

Dutch National Report

Young Scholars Network

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1 Introduction

As most other countries, the financial and economic crisis has marked the Netherlands during the last five years. Although most Dutch people seem to think that the Netherlands is still performing reasonably well, the crisis led to a permanent loss of GDP, high unemployment and an explosion of public and private debt.¹ Dutch GDP fell by 3.7% in 2009, and after that only recovered marginally with growth rates of about 0.1%, which makes the Netherlands one of the worst performers of Western Europe.² Unemployment incidentally only rose moderately, but rocketed from 2011 onwards reaching 8.5% in 2014. Due to rescuing operations on the

¹ CPB (Netherlands Bureau for Economic Analysis): Road to Recovery: available at: <http://www.cpb.nl/publicatie/roads-to-recovery>, p. 1.

² Ibidem, p. 14.

rather large financial sector, where one bank was allowed to go bankrupt and out of the bigger institutions only one did not require financial assistance, public debt rose sharply. The Dutch government implemented a consolidation programme for 2011-2017, the target being 1% per year with a total consolidation volume of 54 billion Euros.³ In order to achieve this consolidation, the government raised taxes (VAT, petrol) and cut back on expenditures.⁴ Individuals have seen their employment prospects diminish, but are hardest hit by the decline in prices for immovable property and a steep rise in rents. The Dutch mortgage system stimulated loans that exceeded the value of the house, which was not a problem as long as prices rose. However, in the crisis, prices have fallen about 30% in real terms, leaving an estimated 1.1 million households with a mortgage higher than the value of the house.⁵ Two consequences of this development deserve some attention. In the first place, loss aversion potentially reduces labour mobility, meaning that unemployment may remain high in particular regions, secondly, households may reduce consumption in order to save money to take the loss, thereby adding to the demand problem.

For the government, the best way to fight the crisis seems to be participation in paid employment. Agreements between the social partners on national level⁶, proposals for acts of Parliament⁷ and a King's speech⁸ all refer to the 'participatory society'. Unsurprisingly, therefore, recent legislative efforts have concentrated on enhancing participation in (paid) employment and on activating individuals receiving social benefits or social assistance. This policy has a double advantage. In the first place, it means that Dutch national policy is in line with the prevalent EU activation paradigm.⁹ Secondly, it helps to keep the state budget within limits. People in employment pay taxes, they can afford to consume, while the state does not have to pay social security or social assistance benefits any more.

Concerning employment and social security, two core priorities can be distinguished. In the field of labour law, the main issue is the segregation on the employment market with a decreasing group of well protected insiders, enjoying permanent employment contracts and a

³ Ibidem, p. 11.

⁴ Ibidem, p. 12.

⁵ Ibidem, p. 43, 47.

⁶ *Stichting van de Arbeid: perspectief voor een sociaal en ondernemend land: uit de crisis, met goed werk, op weg naar 2020, advies van de Sociale Partners van 11 april 2013.*

⁷ In particular the Act on Employment and Security (*Wet Werk en Zekerheid*) and the Act on Participation (*Participatiewet*), which will both be explained in more detail below.

⁸ <http://www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/troonrede-omslag-naar-participatiesamenleving.9102753.lynkx>.

⁹ See e.g. the Europe 2020 Agenda and the Broad Economic Policy Guidelines, particularly Guideline 7 (infra, paragraph 5).

growing group of employees working in flexible employment relations that offer little protection against the loss of the job. In order to achieve a more permeable employment market, efforts are being made to add some security to flexible forms of employment while adjusting the job security of insiders.

In social security law, it becomes clear that the government intends to save money, due to the convergence criteria and the threat of a fine from Brussels.¹⁰ In the second place, the government seems to have endorsed the idea of welfare-to-work. It seems to have become generally accepted that social security and social assistance in particular, have to be earned. Individuals receiving benefits or assistance are supposed to do everything they can to end or lessen their recourse to social security or social assistance by providing for themselves again as soon as possible. Ultimately, also this second aim is underpinned by the rationale of cutting costs and enhancing participation figures, thereby contributing to employment policy aims.

2 Employment contract law

Due to the crisis, at the moment there is little movement on the labour market. Generally speaking, those enjoying a permanent contract will not easily leave that job voluntarily, because prospects to find new employment with comparable security are bleak.¹¹ That means that for starters or for persons re-entering the employment market, opportunities are slim. They usually start on flexible forms of employment such as fixed-term contracts or temporary agency work. Therefore, the main focus of the Government is to (re)create greater mobility on the employment market. For years now, the government has made job creation and participation in paid employment one of the core aspects of its policy.¹² It aims at replacing the prevailing job security by policies focusing on employment security.¹³ This policy of participation and activation contains three related focal points for reform:

1. securisation of flexible forms of employment
2. review of rules concerning termination of employment contracts (flexibilisation)
3. review of benefit schemes, including shorter periods of benefits and more incentives to accept paid employment or other measures that may help to find (new) employment.

¹⁰ *Kamerstukken II*, 2013/14, 33 818, nr. 3, p. 54.

¹¹ This, of course, means that being laid off also means the loss of employment protection “earned” in the stable employment relationship. See *infra* paragraph 2.2.2 *in fine*.

¹² See, e.g. already the report of the Commission on participation in paid employment (*Commissie Arbeidsparticipatie: “Naar een toekomst die werkt*), 16 juni 2008.

¹³ *Kamerstukken II*, 2013/14, 33 818, nr. 3, p. 3.

An issue that stands apart from the structural deficiencies of the Dutch labour market but that has attracted a lot of attention during the crisis are the bonuses and golden parachutes paid to managers from banks that had to be nationalised due to the financial crisis and the extremely high salaries of some managers in the public and semi-public sector like the hospital and care sector. The government has been trying to curb excesses in this field since 2008 with varying success.

2.1 Initiatives on flexible employment

Originally, in 1999 with the Act on Flexibility and Security, the idea was to allow for more flexible forms of employment in order to offer stepping stones for persons who do not easily get an indefinite employment contract and on the other hand to gradually enhance their employment security.¹⁴ Using more flexible forms of employment was perceived as an ideal way to find a way onto the (first) employment market and to gain experience. However, recent figures have shown that the percentage of employees working on some kind of flexible contract is growing and that the number of employees working involuntarily and for a long time in flexible arrangements keeps growing. It seems that fixed-term contracts and temporary agency jobs in particular are becoming a dead end rather than stepping stones towards more secure forms of employment.¹⁵ Even the government thinks that at present, the flexibilisation of the employment market has become excessive and that the forms of flexibility used, mostly agency work, payrolling and recourse to contracts for services start to threaten the social fabric of society.¹⁶

The segmentation on the employment market has developed due to several conditions. In the first place, in the Netherlands it is easy to hire someone on a fixed-term contract as no objective reason is needed to justify the recourse to fixed-term contracts.¹⁷ Combined with very strict rules on trial periods, fixed-term contracts provide a much used way to try out an employee for a longer period of time. In the second place, an employer in the Netherlands is “liable” to continue paying a sick worker’s wages for 104 weeks.¹⁸ As employment contracts can, in principle, not be terminated during this period of two years, the possibility of minimising the risk by using fixed-term contracts is an appealing one. After all, if the contract finish-

¹⁴ *Kamerstukken II*, 1996/96, 25 263, nr. 3, p. 8.

¹⁵ *Kamerstukken II*, 2013/14, 33 818, nr. 3, p. 10.

¹⁶ *Kamerstukken II*, 2013/14, 33 818, nr. 3, p. 10; *Kamerstukken II*, 2013/14, 33 818, nr. 3, p. 10; *Kamerstukken I*, 2013/14, 33 818, nr. C, p. 37.

¹⁷ In the Netherlands, fixed-term contracts are merely subject to temporary and numeral limits, see below.

¹⁸ Article 7:629 *BW* demands sick pay of 70% of a maximum daily wage to be paid, but collective agreements usually top this up to 90 or even 100% during the first year of sickness.

es, the employer's obligation to pay wages also comes to an end.¹⁹ In order to avoid responsibilities of employership, triangular employment relations like agency work and payrolling have become fashionable.²⁰ On the other side, the insiders are becoming more inflexible, it seems. Employment protection depends to a great extent on seniority; it is earned during service with one employer.²¹ This protection is voluntarily renounced if the employee leaves his employer for another one; the employee will have to build up this protection again from scratch. This is a strong incentive to stay put.

2.1.1 Flexible employment for young employees

One of the first crisis measures in employment law was the temporary liberalisation of rules concerning consecutive fixed-term contracts. The general rule in article 7:668a of the Dutch civil code (*Burgerlijk Wetboek, BW*) is that a chain of a maximum of three consecutive²² fixed-term contracts is possible within a maximum period of 36 months. If either limit is overstepped, the last contract will be considered a contract for an indefinite period of time. In the time the liberalisation was proposed, about 39% of all employees working on fixed-term contracts was below 25 years of age. Furthermore, youth unemployment was much higher than unemployment in general. In an effort to counter youth unemployment and to enhance participation in paid employment, the government decided to allow for a longer chain of fixed-term contracts if the employee concerned was below 27 years of age.²³ The exception would be available until 2012, with a possibility of extension until 2014 if it proved effective in combating youth unemployment and if the crisis still affected the employment market at the time the extension would be discussed. The applicable limits for employees below 27 years of age were a maximum of 48 months and four consecutive contracts. At the time the measure was implemented, in 2009, the prevailing thought was that a(nother) fixed-term contract, though offering less security than the permanent contract that would normally have to be offered, was still to be preferred to unemployment. The temporary measure was assessed in

¹⁹ The (ex)employee has to fall back on the Sick pay and Reintegration Act (*Ziektewet*), granting 70% of a maximum daily wage for a year.

²⁰ <http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2014/2014-05-28-k07.htm>.

²¹ Article 4:2 of the Decree on termination (*Ontslagbesluit*), to be replaced by article 7:673 *BW* or by rules agreed in collective agreements.

²² Meaning the contracts have to follow each other within three months.

²³ *Wet van 30 juni 2010 tot tijdelijke verruiming van de mogelijkheid in artikel 668a van Boek 7 van het Burgerlijk Wetboek om arbeidsovereenkomsten voor bepaalde tijd aan te gaan in verband met het bevorderen van de arbeidsparticipatie van jongeren*, *Stb*, 2010, 274.

2011.²⁴ It proved to be ineffective. Of the 19.000 youngsters that had been given a fourth consecutive contract, for 10.000 this prevented unemployment, but for another 9.000 it meant that they were not offered an indefinite employment contract, which they would have been offered except for the temporary deviation possibility.²⁵ Therefore, the measure was discontinued from January 1st, 2012 onwards.

2.1.2 New initiatives

When the crisis deepened, the schism on the Dutch employment market became more and more pronounced, as 60% of those laid off used to work in flexible employment relations.²⁶ This, of course, provided a buffer and thereby protected the insiders on permanent contracts.²⁷ To address this imbalance, a private member's bill was introduced in the Second Chamber.²⁸ The initiative intended to address the "excessive flexibilisation" of the Dutch employment market. According to the initiative, the main problem of the Dutch labour market was the near absence of moves from flexible into more secure forms of employment.²⁹ Therefore, the proposal contained several measures which intended to make flexible work more costly and thus less interesting from a purely economic point of view. The idea was that if the economic costs for flexible employment increased, it would be used more sparingly and only where necessary. A first proposition was to introduce an obligation for the employer to pay a certain fee to the employee employed on a flexible contract, comparable to the French *indemnisation de précarité*.³⁰ Furthermore, the initiative called for differentiated unemployment insurance contributions, as workers on flexible contracts are much more likely to become unemployed than workers enjoying an indefinite contract.³¹ Another measure proposed the limitation of successive fixed-term contracts to a maximum of two contracts in two years. The period which breaks the chain was to be quadrupled from 3 to 12 months.³² Deviation by collective agree-

²⁴ *Evaluatie Maatregel tijdelijke verzuimketenbepaling*, AStri Leiden, 2011:

<http://www.astri.nl/projecten/werkloosheid/astri-evalueert-de-tijdelijke-maatregel-verzuimketenbepaling/>.

²⁵ *Kamerstukken I*, 2011/12, 32 058, p. 2.

²⁶ CPB (Netherlands Bureau for Economic Analysis): Road to Recovery: available at:

<http://www.cpb.nl/publicatie/roads-to-recovery>, p. 60

²⁷ According to the CPB, only 17.5 % of the workforce work in flexible employment relations, showing that they are hit disproportionately.

²⁸ *Kamerstukken II*, 2012/13, 33 499 nr 2 and 3.

²⁹ *Kamerstukken II*, 2012/13, 33 499 nr 3, p. 1.

³⁰ *Ibidem*, p. 7-8.

³¹ *Ibidem*, p. 15.

³² *Ibidem*, p. 11 and 13 respectively.

ment was to be restricted³³ as would be possibilities to include a non-competition clause³⁴ or a trial period in fixed-term contracts.³⁵

The proposal has never been voted on, but several of the ideas voiced there were incorporated in a government-sponsored bill called “*Wet Werk en Zekerheid*”, the Act on Employment and Security which was adopted on June 10th, 2014. The bill consists of three parts, dealing with flexible employment relations, termination of contracts and a reform of unemployment benefits respectively. It intends to create a new balance between flexibility and security in the fields of employment and social security.³⁶

Concerning flexible employment, the core issue that, according to the government, has to be addressed is the fact that more and more employees remain in flexible forms of employment involuntarily and for a long time, without prospects of growing into more secure forms of employment. In general, these employees do not have the same access to training and consequently as employees working on indefinite term contracts, their prospects of getting an indefinite employment contract deteriorate with time. Therefore, they must be given better perspectives and more security.³⁷ In the first place, the chain of consecutive fixed term contracts is reduced from a maximum of 36 months to a maximum of 24 months. A contract will be regarded as consecutive, if it follows an earlier one within six months. This means that the waiting period which breaks the chain of contracts will be doubled. This measure intends to prevent the abuse of chains of fixed term contracts by rendering so-called ‘revolving door constructions’ between chains of fixed-term contracts and unemployment benefits less attractive. Until now, the three months break could be covered by an unemployment benefit, which led to deals between employers and employees on “topping up” unemployment benefits in exchange for coming back for a new chain of fixed-term contracts.³⁸ With the new rules, the employee will have to have been in employment for six years before he can bridge the gap between two periods of fixed-term employment.³⁹ Obviously, he will also be expected to apply for jobs during these six months. The employer will therefore have less security that the worker will become available again after the waiting period. If the employer wants to keep the

³³ Ibidem, p. 12.

³⁴ Ibidem, p. 16.

³⁵ Ibidem, p. 17.

³⁶ *Kamerstukken II*, 2013/14, 33 818 nr. 3, p. 2.

³⁷ *Kamerstukken II*, 2013/14, 33 818 nr. 3, p. 10-11.

³⁸ *Rechtbank Amsterdam*, 11 mei 2012, ECLI:NL:RBAMS:2012:BW6495.

³⁹ In the Netherlands, an individual who has been in employment for 26 out of 36 weeks prior to unemployment has a right to benefits for three months. A prolongation of the benefit has to be earned in the sense that the individual must have worked 52 days in four out of the five years prior to the year of unemployment, and for each year of working experience, a month of benefit rights is added up to a maximum of 38 months (for the changes as of 1 January 2016, see paragraph 4.2)

employee, he will have to balance the risk of losing him against the risk of offering a normal contract, including obligations as termination rules and sick pay. Deviations from the maximum period of 24 months to 48 months are possible if the contracts concerned are temporary agency contracts as defined in Dutch law or if the deviation is necessary due to the intrinsic nature of the posts concerned.⁴⁰ The minister may also decree that in certain sectors, specified by decree the limits are inapplicable.⁴¹ Two more changes are noteworthy as well. The employer will have to notify the employee on his intentions to prolong or not to prolong a fixed-term contract one month before the contract ends.⁴² Furthermore, possibilities to shift the risk of payment to the employee by using so-called ‘zero-hour-contracts’ will be restricted.⁴³ Finally, two measures that had already been part of the earlier proposition have been included in the bill. In the future, a non-competition clause will – in principle – be invalid if it is part of a fixed-term contract. However, the employer may include a non-competition clause if he can explain and justify the use of this clause in the individual employment contract.⁴⁴ In addition, in contracts of up to six months, the employer cannot include a trial period. He will have to choose between a longer contract, possibly including the right to terminate the contract prematurely, or a shorter contract without a trial period.

2.2 Initiatives regarding the termination of employment

The legislation concerning the termination of contracts has been the second focal point of the recent reform. So far, employer and employee have a choice between three ways of ending a contract: they can agree to end the contract by mutual consent, the employer can address an administrative authority for prior authorisation for dismissal or can ask the county judge to resolve the contract. All these procedures are subject to different requirements, differ in length, the availability of legal remedies and compensation offered. The system is seen as unfair, costly and intransparent. Therefore, different attempts have been made to simplify the system. For example, in 2011, a private member’s bill proposed a drastic change of the system.⁴⁵ In order to replace the dual system of termination causing inequitable outcomes (either administrative authorisation leading to dismissal without any compensation or resolution of

⁴⁰ Unfortunately, the Dutch original text is no clearer than that, there will surely be a lot of discussion on the “intrinsic nature“ of certain posts / functions.

⁴¹ One of the examples provided during the discussion of the bill was that of professional football players who always get fixed-term contracts.

⁴² Article 7:668 *BW*.

⁴³ Article 7:628 *BW*.

⁴⁴ From the new provision, it is not clear whether the justification may also be included in a collective agreement, which would, of course, mean that the exception might become quite widely applicable.

⁴⁵ Fatma Koser Kaya: Proposition of law Number 33 075.

the contract by the judge, usually combined with some compensation), the bill proposed one single way: termination of the contract by the employer, and the possibility to challenge this decision in court afterwards. In academia, the proposal was met with widespread enthusiasm, but neither political parties nor social partners adopted this view, and therefore it never transcended beyond the stage of a proposal.

2.2.1 The termination itself

The Act on Employment and Security intends to make the law concerning dismissals and termination of contracts easier, more transparent and more just.⁴⁶ Considering these aims, it is interesting to note that the dual system, including the preventive control by a third party, will be maintained, although the element of choice is abolished. From July 2015 onwards, the procedure to be followed will depend on the reason for the termination of the contract.⁴⁷ Termination for economic reasons and for long-term illness will be dealt with by the administrative authority⁴⁸, all other grounds by the county judge. This limitative enumeration of grounds for dismissal and the different procedures attached to them has provoked a lot of criticism. Several scholars as well as leading practitioners in labour law are convinced that several reasons can exist at the same time,⁴⁹ and as the government confirmed, this means that different procedures will have to be followed if the employer does not want to choose one reason only.⁵⁰ In line with the new law's focus on activation, employability and work-to-work transitions, the administrative authority as well as the county court judge will not only take account of the reasons for the dismissal, but will also inquire whether there really are no possibilities to keep the employee, e.g. in another job, after some training if necessary.⁵¹

Concerning the termination by mutual consent, two interesting changes have been made. In the first place, in the future, the agreement has to be in writing.⁵² Secondly, the employee has the right to withdraw his consent within fourteen days of the signature. He does not have to give reasons for this. This provision, as well as article 7:671 BW containing an identical provision for the case the employee agrees to the termination proposed by the employer, was much debated. It is widely feared that employees will use this sweeping right of annulment to

⁴⁶ *Kamerstukken II*, 33 818, nr. 3, p. 25.

⁴⁷ Article 7:669 BW.

⁴⁸ In addition, by collective agreement, independent bodies can be installed which may take over the administrative authority's duties, adding a third possibility.

⁴⁹ See e.g. E. Verhulp, *De arbeidsovereenkomst als onbereikbaar statussymbool na inwerkingtreding Wet Werk en Zekerheid?* TRA 2014/3, nr. 24.

⁵⁰ R.A.A. Duk, *Artikel 7:669 Wetsvoorstel Werk en Zekerheid: de rechter als bureaucraat?*, TRA 2014/3, nr. 26.

⁵¹ Article 7:669 (1) BW.

⁵² Article 7:670b (1) BW.

exert pressure on the employer, e.g. to obtain a higher compensation in exchange for not using this right.⁵³ As all clauses that restrict this right or add conditions on exercising it will be considered null and void, the employer has no possibilities to prevent unjustified annulments.

2.2.2 Severance pay

The Act also addresses another major problem of the current system, the inequality of the outcome of the termination process according to the chosen procedure. From July 2015 onwards, every employee with a minimum of 24 months of seniority will be entitled to a standardised severance payment.⁵⁴ This severance payment, officially labelled “transitory compensation” should, in the view of the government, be used to ease the transition from one job to another.⁵⁵ However, there is no provision to ensure that the money is really used for this purpose, so the ex-employee can also spend the money on a trip around the world or a new car. The transitory compensation is due in case the employer either terminates the contract via the administrative authority or the judge or does not continue a (series of) fixed-term contract(s). The payment is also due in case the employer’s behaviour must be qualified as seriously reprehensible and the employee therefore quits the job himself (constructive dismissal).⁵⁶ It consists of 1/6 of the payment per month for each six months of service. From the tenth year of service onwards, it is 1/4 of the payment per month per six months of service. The statutory upper limit is 75.000,- Euro or, if higher, one annual salary.⁵⁷ However, the law allows for deviation from these rules by contractual agreement, meaning that higher payments remain possible.⁵⁸ The employer may deduct costs incurred for training during the job from the amount due at the end of the contract without limitations.⁵⁹

A possible problem with the transition compensation may be that, although it is meant to help the employee from one job into another, it still contains incentives to stay put. The severance pay is calculated on the basis of seniority and – unlike in the Austrian system – entitlements earned in earlier jobs cannot be transferred to a new employer. Even under the new system, therefore, moving on means losing entitlements, and therefore an incentive to remain in a giv-

⁵³ S.F. Sagel: *De bedenkelijke bedenkttermijnen in Wetsvoorstel Werk en Zekerheid*, TRA 2014/3, nr. 27.

⁵⁴ There are exceptions for young persons of up to 18 years who work less than 12 hours a week, as well as for employees whose contracts are terminated due to them reaching pensionable age and in case of summary dismissal.

⁵⁵ *Kamerstukken I*, 2013/14, 33 818, nr. A, p. 10-11.

⁵⁶ Article 7:673 (1) *BW*. In these cases, the judge can award an additional compensation.

⁵⁷ Article 7:673 (2) *BW*

⁵⁸ *Kamerstukken I*, 2013/14, 33 818, nr. A, p. 33.

⁵⁹ Article 7:673 (6) *BW*

en job still remains. The effectiveness of this new tool, created to ease the transition from one job to another, may be less than the government hopes for.

2.2.3 Legal review

Considering that one of the aims of the new Act is to prevent lengthy litigation, it is rather surprising that the government decided to include the possibility for judicial review, which so far has been absent.⁶⁰ Until now, the government deliberately ruled out the possibility of appeal, because it preferred clarity about the (continued) existence of the employment contract on the short term to uniformity in outcome. From July next year onwards, however, it will be possible to lodge an ‘appeal’ with the county court judge if the authorisation for the administrative authority for termination has not been granted.⁶¹ Furthermore, it becomes possible to challenge the county court judge’s decision in second and third instance.⁶² However, these challenges do not suspend the execution of the judgement, meaning that e.g. a dismissal will not have to be made undone until after a final judgement declared the dismissal unjust.⁶³ Even then, considering the time lapse, the judge is expected not to restore the employment relation but to award damages.

2.3 Initiatives concerning ‘excessive’ salaries and / or bonuses

As already mentioned, another issue on which reform was deemed necessary concerned excessive salaries, bonuses and golden parachutes of managers and directors-general, particularly, but by no means exclusively, in sectors which are partly or fully funded by taxes.

2.3.1 Salary caps

One of the first initiatives was an act setting norms for top executive employees (*Wet normering belonging topinkomens*). It came into being in 2011 and regulates the income of the top layer of the management. According to the government, regulation of top level incomes is necessary because these positions are rarely covered by collective agreements, and thus, limi-

⁶⁰ The three possibilities to challenge a county court judge’s decision are (1) infringement on the right to a fair trial, (2) the judge applied *Article 7:685 BW* while the contract was not an employment contract, (3) the judge refused to apply *Article 7:685 BW* although the contract was an employment contract.

⁶¹ Art. 7:671b (1) *BW*

⁶² *Kamerstukken II*, 33 818, nr. 3, p. 35.

⁶³ Article 7:683 *BW*

tations set by autonomous rules do not exist.⁶⁴ By containing top level wages, the government expects that the level of remuneration in the lower echelons will be adjusted accordingly.⁶⁵ The law contains three different measures that apply according to the sector's closeness to public finances. The strictest system is that of the maximum income cap.⁶⁶ This strict regime applies to public and semi-public organisations described in Article 1.2 and 1.3 of the Act. The income cap is related to the Prime Minister's income.⁶⁷ Including a fixed amount for expenses and the employer's part of social insurance premiums, the total payment may not be more than 228.599 Euro per calendar year (in 2014). If the sum of all payments is higher than that, it may remain so for four years. After that period, the payments will be adapted to the maximum allowed level within three years.⁶⁸ The second limitation, used for health insurance companies mainly⁶⁹, is the so-called sector norm.⁷⁰ Finally, all organisations that come within the ambit of Articles 1.2, 1.3 or 1.4 WNT have to publish the taxable salaries of their top managers.⁷¹ This duty also applies to organisations which maintain an even greater distance to the public sphere.⁷²

2.3.2 Claw back

Another initiative to get a grip on 'excessive' payments is the "claw back" initiative in the field of company law. The changes made to the rules concerning enterprise policies on flexible payments now explicitly state that bonuses (defined as any sort of flexible payment) which exceed any reasonable proportion, can be adapted to reasonable standards.⁷³ Secondly, if bonuses have been paid already based on information concerning the aim on which the payment depended, but which later turns out to be wrong, they can be claimed back.⁷⁴ Both possibilities existed before, in hard law⁷⁵ as well as in soft law,⁷⁶ but because of several well publicised instances of bonuses deemed excessive, the government opted for the explicit codi-

⁶⁴ *Kamerstukken I*, 2011/12, 32 600, F, p. 16.

⁶⁵ *Kamerstukken I*, 2011/12, 32 600, F, p. 15.

⁶⁶ Paragraph 2 *WNT*, in particular Article 2.3.

⁶⁷ The so-called Balkenende-norm, after a former Prime Minister.

⁶⁸ Article 7.3 (5) and (8). It is possible to deviate from this maximum under the provisions of art. 2.4 to 2.6 *WNT*.

⁶⁹ See Article 1.4 *WNT*.

⁷⁰ Article 3.1 *WNT*.

⁷¹ See paragraph 4 *WNT*.

⁷² Article 1.5 *WNT* and appendix 4 to *WNT*.

⁷³ Article 2:135 (6) *BW*.

⁷⁴ Article 2:135 (8) *BW*.

⁷⁵ Articles 7:611 and 7:613 *BW* offer a legal basis for changes of contractual arrangements; the principle of "onverschuldigde betaling" (recovery of undue amounts) offers a basis to claim back money that turned out not to have been due.

⁷⁶ Points 2.10 and 2.11 of the Dutch Corporate Governance Code.

fication of the possibility to modify bonus rules and to claim back. As the material rules have not changed, it remains to be seen whether these new clauses will be used more frequently than the existing instruments. The codification of the mere possibility to intervene, however, may exert a certain pressure to comply with the rules.

2.3.3 Financial institutions

Finally, the most recent proposition deals with salary policies in financial institutions (*Wet beloningsbeleid financiële ondernemingen*). This initiative tries to address people's lack of trust vis-à-vis the financial institutions.⁷⁷ The proposal contains an absolute limit to variable payments. The variable payments may not exceed 20% of the yearly salary. Furthermore the proposition contains a prohibition on guaranteed flexible payments and a prohibition of flexible payments in case the institution receives government support.

The Dutch government explicitly chose for a maximum flexible payment that is lower than several European instruments advise or contain.⁷⁸ Persons working outside the Netherlands or the EU/EER are exempted from this rule. In addition, derogations are possible in specific cases, but only after the supervising authority agreed. Whether this measure will be effective, depends on several factors, amongst which degree of acceptance in the sector itself. This might be a problem, as the first reaction to the plans was the announcement that fixed salaries would be raised substantially.

3 Trade union law and collective bargaining

In trade union law, few changes have occurred. The Dutch “*Poldermodel*”, the collective bargaining model prioritising friendly cooperation, worked well during the crisis, as, e.g. the use of part-time unemployment showed (see below, paragraph 4.1). The changes to employment and social security law have not led to discord between the social partners either, as the measures reflect to a great extent the content of the social agreements made during the last couple of years, particularly the 2013 agreement.⁷⁹ However, as the changes, particularly in the field of social security and social assistance become more and more costly, one employ-

⁷⁷ At the time of writing no number was yet available for the proposal, the information can be found in the *Memorie van Toelichting* at: <http://www.internetconsultatie.nl/wbfo2015>, p. 1.

⁷⁸ *Ibidem*, paragraph 5, referring explicitly to the directive on capital requirements and the freedom to provide services.

⁷⁹ *Stichting van de Arbeid: perspectief voor een sociaal en ondernemend land: uit de crisis, met goed werk, op weg naar 2020, advies van de Sociale Partners van 11 april 2013.*

er's organisation already said that collective agreements have to become plainer and simpler again.

From a legal point of view, few changes have been made in trade union law or laws regarding works councils. One of the changes that did occur concerns the termination of employment contracts. From July 2015, it will be possible to lay down rules concerning the selection of employees in the case of (collective) dismissals based on economic grounds. Furthermore, trade unions may participate in the prior authorisation procedure, for which purpose specific committees are to be established. Considering that only about 20% of the Dutch employees are members of trade unions, it remains to be seen how this law on termination by collective agreement will become binding on non-members and how the problems of the maximum duration of collective agreements will affect this instrument.⁸⁰

4 Social security

In the field of social security, one of the first crisis measures was the (re)introduction of the so-called part-time unemployment. Yet, more profound changes have been introduced as well. In keeping with the general line of policy of the Employment and Security Act, the Dutch Unemployment Act has been changed, to be effective as of January 1st 2016 onwards. The reform intends to enhance participation in paid employment by shortening periods of eligibility and tightening criteria defining suitable work. Furthermore, from January 1st, 2015, the Participation Act (*Participatiewet*) changes the rules applicable to certain groups which encounter difficulties participating in paid employment e.g. people in sheltered employment or persons receiving long-term social assistance. Another interesting piece of legislation, adopted alongside the Participation Act is the Act dealing with corrective measures in social assistance (*Wet maatregelen Wet Werk en Bijstand*).

4.1 Part-time unemployment

One of the first crisis measures, intended to head off a surge of unemployment, was the introduction of the so-called part-time unemployment. This measure, introduced in 2009⁸¹, was

⁸⁰ In the Netherlands, collective agreements can be concluded for a maximum of 5 years (article 18 of the Act on collective agreements (*Wet Cao*)). This would mean insecurities due to expired agreements and maybe also (at least in the beginning) frequent changes to the rules laid down in the collective agreements.

⁸¹ *Besluit van de Minister van Sociale Zaken en Werkgelegenheid van 14 juli 2009, nr. IVV/I/16262, Stcrt. 2009/10813.*

intended to prevent spiralling unemployment and contribute to the preservation of the workforce, while partly shifting the burden of wage costs from employers to the general public. The Dutch model of part-time unemployment worked as follows: the employer first had to show a sharp decline in economic activity which had to originate from a source outside the employer's control. Part-time unemployment was not to be used to subsidise firms that were badly managed or no longer up to competition.⁸² Secondly, the employer had to consult either representative trade unions, or, in small enterprises, other employees' representatives. If they agreed, the employer was allowed to reduce working hours by 20-50% for at least 26 weeks. The employees were then entitled to unemployment benefits relating to their percentage of unemployment.⁸³ According to the government, this possibility relieved the (economic) pressure of employers, while keeping employees' incomes at a reasonable level to stave off a complete stop of consumption⁸⁴, which would, in turn lead to more dismissals, which would lead to less consumption ending in a vicious circle of depression. The employer was liable to pay back the benefits if he had to dismiss employees on part-time benefits within 13 weeks of the termination of the measure. Employees on part-time unemployment were exempted from the duty to apply for jobs, as one of the goals of the measure was to keep the workforce intact. However, the employer had to make arrangements to offer training or secondment to other employers for employees participating in part-time unemployment schemes. Finally, the employer had to make arrangements concerning employees who were not entitled to unemployment benefits. Since July 2011, the option of part-time unemployment is no longer available.⁸⁵

4.2 Activation measures in the new Unemployment Act

Another measure, which will take effect from 2016 onwards, is the modernisation of the Unemployment Act (*Werkloosheidswet, WW*) as part of the Act on Employment and Security, already mentioned before. The law contains two big changes and several smaller adaptations. One of the main changes is the reduction of the period of entitlement to benefits from a max-

⁸² A.J.T.M. Jacobs, *Werktijdverkorting, het juiste medicijn?*, TRA 2009/13.

⁸³ In Dutch academia there was some discussion as to the correct calculation of benefits and partition of risks. One opinion held that the employer was entitled to reduce the wages by 20-50%, according to the unemployment; another opinion held that the employer remained liable to pay full wages, but was entitled to deduct the payments made by the unemployment aid offices.

⁸⁴ The employees concerned did, however, "consume" their individual rights to unemployment benefits, meaning that the period they were on part-time unemployment was deducted from the period of benefits to which they were entitled on the basis of their employment record.

⁸⁵ From September 2014 onwards, a new policy applies, see: *Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 12 juli 2013, nr. 2013-0000094121 (Regeling Calamiteiten WW)*, which contains much stricter requirements.

imum of 38 months to a maximum of 24 months.⁸⁶ This reduction pursues a double aim. In the first place, it is meant to save money.⁸⁷ In the second place, the government hopes that a reduction of the period of benefits will get people back into paid employment more quickly. According to the government, figures show that the chances to find a new job are highest in the first year of unemployment and that people try hardest to find a new job just before benefit entitlements come to an end. The underlying assumption is thus that, if periods of eligibility for benefits are shortened, people will try harder to find a job sooner.

Under the new regime, employees build up basic protection fairly quickly, as the first ten years of employment correspond to a month's right to benefits per year of service. Afterwards, every year only yields a right to half a month's benefit, with a maximum of 24 months.⁸⁸ The maximum period of 24 months may be extended by collective agreement, and the Government clearly expects this to happen.⁸⁹ How this relates to the aim of securing participation and activation remains unclear. The government does not seem to expect problems, as it already indicated its willingness to extend these collective agreements across the sector.⁹⁰ The other major change concerns the definition of 'suitable work'. Until now, the definition of 'suitable work' became wider every six months, but from 2016 onwards, after the first six months of unemployment, any kind of job will be considered suitable.⁹¹ In exchange for the duty to accept a broader range of jobs, the rules on earning an income from (low-paid) work in addition to receiving benefits have been relaxed in order to stimulate individuals to take up employment, even if this yields wages below the benefit level.⁹²

4.3 Social assistance: participation above all

A final piece of legislation, adopted on July 1st 2014, is the new Act on Activation and Participation (*Participatiewet*) which will enter into force on January 1st, 2015. It is an act that integrates different pieces of legislation dealing with different categories of individuals who encounter difficulties in finding employment. The Act, as is usually the case in social assistance, takes into account (to various degrees for the different groups concerned) need and income of the individual and of the household. Next to the spouse and the common household, two con-

⁸⁶ Article 42 (1) *WW*.

⁸⁷ *Kamerstukken II*, 33 818, nr. 3, p. 54, See also: S. Klosse, G. Vonk, (Social Security Law, not yet published), paragraph 6.3.3.

⁸⁸ This period will correspond to 38 years of employment, with the first ten years yielding ten months, the remaining 28 years a right to 14 months benefit.

⁸⁹ *Stenografisch verslag Handelingen Tweede Kamer*

⁹⁰ *Kamerstukken I*, 2013/14, 33 818 nr. C, p. 17.

⁹¹ Article 24 (3) *WW*.

⁹² Article 35 aa *WW*.

cepts that are already used widely, the Act introduces a new concept: the ‘*kostendeler*’, meaning those who share the costs of living.⁹³ If two persons of age, not being related and not being a couple, are registered under the same address, assistance levels will be reduced because these individuals are able to benefit from economies of scale.⁹⁴

As the Participation Act intends to bring more people into (paid) employment, it is hardly surprising that it contains many obligations for the benefit recipient. However, these do not differ from the old regime as much as one would have thought. The changes are mainly brought about by the Act on sanctions in the social assistance regime (*Wet maatregelen Wet Werk en Bijstand*). The individual concerned has to offer all information that may impact the right to assistance and has to tolerate visits to the house which the authorities may deem necessary in order to establish the right to assistance. Unsurprisingly, the individual concerned has to accept generally acceptable job offers and even unpaid activities if the latter enhance the individual’s perspectives on re-entering the employment market. The municipalities will have to walk a fine line when developing policies in this field. On the one hand, they have a direct financial interest in getting as many people as possible out of the assistance scheme.⁹⁵ On the other hand, they have to take into account the prohibition of forced or involuntary labour as laid down e.g. in art. 4 ECHR. Therefore, municipalities must ensure that the obligations, and in particular the sanctions remain proportionate.⁹⁶

5 European influences on these measures and reforms

In general, little mention was made of European economic and employment policy when the different new acts were discussed with the notable exception of the Act on salary policies and salary caps in financial institutions discussed in paragraph 2.3.3. There, the Dutch government established a clear link between EU policy concerning excessive salaries in the financial sector and its own policy. It is interesting to note that at this point, the Dutch government decided to implement even harsher salary and bonus caps than the EU intends.

On the other fields, EU economic policy choices may have influenced the choices the government made, but no explicit reference to EU policy has been made. For example, the initiatives on social security and social assistance legislation are intended to help restoring the bal-

⁹³ Article 22a *Participatiewet*.

⁹⁴ Income and/or wealth of these ‘housemates’ are considered irrelevant.

⁹⁵ Municipalities get money from the central government to finance income assistance as well as re-integration. They are allowed to keep what they do not spend on assistance, but have to pay back what they do not spend on income assistance.

⁹⁶ See the discussion in S.Klosse, G. Vonk (Social Security Law, not yet published, paragraph 11.2.8)

ance in the state budget, but no direct reference is made to the need of a balanced budget in the light of the convergence criteria. Nevertheless, the general focus on activation and participation that is present in the Europe 2020 Agenda, with an overall aim of 75% of those between 20 and 65 years of age in paid employment by 2020, can be clearly distinguished in the national legislation. On the European level, the Broad Economic Policy Guidelines advocate a high level of participation and a policy that helps bringing about a skilled and adaptable workforce.⁹⁷ Guideline 7 is of particular interest: it advocates the integration and application of the flexicurity principles in(to) national labour market policies to achieve the participation aim. In national law, this can be traced in the relatively high acceptance of flexible forms of employment, particularly fixed-term and agency work. These forms of employment, it is hoped, offer stepping stones onto the labour market. Another clear link between EU policy guidelines and national policy choices can be found in social security and social assistance legislation. Legislation in both fields has been modernised taking into account the mutual responsibilities approach, which maintains incentives for work whilst ensuring income, as Guideline 7 recommends.

6 Conclusion

To conclude in the Netherlands, several important changes to employment and social security law have been made in order to face the crisis. Several of the changes, e.g. the law concerning termination of contracts, have been on the agenda for a long time, but the financial and economic crisis made reforms even more urgent. When these reforms could no longer be put off, due to the effects of the crisis, the changes made to employment, social security and social assistance law reflect the general EU policy approach, even if they do not explicitly refer to EU policies.

⁹⁷ Council decision of 21 October 2010 (2010/707/EU), Guidelines 7-10.