entitled to the Dutch statutory minimum wage that consists of a basic wage and a number of allowances, e.g., for shift work and irregular working hours. Some income components, such as overtime pay or expense and end-of-year allowances, are not included in the calculation of the minimum wage. For younger workers (below 21 years old) a sliding scale of mandatory minimum wages applies. This general rule applies to all workers within the territory, independent from origin or nationality. Also posted workers are covered, based on the transposition of the EU-Directive.

#### 8. Special obligations for employers and sectoral variation

Employers that submit applications for a residence permit for employees that it wants to bring to the Netherlands must meet several legal obligations: the duty of care (only for recognised sponsors), the duty to keep and retain records and the obligation to provide information. Moreover, the employer is responsible for the foreign national's return and may be obliged to pay the costs of a compulsory departure. Recognised sponsors have a duty to ensure a careful recruitment and selection of highly skilled migrants or employees who have been transferred within the company (Intra Corporate Transferees). They must also inform the highly skilled migrant of the relevant regulation (conditions for admission and residence) which he or she must meet. The following records must be kept: the employment contract, the appointment decision or the hosting agreement; the original work permit (if required) or the additional document accompanying the single permit; a copy of the passport; in case of a transfer of the employee within a group of companies: a statement from the foreign (parent) company and a statement from the business unit in the Netherlands; the payslips; in case of a (regulated) profession such as a doctor: proof of registration in the BIG-register; the antecedents certificate, completed and signed by the foreign national (only if there is no antecedents). They must

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<sup>13</sup> For a detailed assessment of the functioning of the Dutch sanctions on illegal employment, see: Berntsen L. and T. de Lange (2018) 'Employer Sanctions', in Rijken C. and T. de Lange (Eds): *Towards a Decent Labour Market for Low Waged Migrant Workers*. Amsterdam University Press

retain these records and documents for up to 5 years after the sponsorship has ended. All changes that are relevant to the foreign national's right of residence must be reported to the IND.

An additional obligation is related to the responsibilities of the employer in a chain of subcontracting. Beyond the party that entered into an employment contract with the employee, any other party for whose benefit works or services are provided (whether directly or indirectly) can qualify as an employer under the Foreign National Employment Act. The undertaking that signs the employment contract with the employee has the primary responsibility to make sure that the required permits are in place. In addition, any other user undertaking needs to ensure that all legal requirements have been met. In principle, all parties can be fined separately, if foreign workers are performing labour without a valid work permit somewhere in the chain.

This is also relevant for certain provisions or legal requirements, such as occupational safety and health, payment of the statutory minimum wage and compliance with general binding conditions. In some areas, all parties in a production or supply chain may fall under the definition of the employer involved. For instance, with regard to respect for the minimum wage, the links in a chain are sequentially liable for payment of back wages, until the main undertaking or client is liable.<sup>14</sup>

#### 9. Coverage by collective agreements

There is no difference between nationals and foreign persons (EU citizens and third-country nationals) working and residing in the Netherlands related to the application of collective agreements. Parties involved in the development of a collective agreement can request the Minister of Social Affairs and Employment to declare the provisions of the agreed industry collective agreement generally binding for all employers or employees in the industry or sector, irrespective of their nationality.

#### 10. Third country workers during the Covid-19 crisis

With a residence permit, TCNs can have the permission to stay abroad for a certain period of time. How long their stay outside the Netherlands can be depends on the type of residence permit. If foreign workers are unable to travel back in time to the Netherlands due to the measures against corona, there will be no consequences for the residence permit if they can explain that this is not their fault. In the recent pandemic, travel bans did not apply to TCNs who were key workers in certain well-defined sectors and occupations. If a third country worker who is abroad cannot return, for instance because a Covid-19 related entry ban applies, his or her employer must report this to the IND. As part of the obligation to provide information, employers have to report changes to the IND within 4 weeks.

The monthly wage criteria for certain categories of highly skilled TCNs or for work in paid employment still apply during the Covid-19 period. It was announced that the IND will handle the situation flexible and not revoke residence permits if people temporarily receive less salary.

### **Questions concerning posting of TCNs**

#### 11. Posting from outside the EU

Posting straight from outside the EU, with no intermediate Member State, is rather rare. The available data only provide figures of third-country nationals arriving via EU Member States. The WagwEU is the Dutch implementation of the Posting of Workers Directive (1996/71/EC) and the Enforcement Directive (2014/67/EU). Undertakings from other EU/EEA countries or Switzerland who temporarily come to the Netherlands with posted workers in the frame of the free provision of services are subject to the WagwEU. There is no difference in treatment of posted EU-citizens or posted TCNs. However, there is a lot of case-law that deals with disputes about the validity of service provision through posting with TCNs and the (absence of) the necessity to apply work permits. The

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<sup>14</sup> <https://www.government.nl/documents/leaflets/2016/02/05/information-for-employers-and-clients>



item most often questioned is whether the posted workers resided and worked lawfully in the sending Member State. The main outcome is that the free provision of services with posted TCNs is lawful, once the worker resides in another Member State, and as long as the intention to have access to the Dutch labour market is absent. Thus, third-country national workers posted from another Member State are exempt from the requirement to have an entry visa or to apply for a work permit.

The Netherlands had no unified mandatory notification/registration of posted workers before March 2020. From that moment on, a declaration before the posting starts has been introduced. This declaration entails the posted workers' identity (not *the nationality*) and must contain information about the posting employer's contractual partner (name, address of the workplace, contact information). The lack of registration makes it difficult to provide reliable figures and to quantify the total number of TCNs that are posted to the Netherlands.<sup>15</sup>

In reaction to a public consultation on the future of EU legal migration, the Dutch government wrote to the European Commission (without providing concrete data) and called for a study of this phenomenon to get a clear picture of the numbers of third-country nationals posted in the EU:

The number of third-country workers who are posted in the Netherlands from another Member State under the freedom of services has strongly increased in recent years. Differences in work permit requirements among Member States allow third country nationals to enter the EU in Member States with flexible admission requirements, from where they are posted to other EU Member States with more stringent admission requirements (such as the Netherlands). Although this is legal, it does create a loophole in the system. These workers are vulnerable for precarious living and working conditions and labour contracts with limited social security coverage. It puts national labour market policies regarding access of third country nationals under pressure and can contribute to a race to the bottom on labour conditions.<sup>16</sup>

In recent reports of the labour inspectorate, the increased posting of TCNs entering the EU via another Member State (or an EEA-country/Switzerland) has been signalled (I-SZW 2020). Inspectors report mainly posted work performed in construction, carried out by workers from Turkey, Ukraine and Bosnia-Herzegovina, and in the last decade a growth of the use of A1-declarations in international transport combined with work permits issued in Central and Eastern Europe.<sup>17</sup>

According to the Inspectorate, the border of third countries of origin is shifting eastward and to Southeast Asia (Ukraine, the Balkans and the Philippines). Another report indicated that Poland, the Czech Republic, Slovenia, Hungary and Lithuania have issued in recent years a growing number of work permits to persons from the former Soviet states and Asia (Mesters 2020). A trade union report signalled the recruitment of TCNs via CEE-countries in the transport sector (VNB-ITF-IUF 2020).

## 12. Social security if posting from outside the EU

A foreign service provider must notify the Social Insurance Office in advance about where, when and with which employees work is performed in the Netherlands. The notification concerns a proof of registration in the national social security system, an A1 statement or other proof of documents on the payment of social security contribution in the country of issuing, the name of a contact person established in the Netherlands, and the name of the person responsible for paying wages. The coordination of social security is equal to the situation with EU citizens, in this respect that the social security applies of the country where the A1-form was issued.

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<sup>15</sup> <https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act>

<sup>16</sup> <https://www.rijksoverheid.nl/ministeries/ministerie-van-sociale-zaken-en-werkgelegenheid/documenten/publicaties/2021/01/11/bijlage-response-from-the-netherlands-regarding-the-public-consultation-on-the-future-of-eu-legal-migration>

<sup>17</sup> Other, incomplete data reveal that in 2019, some 11.000 TCNs were active in the Netherlands based on the free provision of services (with 51 nationalities – 35% of Ukrainian nationality), <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/09/23/brief-kamervragen-over-arbeidsmigranten>

### 13. Migration rules for posting from outside the EU

The condition for the entrance through posting is that the third-country national is legally allowed to work and reside in another EU/EEA country or Switzerland. The employer must notify the entrance at least two days before the start. The introduction of the notification requirement in 2019 (identical for all posted workers, whether intra-EU or third country workers) might lead to a higher verifiability of posted work. The decision of a third-country national resident in one Member State to settle in a second Member State, even if all necessary (formal and administrative) conditions for acquiring a visa and/or residence permit have been met, is restricted by some measures that were already mentioned beyond (activity in line with the national economic interest, evidence that the position cannot be filled by EU/EEA/EFTA nationals).

### 14. Visa or work permit for posting from outside the EU

Third country nationals that enter through posting don't need to apply for a Dutch work permit, if the TCNs are legally employed by an employer in one of the EU/EEA countries or Switzerland and are temporarily posted to the Netherlands. In such cases, the country where the work is performed (the Netherlands) has no say about a flexible national admission policy of other Member States. Workers being posted from outside the EU/EEA/Switzerland in the frame of an intra-corporate transfer for a period shorter than three months must apply for a work permit. Employees from an international company who will be posted in the Netherlands in the frame of an intra-corporate transfer for longer than three months require a residence permit. If the employee has already obtained this residence permit in another EU country, there is no need to request it again or apply for a work permit, but notification of the Employee Insurance Agency (UWV) by filling in an 'Intra-corporate transfer' form is mandatory.

### 15. Monitoring visa or work permits

In compliance with labour laws, the Inspectorate must check whether the activities in the Netherlands are truly temporary, correspond to the work for which the original work permit was issued, and whether the work and residence permits in the EU/EEA country or Switzerland are legal.

### 16. Differences between outside and intra-EU posting

The implemented Posting of Workers Directive (96/71/EC) is not referring specifically to posted third-country nationals. The Dutch transposition makes almost no difference between posted EU citizens and third country nationals legally residing in an EU/EEA country or Switzerland. The instructions for the mandatory notification just indicate that the posting undertaking must indicate whether the posted worker is an EU citizen or a third country national.

### 17. Any particular regulation for posting of TCNs

If a posting undertaking registers a TCN, this registration must indicate the validity period of the work permit that was issued by the sending EU/EEA-country. TCN workers with a work permit in another EU/EEA country must carry out their main activity in that country. In comparisons, the Netherlands is often categorised as one of the countries with relatively few differences in the national rules and procedures for mobile posted TCN workers and for those who have entered directly from a third-country (EMN 2013). Besides, the equal treatment, for instance in remuneration, of EU/EE nationals and TCNs is also meant to prevent wage-dumping and undercutting salary levels of national workers.

### 18. Special rules for particular sectors (sectors with labour shortages, high-skilled workers).

There are no special regulations for specific sectors. The Dutch legislation makes no distinction in the application of the free service provision with posted workers; the WagwEU provides third country workers who are legally residing in another Member State the same status as EU/EEA citizens.<sup>18</sup>

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<sup>18</sup> It is recommendable to analyse in detail the increasing use of A1-forms based on article 13 of Regulation 883/2004 in the road freight transport sector, a sector that is prominently present in the Netherlands.

## Questions concerning temporary agency workers from third countries

### 19. Legal framework applicable for temporary work from outside the EU

In principle, it is not possible for temporary agency workers from outside the EU to enter another Member State through the ordinary free movement of workers, because their work permit is bound to the country of entrance. However, once third country workers have entered the EU/EAA territory, they can be posted to another Member State in the frame of the free provision of services. Posted temporary third country agency workers stay on the payroll of the foreign agency and the social security contributions are paid in the country of establishment. The management and supervision with temporary agency work is not the responsibility of the service provider (the temporary employment agency), but of the hirer (the service recipient or user undertaking). However, the temporary employment agency remains responsible for the terms of employment of the temporary agency worker. For temporary agency workers that are posted to a Dutch user undertaking the working conditions apply of generally binding collective agreements that the user undertaking has to respect for its workforce. Compliance control with collective agreements is a civil matter; in most industries this is performed by the social partners, or joint institutions established by the social partners. In the temporary agency sector, the social partners have created a special compliance office (the SNCU) in 2004. Unions and employers organisations transferred the competence to go to court to this institution. SNCU has set up a reporting point in several languages. It gives every worker the possibility to report cases of non-application of collective agreements or to ask a question.<sup>19</sup>

### 20. Equal treatment

In general terms, the Dutch Equal Treatment Act guarantees protection against discrimination for all persons on the territory, and equal treatment with Dutch citizens. However, there is little case law in this area. The two employers' organisations in the temporary agency sector have opposite opinions on the use of posting methods. The biggest organisation (ABU) stresses the risks of abuse (with artificial arrangements / letterbox practices) and of distortion of competition. The second organisation (NBBU) sees the use of an A1-declaration as lawful and stresses that more has to be done against breaches.

### 21. Sending TCNs as temporary workers to other countries

In recent decades, it has been signalled that a relatively high percentage of TCNs posted to neighbouring countries were originally engaged as temporary workers in the Netherlands (EMN 2013). Large Dutch temporary work agencies are very active in Central and Eastern Europe. They use the potential 'third country labour reservoir' for their recruitment. A report of the ABN-AMRO bank (Mesters 2020) confirms the tendency of Dutch temporary agencies to buy (or establish) undertakings in CEE-countries, with the aim to recruit through this channel temporary third country workers. According to the report, this type of recruitment is growing. Other authors confirm the related risks of exploitation and distortion of competition (Van Gardingen 2019). The only condition to be fulfilled is that the foreign undertaking must have substance and a reasonable turnover in the country of establishment in the sector that is served by the agency. Temporary agencies expect to expand this recruitment beyond the eastern neighbouring countries to Vietnam, Indonesia or China.

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According to Eurostat data, half of the A1 certificates issued in the EU according to Article 13 in 2018 were issued to persons employed in the road freight transport sector. This high number of Article 13 A1 certificates for truck drivers was mainly issued to posting companies with a headquarter in CEE-countries (next to Luxembourg and Liechtenstein). So far, there is no distribution by sector of activity in receiving Member States available for the A1-forms issued according to Article 13 (De Wispelaere 2019). There is only proxy evidence that a substantial part of the truck drivers has a TCN-background.

<sup>19</sup> SNCU published on its website a series of YouTube films in several languages that inform foreign temporary agency workers about wages, working conditions and living in the Netherlands.

<https://www.sncu.nl/en/working-as-a-temporary-agency-worker/>.

## Questions concerning self-employed from third countries

### 22. Conditions for the entrance

Third country workers who want to enter as self-employed entrepreneur need a residence permit, next to a number of general conditions that apply to all purposes of stay. There are two different schemes for self-employed workers: either they come in as independent entrepreneur or as starting entrepreneur in a start-up. The total number tends to be low.

Independent entrepreneurs have to perform activities that serve an essential interest for the Dutch economy. Admission is restricted and the product or services must be innovative in nature. To assess this, the IND requests advice from the Netherlands Enterprise Agency (RVO). The RVO acts on behalf of the Minister of Economic Affairs. The essential interest is assessed on the basis of a points system that consists of three parts: personal experience (education, entrepreneurship, and work experience), a business plan (market analysis, product/service, price, organisation, financing), added value for the Netherlands (innovation, employment creation, investments). The three parts together consist of a total of 300 points. At least 90 points are needed, with a minimum of 30 points for each part.<sup>20</sup> Entrepreneurs must meet the requirements for practising their business or profession, i.e., have all the necessary licenses. Moreover, they need to earn sufficient income from their activities as an independent entrepreneur. A residence permit for an entrepreneur is valid for two years and can be extended if the business is doing well; access into permanent residence is possible after five years. A residence permit as 'start-up' gives ambitious starters a year to start an innovative company in the Netherlands. One condition in this regard is that they are supervised by a reliable supervisor (facilitator) in the Netherlands.<sup>21</sup> Facilitators, either private or public institutions must be experienced business coaches. A start-up action plan must provide insight into the role of the migrant in the start-up and the innovative aspects of the start-up. The activity is innovative if it is new to the Netherlands, if it involves new technology for production, distribution or marketing or if it involves an innovative organisational set-up and working method (de Lange 2018). The Netherlands have earmarked certain sectors as innovative priorities, for instance water management, but also logistics and agriculture.

Overall, very few applicants are successful and the total entrance via both tracks is relatively small.

A special case is the entrance of self-employed third country workers via the provision of services with posted workers.<sup>22</sup> Self-employed service providers residing and established in the EU/EEA that perform posted work in the Netherlands do not need a work permit. According to the WagwEU, all posted self-employed must keep documents available concerning their identity, the identity of the receiver of the services and the identity of the entity that pays the services. Third country nationals posted for a period longer than three months have to apply for a residence permit.

### 23. Mandatory registration and tax/social security regime

Self-employed third country nationals should register in the Trade Register of the Chamber of Commerce (KvK). Third country nationals with a residence permit as an independent entrepreneur are not allowed to receive social benefits. If they want to work in paid employment, a work permit is required. When a self-employed person is in a relationship of authority with the party for whom he performs assignments on a self-employed basis, this is seen as a breach of the Foreign National

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<sup>20</sup> See the points system: [https://ind.nl/en/Documents/Scoring\\_system.pdf](https://ind.nl/en/Documents/Scoring_system.pdf)

<sup>21</sup> For start-up conditions see: [https://ind.nl/en/work/working\\_in\\_the\\_Netherlands/Pages/Start-up.aspx](https://ind.nl/en/work/working_in_the_Netherlands/Pages/Start-up.aspx)

<sup>22</sup> In principle, Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State applies. Posted TCNs are not covered by this Directive, unless they are already legally residing and working in a Member State and posted to another Member State, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0098&from=EN>

Employment Act. The self-employed must be able to determine the own working hours, work entirely at own risks and payment must be fully made to the self-employed person. The competence to control compliance lies with the Labour Inspectorate.

Starting 1 March 2020, posted third country self-employed in certain sectors (i.e., cleaning, care, construction, metal, food processing, agriculture and horticulture) must register in an online counter.

24. Any bilateral agreements regulating the entrance of self-employed of third countries. For any admission rules, as well as the rights and status of persons admitted, the Partnership and Cooperation Agreements between the EU and the third country formulates the guiding principles. Within the context of the World Trade Organization (WTO), bilateral free-trade agreements and association agreements contain provisions on the admission of persons. These provisions cover the admission of third-country nationals who want to come to the Netherlands on an occasional basis and for a short period and third-country nationals who want to gain temporary access to the labour market. In recent years, there have been debates about the application of special arrangements with certain Asian countries (i.e., the Philippines, Indonesia) for the recruitment of care workers.

## References

- De Lange T. (2018) Welcoming talent? A comparative study of immigrant entrepreneurs' entry policies in France, Germany and the Netherlands, *Comparative Migration Studies*, 6, 27.
- De Wispelaere F. et al. (2019) *Posting of workers - Report on A1 Portable Documents issued in 2018*, Directorate-General for Employment, Social Affairs and Inclusion, European Commission, Brussels
- Eisele K. editor (2020) *The Return Directive 2008/115/EC - European Implementation Assessment*, European Parliamentary Research Service, Brussels
- European Commission (2020). *Annual Report on Intra-EU Labour Mobility 2020*. Social Europe, Brussels.
- European Migration Network (2020). *Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom - Synthesis Report*. Brussels: European Migration Network.
- European Migration Network (2013). *Intra-EU Mobility of third-country nationals*. Brussels: European Migration Network.
- I-SZW (2019) *Staat van eerlijk werk 2019 - 'Risico's aan de onderkant van de arbeidsmarkt'*, Ministerie van Sociale Zaken en Werkgelegenheid, The Hague.
- Martín I. et al. (2015) *Exploring new avenues for legislation for labour migration to the European Union*, Policy Department Citizens' Rights and Constitutional Affairs, European Parliament, Brussels.
- Mesters H. (2020) *Goedkopere arbeidsmigrant komt van steeds verder weg*. ABN AMRO.
- Pennings F. (2020) Migrants' Access to Social Protection in the Netherlands. In: Lafleur JM., Vintila D. (eds) *Migration and Social Protection in Europe and Beyond* (Volume 1). IMISCOE Research Series. Springer, Cham.
- Remáč M. (2015) *The EU Blue Card Directive – Briefing*, European Parliamentary Research Service, Brussels
- Van Gardingen I. (2019) *Derdelanders in de EU; Waar ligt de grens?*, Casestudy van internationale werving, in- en doorleenconstructies in de transportsector, Beleidspaper voor de NL arbeidsmarktdag 2019. Utrecht.
- VNB-ITF-IUF (2020) *Pandemic of exploitation in European trucking - Report on European road transport*.
- All links were checked on 15.02.2021