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**Why Freedom needs Regulation.**  
The Social Dimension of Implementing Free Movement of CEE-Workers  
in the Netherlands on 1 May 2007

**Bachelor Thesis**  
**- Final Report -**

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## **Abbreviations**

ABU	Algemene Bond uitzendondernemingen
BSN	Burgerservicenummer
EES	European Employment Strategy
EU	European Union
EU-8	refers to the eight Central and Eastern European Countries that acceded the EU in 2004
cao	collective arbeidsovereenkomst
CBS	Centraal Bureau voor de Statistiek
CDA	Christen Democratisch Appèl
CEE	Central and Eastern European
CPB	Centraal Planbureau
ECJ	European Court of Justice
EEC	European Economic Community
EFRA	Committee on the Environment, Food and Rural Affairs
ETUC	European Trade Union Confederation
GBA	Gemeentelijke Basis Administratie
GLA	Gangmaster Licensing Authority
ILO	International Labor Organization
NBBU	Nederlandse Bond van Bemiddelings- en Uitzendondernemingen
NEN	Nederlands Normalisatie-Instituut
NRC	NRC Handelsblad
OMC	Open Method of Coordination
PvdA	Partij van de Arbeid
SER	Sociaal-Economische Raad
SZW	Ministerie van Sociale Zaken en Werkgelegenheid
TEC	Treaty establishing the European Community
TK	Tweede Kamer der Staten Generaal
UK	United Kingdom
UWV	Uitvoeringsinstituut Werknemersverzekeringen
VIA	Vereniging van Internationale Arbeidsbemiddelaars
VK	De Volkskrant
VNG	Vereniging van Nederlandse Gemeenten
VROM	Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieu
VVD	Volkspartij voor Vrijheid en Democratie
WAADI	Wet Allocatie Arbeidskrachten door Intermediairs

## **1 Introduction**

How to fill a rather technocratic and bulky item with life? Negation possibly does the trick. “On ne tombe pas amoureux d’un marché intérieur!” - You can’t fall in love with the internal market - Jacques Delors said more than once<sup>1</sup>, and it was appreciatively quoted even more often. In presuming the internal market not to be loved, Delors indirectly conferred an attribute of life upon it, and, in fact, there is something true about it. The internal market is based on the four fundamental freedoms, the Free Movement of Capital, Goods and Persons (which comprises Services and Workers). The last one, Free Movement of Persons, is different from the others. It is more than a market shaping mechanism. It is about humans and individual lives. It is about personal choices and chances. It is a broader range of jobs and making friends in another country of the European Union. It is about becoming part of another culture, additionally to the one you were given by your ancestors - if everything works out well. It is also about risks. People leave the surrounding they are familiar with and exchange their home country with a foreign one, where customs, sometimes only little gestures, which were taken for granted so far, are unknown now and might sometimes encounter incomprehension. Whether the start of a new life is a success or a failure essentially depends on the prerequisites people bring with them. Knowledge about the country they are moving to, language skills and a certain degree of financial independence are recommendable.

Migrant workers from the Central and Eastern European Countries (CEE-countries) moving to one of the “old” European Member States are generally not provided with these basic prerequisites. Their choice is very often that of living a poor life in their home country or going abroad for a period of time, earning enough money for a better future at home, a business, a study, or just to support a family that stays behind. This is possible due to differences in living standards and wage differences respectively spending capacity. Thus it is not really love at first sight than rather a partnership of convenience between CEE-Workers and their respective host countries. While they come to earn money, the different economies embrace them as cheap labour force.

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<sup>1</sup> See, e.g., Figel, J., ‘Culture, intercultural dialogue and the role of religion’ *European View* 6 (2007), 65-70; Verheugen, G., ‘Échange de vues entre le Vice-Président Verheugen et la Commission du marché intérieur et de la protection des consommateurs Parlement européen’ *Commission du marché intérieur et de la protection des consommateurs Parlement européen*, Brussels (2006) Speech 06/ 500; Ziltener, P. ‘Tying up the Luxembourg package of 1985’, in : Bornschier, V. (ed.): *State-building in Europe. The Revitalization of Western Europe Integration*. Cambridge 2000, 54

Politicians have mixed feelings about it. Fostering stable economic growth is surely an important goal, nonetheless not taking the voters' anxieties of being flooded with cheap labour into account, is threatening their power.

The conditions for integration are rather poor in this respect, if this task is left to migrant workers and their new surroundings. Which are the social problems brought about by (the often temporally limited) migration from CEE-countries to the Netherlands? The paper examines the period from over a year after the Dutch full endorsement of workers from these so-called "new" Member States acceding the EU in 2004, thus from May 2007, when the Netherlands decided to abandon the transitional period due to free movement of CEE-workers, to summer 2008. For Bulgaria and Romania, which joined the EU not before 2007, the Dutch Parliament hesitates to take a decision, albeit workers from these countries already form the second and third strongest migration group after the Poles. How do the different levels – the national, the EU, but in patches and to a very small extent also the local level – deal with problems? Presuming that current efforts are not sufficient, inter alia an intensified EU responsibility is claimed. The paper eventually suggests a regulating regime which is capable to tackle transnational problems. The overarching research goal is to substantiate, why freedom – and free movements of workers is one of the four fundamental freedoms<sup>2</sup> – needs regulation.

The conceptual formulation of the paper is thus limited to the migrants' perspective. Social problems CEE-migrants cause to Dutch citizens, e.g., due to excessive drinking or aggressive squatting (*'kraken'*) in the big cities are not taken into account. These problems are likely to be reduced, when adequate housing conditions are established.

Notwithstanding the conflicts are not specific Dutch, but occur more or less in all 'old' Member States, the Netherlands are ideal to investigate them: They have longstanding the lowest unemployment rates, thus replacement of Dutch workers has not to be considered. In case of economic depression, the assessments would have to be changed though, taking the needs of home country citizens by all means into account: Without wage differentials and thus difference of living costs wage competition would possibly make feeding a family impossible. But as long this situation is not occurring, CEE-migrants are the most vulnerable person subgroup. Furthermore, the Netherlands are a rather small country, thus problems are earlier visible and effects are possibly even

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<sup>2</sup> See, e.g., Oliver, P. and Roth, W.H., 'The Internal Market and the Four Freedoms', Common Market Law Review (CML) 41 (2004), 407-441

more intensely. Consequently the Netherlands are suitable to serve as indicator for larger 'old' Member States, where problems can be hidden easier.

The paper is organized as follows: Chapter two deals with the basic principles and backgrounds of free movement of workers. For explaining the modification in perspective of European decision makers in paragraph 2.1 – the shift from a mere economic dimension to an attitude that also takes the social dimension into account – the books of prominent scholars of European Law were consulted, e.g., *EU Law*, written by Paul Craig and Gráine de Búrca, and *The substantive law of the EU, the four Freedoms*, written by Catherine Barnard. On the basis of case-law it is reconstructed, how the European Court of Justice developed the legal status 'worker' giving it a broadly defined, inclusive meaning. In the course of the paper it becomes clear, why a well defined status provides certain reliability and security. Paragraph 2.2 describes legal provisions and political decisions of Member States with regard to the Eastern Enlargement in 2004 and 2007. To the Dutch decisions is responded in more detail, as they lead over to the main research issue: Social problems CEE-workers are confronted with, in the Netherlands. For evaluating Dutch decisions, Parliament Documents were used, obtainable by the web-based service of the Dutch Parliament, *Parlando*<sup>3</sup>. From paragraph 2.3 it becomes clear, that the social implications of CEE-migration did not begin with the liberalization of the labour market. Due to labour market shortages, particularly in the agriculture but later in other sectors, too, an unknown number of CEE-migrants with different legal status already worked in the Netherlands. The problems they faced in the time before the abolition of transitional periods are examined inter alia by Cathelijne Pool, Erik de Bakker and Roos Pijpers. All three have in common that they currently work or worked on a dissertation about this issue. De Bakker wrote his dissertation *De cynische Verkleuring van Legitimiteit en Acceptatie* in the field of Social Law, Pijpers her dissertation *Between fear of masses and freedom of movement: migrant flexwork in the enlarged European Union* in the field of economic geography, which indicates the multidisciplinary character of the issue. The reports of the research institutes *Regioplan*, which was prepared on behalf of the Ministries of Social Affairs and of Housing and Regional Development, and *Risbo*, delivered important information about the assessment of numbers of migrants for this paragraph, but also on other topics for the next chapter.

Chapter 3 focuses on the social implications in the Netherlands due to the topics work, housing and integration. The measures taken by the Dutch State were analyzed

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<sup>3</sup> Parlando, web-based service TK: <http://parlando.sdu.nl/cgi/login/anonymous>

and EU-provisions were examined with regard to their capability to deal with the problems. Vulnerability, defined by François Eyraud and Daniel Vaughan-Whitehead in *The evolving world of work in the enlarged EU* clearly applies to a large part of CEE-workers. Both are scholars of economy and executives of the International Labor Organization (ILO). Parliamentary documents and the above mentioned reports (Regioplan/ Risbo) inter alia delivered current information about the measures that are taken, contrasted in chapter 3.1. Furthermore, a comparison between the Dutch NEN-certificate and the UK's Gangmaster licensing Act enabled the analysis of Dutch plans to tackle exploitation and competition. For the topic housing the leading role of the recruitment agency sector is salient, which is elaborated in chapter 3.2. Chapter 3.3 refers to the research of Godfried Engbersen et al., a scholar of sociology and migration. His articles, inter alia *A room with a view. Irregular immigrants in the legal capital of the world*, examine Bulgarians, integrating in the irregular migration networks in The Hague. Furthermore a focus was placed on the integration of children of migrant workers and generally on the Dutch language as key of integration.

Which regulation regime is capable and legitimated to tackle the problems CEE-workers are involved in, is analyzed in chapter 4. Jean-Michel Servais, Senior ILO official and scholar of law, advocates in *Quelque réflexions sur un modèle social européen* a tripartite approach, in accordance with the general line of the International Labor Organization<sup>4</sup>. On the basis of the publications, *The logic of collective action*, written by the prominent scholar of economy and politics, Mancur Olson, *Soziale Marginalität und kollektives Handeln*, written by Thomas von Winter and Ulrich Willems, scholars of politics, and *Illusory Corporatism in Eastern Europe: Neoliberal Tripartism and Postcommunist Class Identities*, written by David Ost, scholar of politics, this paper demonstrates in paragraph 4.1 why tripartism with regard to EU-migrant workers is not legitimate. Instead, it advocates the application of the Open Method of Coordination in paragraph 4.2, which is suggested by the Dutch States Secretary Frans Timmermans for the field of integration. The paper suggests to apply this relatively new detected soft law approach of policy making to all three issues the paper is dealing with. OMC is namely regarded to be ideal for political sensitive issues, for which States are reluctant to give up competencies, as is described generally by Robert Dahl, a prominent scholar of politics in *A Democratic Dilemma. System Effectiveness versus Citizen Participation*. The functioning of the Open Method of

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<sup>4</sup> Simpson. W.R., 'The ILO and tripartism: some reflections', *Monthly Labor Review*, September 1994, 40-45

Coordination and the subsumption of the conflicts with regard to free movement of workers bases on publications inter alia from Susana Bórras and Kerstin Jacobsson, scholars of politics with emphasis on soft governance, which wrote *The open method of coordination and new governance patterns in the EU*, or Samantha Velluti, scholar of law, author of *What European Union Strategy for Integrating Migrants*, also specialized on OMC. Finally, in Chapter 5.4, Fritz Scharpfs theory for strengthening a common European identity, the prominent scholar of politics and law described in *Governing in Europe. Effective and Democratic?*, was taken into account. Implementing the regulations suggested in this paper could lead indeed to more ‘*Gemeinschaftskeitsglauben*’.

## **2 Basic Principles and Backgrounds**

Free movement of workers was already established by the Rome Treaty in 1957. Over the years the principle took shape. Market integration, which was mainly economically motivated, received social traits. While the Member States hesitated to give up competences, the European Court of Justice turned out to be an advocate of the citizens. Migrant workers, standing at the intersection of tensions between economic and social dimensions, where and are in dire need of such an advocate. The broad interpretation of the legal definition of ‘worker’, which is outlined in paragraph 2.1, is an important example of such a backing.

With the accession of eight CEE-States in 2004 and two in 2007, free movement of workers turned out to be a sensitive issue. Because ‘old’ Member States feared their labour markets to be flooded with migrant workers, transitional provisions were negotiated. It is arguable whether this really was a change for the better, particularly as the free movement of services was adopted immediately, which is specified in paragraph 2.2.

In a situation of permanent labour shortage and after long debates, which expressed the aim to retain control over their labour market, the Netherlands decided to open their borders for migrant workers from eight CEE-States. In paragraph 2.3 it is described whether a control really was feasible and how difficult it is to just determine the number of migrant workers.



## 2.1 Between Economic Demands and Social Needs: Developing a Legal Status

In March 2000 the head of states of the then 15 members of the European Union adopted an ambitious strategy. At the so-called Lisbon summit they determined ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’<sup>5</sup>. This strategy to cope with globalization was much too ambitious and was criticized<sup>6</sup> and revised<sup>7</sup> later. However the fact that Member States formulate common interests that go beyond the economic dimension and are thus in the position to take respective common decisions has its fundament in the very first beginnings of the European Union.

The Rome treaty in 1957 established a common market which was designed as a Customs Union. Other than a mere Free Trade Area, which permits free movement of products and removes trade barriers between participating states only, a Customs Union has additionally common external tariffs and aims for the free movement of factors of production, which is financial and human capital<sup>8</sup>. Article 2 of the Treaty establishing the European Community (TEC)<sup>9</sup> empowers the Community to establish a common market. This common market, referred to as ‘internal market’ in Article 3 TEC, shall be ‘characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’<sup>10</sup>.

From an economic point of view this removal of trade barriers is the basic condition to optimally allocate these resources within the internal market<sup>11</sup>. For instance free movement of persons, allowing full labour mobility, leads according to neo-classical equilibrium theories to a well-balanced demand and supply with regard to full employment and to wage equations, provided that perfect conditions are met, e.g.,

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<sup>5</sup> European Council, ‘Presidency Conclusions: Lisbon European Council 23 and 24 March 2000’, [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00100-r1.en0.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm)

<sup>6</sup> Kok, W. (chair), ‘Facing the challenge. The Lisbon strategy for growth and employment’, *Report from the High Level Group*, Luxembourg 2004

<sup>7</sup> European Commission, ‘Communication to the Spring European Council: Working together for growth and jobs. A new start for the Lisbon Strategy’, Brussels 2005, COM (2005) 24

<sup>8</sup> Barnard, C., *The substantive law of the EU. The four freedoms*, Oxford 2007, 8-11

<sup>9</sup> the successor of the Treaty establishing the European Economic Community, which was the original version of the Rome Treaty

<sup>10</sup> Article 3 (c) TEC

<sup>11</sup> See, e.g., De Bruijn, R., Kox, H., and Lejour, A., ‘Economic benefits of an integrated European Market for Services’, *Journal of Policy Modeling* 30 (2008), 301-319; Garrett, G., ‘International Cooperation and Institutional Choice: The European Community’s Internal Market’, *International Organization* 46, 2 (1992), 533-560; Marques, H., ‘Trade and factor flows in a diverse EU: What lessons for the eastern enlargement(s)?’, *Journal of Economic Surveys* 22, 2 (2008), 364-408

perfect information and wage differentials as only mainspring for workers to move<sup>12</sup>. ‘The Rome Treaty laid the foundations for economic integration’, Craig explains the rationale behind the creation of the common market, ‘[t]his was the principal focus of the Treaty, and it was a conscious decision after the failures of the more ambitious attempts at European integration of the mid-1950s’<sup>13</sup>.

The free movement of workers is determined in Title III, chapter 1, Articles 39-42 TEC, though due to workers’ rights Article 39 can be regarded as core provision. It contains the right of non-discrimination on grounds of nationality, notably with regard to ‘employment, remuneration and other conditions of work and employment’, the right to enter the host state, to move freely to seek for employment, to accept respective offers and to stay in this state to perform the employment function<sup>14</sup>. Under certain conditions it is also allowed to remain in the host country after termination of employment. Notwithstanding the existence of the principle of free movement of workers since 1957 it was not vitalized until 1968 when Regulation 1612/68<sup>15</sup> was adopted<sup>16</sup>. Regulation 1612/68 was the inception of fleshing out the rights of migrant workers and their families, laid down in the treaties<sup>17</sup>.

Although primary legislation mainly deals with negative integration – the removal of trade barriers –, positive integration, e.g., harmonization of provisions and finding common regulations was also enabled from the beginning, albeit under the requirement of unanimity<sup>18</sup>. While advocates of the above mentioned economic theories considered the removal of trade barriers to be sufficient to encourage workers to migrate, they turned out to be wrong. Social motivations, inter alia, were a strong incentive to stay within the familiar networks of family and friends, despite threatening or factual unemployment<sup>19</sup>. In 1971 Regulation 1408/71<sup>20</sup> ensured basic social security for migrant workers at least.

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<sup>12</sup> Tassinopoulos, A., and Werner, H., ‘To move or not to move – migration of labour in the European Union’, *IAB Labour Market Research Topics* 35 (1999), 1-19

<sup>13</sup> Craig, P., ‘The Evolution of the Single Market’, in Barnard, C., and Scott, J. (eds.), *The Law of the Single European Market. Unpacking the Premises*, Oxford 2002, 1

<sup>14</sup> a general prohibition of discrimination on grounds of nationality is provided in Article 12

<sup>15</sup> ‘Regulation EEC No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community’,

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968R1612:EN:HTML>

<sup>16</sup> See, e.g., El-Agraa, A.M., *The European Union. Economics and Policies*, Cambridge 2007, 158; Barnard, n. 8 above, 286

<sup>17</sup> Craig, n. 13 above, 4

<sup>18</sup> *Ibid.*, 5

<sup>19</sup> See, e.g., El-Agraa, n.16 above, 157-161; Tassinopoulos, n. 12 above; Barnard, n. 8 above, 286

<sup>20</sup> ‘Regulation EEC No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community’, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1971R1408:20060428:en:PDF>

The next step to improve the efforts for positive integration was the adoption of the Single European Act which came into force on 1 July 1987: Article 95 was introduced, a new legal basis to facilitate adopting harmonization measures by qualified majority to complete the single market. The requirement of unanimity (Article 94 TEC) had been resulting in the so-called euro-sclerosis in the period between 1973 and 1986<sup>21</sup>. It should not help to enhance the principle of free movement of persons however. Article 95 (2) TEC determines that qualified majority vote ‘shall not apply to [...] provisions [...] relating to the free movement of persons nor to those relating to the rights and interests of employed persons’. According to Barnard, issues relating to free movement of persons are still considered as ‘too sensitive to be the subject of qualified-majority voting’<sup>22</sup>. The realization of the internal market altogether can be regarded as ‘ongoing project’.<sup>23</sup> The difficulties to encourage people to move on the one hand and the reluctance of Member States to give up competencies in this area on the other, gives a notion of the social dimension’s significance. The so-called Citizens’ Right Directive 2004/38<sup>24</sup> meets social concerns, as it considers the rights of workers’ family members, which facilitate the migration of spouse and children and thus integration in the host state. Craig and De Búrca speak about a shift within the Community from the focus on predominating economic dimensions in the 1980s and early 1990s which is still ‘a central aspect of single-market policy’ towards a broader concern due to ‘social, environmental and consumer policy’ which inescapable leads to tensions between the economic and social dimension<sup>25</sup>. This was also noticeable in the debate about the above mentioned Lisbon-strategy, which optimistically stressed both ‘economic growth’ and ‘social cohesion’. Hence against the background of global competition and economic downturn, the ‘new start for the Lisbon Strategy’ was also a shift, but then one back to the economic camp. It stated: ‘Making growth and jobs the immediate target goes hand in hand with promoting social or environmental objectives.’<sup>26</sup>

Actually it was the European Court of Justice, the ‘interpreter of the Treaties’ which played an active role in creating and shaping the internal market<sup>27</sup> and in doing so it’s

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<sup>21</sup> See, e.g., Barnard, n. 8 above, 11-13; Craig, n. 13 above, 14-19

<sup>22</sup> Barnard, n. 8 above, 570

<sup>23</sup> Ibid., 13

<sup>24</sup> ‘Directive 2004/38 EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’,

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF>

<sup>25</sup> Craig, P. and De Búrca, G., *EU Law. Text, Cases and Materials*, Oxford 2008, 635

<sup>26</sup> European Commission, ‘Communication to the Spring European Council: Working together for growth and jobs. A new start for the Lisbon Strategy’, Brussels 2005, *COM* (2005) 24, 4)

<sup>27</sup> Craig, De Búrca, n. 25 above, 72-73

social character. Barnard describes for instance the Case *Deutsche Post v Sievers and Schrage*<sup>28</sup>, in which the Court emphasized the social character of Article 119 TEC, notwithstanding the original legislature's intention was market-making<sup>29</sup>.

Presumably more than other person subgroups, migrant workers, moving from one European Member State to another, stand at the intersection of tensions between economic and social dimensions. The first problem occurs with the definition of the term 'worker'. Falling in the category of being a worker is connected with a certain legal status<sup>30</sup>. To prevent Member States from defining the status 'worker' differently and thus from circumventing the rights emanating from this status<sup>31</sup>, here, too, the European Court of Justice attended to this potential loophole and developed in various cases a broad and inclusive definition of 'worker' in the interest of migrant workers. Thus for example in *Hoekstra* the Court emphasized its authority in saying that 'If the definition of this term [worker] were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'Migrant Worker' and to eliminate at will the protection afforded by the treaty to certain categories of person'<sup>32</sup>. Work has to be 'effective and genuine', the Court ruled for example in *Kempf*<sup>33</sup>. Whether it is 'effective and genuine' however, does not depend on the income achieved, thus part-time workers are also to be considered as workers. In *Lawrie-Blum* the Court set up 'objective criteria' which are fulfilled in case of a 'relationship of subordination vis-à-vis the employer, irrespective of the nature of that relationship', in which services are provided by the employee, who in return, receives remuneration<sup>34</sup>. These criteria can be achieved by workers 'irrespective of whether they are permanent, seasonal or frontier workers or workers who pursue their activities for the purpose of providing services said the Court in

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<sup>28</sup> C-270/97 and C-271/97 'Deutsche Post AG v Sievers and Schrage', 2000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0270:EN:HTML>

<sup>29</sup> Barnard, n. 8 above, 23-24; C-270/97, n. 28 above, para. 57: 'In view of that case-law, it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.'

<sup>30</sup> Muffat-Jeandet, D., 'European Developments Section', *Industrial Law Journal* 20, 1 (1991), 76-79

<sup>31</sup> Craig, De Búrca, n. 25 above, 747

<sup>32</sup> Case 75/63, 'Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Business). Judgement of the Court of 19 March 1964',

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61963J0075:EN:HTML>, para. 1

<sup>33</sup> Case 139/85, 'R. H. Kempf v Staatssecretaris van Justitie. – Reference for a preliminary ruling: Raad van State – Netherlands. Judgement of the Court of 3 June 1986',

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0139:EN:HTML>, para. 6

<sup>34</sup> Case 66/85, 'Deborah Lawrie-Blum v Land Baden-Württemberg. Judgement of the Court of 3 July 1986',

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0066:EN:HTML>, para. 15

*Levin*<sup>35</sup>, however activities that are ‘purely marginal and ancillary’ are excluded<sup>36</sup>. In *Betray* for example, the Court refused a former drug addict the status of ‘worker’, because his work was no ‘genuine economic activity’, but its main purpose was rehabilitation<sup>37</sup>.

Following the argumentation, the term ‘worker’ can be summarized to this definition: A worker is a person that is situated in an employment relationship of subordination that serves economic purposes, irrespective of duration or extent of the contract and of the income achieved, as long as activities are not that marginal, that the work serves as justification to maintain the legal status ‘worker’ only.

## 2.2 Eastern Enlargements and Dutch Decisions

Free movement of workers is part of the *acquis communautaire*, ‘the whole body of EU rules, political principles, and judicial decisions’<sup>38</sup>, which applies to all Member States. Subsequent candidates have to adopt the entire package and are thus provided with the same rights and obligations as the establishment. The accession of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia on 1 May 2004<sup>39</sup> and of Bulgaria and Romania on 1 January 2007<sup>40</sup>, also referred to as Eastern Enlargement, was likewise bound to the entire EU law. The right of free movement of workers however, was derogated by transitional provisions. Fear of ‘massive inflow of economic migrants’ from east to west<sup>41</sup> due to wage differences and differences in standard of living<sup>42</sup> as well as ‘old’ Member States’ concerns about ‘social tourism and

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<sup>35</sup> Case 53/81, ‘D.M. Levin v Staatssecretaris van Justitie. – Reference for a preliminary ruling: Raad van State – Netherlands. – Right of residence. Judgement of the Court of 23 March 1982’, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61981J0053:EN:HTML>, para. 14

<sup>36</sup> *Ibid.*, para. 17

<sup>37</sup> Case 344/87, ‘I. Betray v Staatssecretaris van Justitie. Reference for a preliminary ruling: Raad van State – Netherlands. Judgement of the Court of 31 May 1989’, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0344:EN:HTML>, para. 17

<sup>38</sup> Grabbe, H., ‘European Union Conditionality and the “Acquis Communautaire”’, *International Political Science Review* 23, 3 (2002), 249-268

<sup>39</sup> ‘Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union’, *Official Journal of the European Union* L 236 Volume 46, 23 September 2003, <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2003:236:SOM:en:HTML>

<sup>40</sup> ‘Documents concerning the accession of the Republic of Bulgaria and Romania to the European Union’, *Official Journal of the European Union* L 157 Volume 48, 21 June 2005, <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2005:157:SOM:EN:HTML>

<sup>41</sup> Carrera, S., ‘What does free movement mean in theory and practice in an enlarged EU?’, *European Law Journal* 11,6 (2005), 699-721

<sup>42</sup> Sinn, H., ‘EU Enlargement and the future of the Welfare State’, *Scottish Journal of Political Economy* 49,1 (2002), 104-115.

social dumping<sup>43</sup> resulted in the possibility of restriction of free movement of workers for up to seven years. According to the so-called 2+3+2 principle, Member States are allowed to close their labour markets towards CEE-workers in the first two years after accession by applying national measures or bilateral agreements (phase 1). With regard to the following three years, the Member State can inform the Commission about further restriction – without giving reasons (phase 2). The last two years of the transitional period can be called upon if a Member State assumes ‘serious disturbances of its labour market or threat thereof’<sup>44</sup> (phase 3). While Sweden, Ireland and the United Kingdom granted access to CEE-workers that acceded in 2004, Germany and Austria still maintain restrictions. Other countries renounced or at least eased the transitional provisions in the meantime<sup>45</sup>.

The attitude in the Netherlands changed over time. In 2001 the second cabinet of Prime Minister Wim Kok (*PvdA*, Social Democrats) determined to open borders after the first CEE-accessions immediately, however the succeeding cabinet of Prime Minister Jan Peter Balkenende (*CDA*, Christian Democrats) revoked the decision in 2004.

In 2001 a report brought out by the *Sociaal-Economische Raad (SER)*<sup>46</sup>, had recommended the liberalization of the labour market. From experience due to southern EU enlargement in the 1980s<sup>47</sup>, the SER did not expect massive migration flows, but rather welcomed mobility as contribution to labour shortage and a general welfare enhancement<sup>48</sup>. It forecasted a rise of immigration from 10.000 persons in 1998 to 44.000 persons in 2030<sup>49</sup>. The cabinet-Kok opted for a full implementation of free movement of workers, merely supplemented by safeguard measures, e.g., the allowance to reintroduce work permits, if economically necessary<sup>50</sup>. In 2004, the Balkenende II Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en*

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<sup>43</sup> Kvist, J., ‘Does EU Enlargement start a race to the bottom? Strategic interaction among EU Member States in Social Policy’, *Journal of European Social Policy* 14,3 (2004), 301-318

<sup>44</sup> Documents concerning the accession, n. 39, 40 above, see, e.g., for Poland: Annex XII: List referred to in Article 24 of the Act of Accession, 2. Freedom of Movement for Persons, 1-6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:236:0875:0905:EN:PDF>; Kvist, n. 43 above

<sup>45</sup> Schneider, C.J., ‘Differenzierte Mitgliedschaft und die EU-Osterweiterung: Das Beispiel der Arbeitnehmerfreizügigkeit’, *Swiss Political Science Review* 12, (2006), 67-94; European Commission, ‘Enlargement – Transitional Provisions’, [http://ec.europa.eu/employment\\_social/free\\_movement/enlargement\\_en.htm](http://ec.europa.eu/employment_social/free_movement/enlargement_en.htm)

<sup>46</sup> The Social and Economic Council of the Netherlands is an advisory and consultative body of independent professionals. It supports the Dutch government in finding solutions to issues related to socio-economic questions.

<sup>47</sup> for instance Greece in 1981, Portugal and Spain in 1986

<sup>48</sup> Sociaal-Economische Raad, ‘Arbeidsmobiliteit in de EU’, *SER 01/04*, 16 februari 2001, 95-106

<sup>49</sup> *Ibid.*, 90

<sup>50</sup> TK, vergaderjaar 2000-2001, 23987, nr. 5, 17 mei 2001.

*Werkgelegenheid - SZW*) explained the change in attitude with a new evaluation, prepared by the *Centraal Planbureau (CPB*<sup>51</sup>): This analysis forecasted 5.000 to 10.000 permanent settling CEE-workers per year in 2004 and 2005 and furthermore 10.000 seasonal workers. Because of network effects – workers choose for destinations where countrymen are already living – 8,4 percent of all CEE-migrants would come to the Netherlands, not at least because of the closed borders from Germany and Austria<sup>52</sup>. The Ministry for Social Affairs also feared a tighter labour market with rising unemployment in its report from 23 January 2004<sup>53</sup>, which ex post was rather ill-founded: The unemployment rates were indeed increasing in 2004 and 2005 to 4,6 respectively 4,7 percent, however they declined to 3,9 percent in 2006 and 3,2 percent in 2007 again, which is enviable from the perspective of other EU-countries<sup>54</sup>. The report as well addressed the replacement problem (*'verdringende effecten'*) because of CEE-workers accepting lower working conditions, e.g., minimum wages. Hence the compliance with regularized standards would be jeopardized and social dumping the result. Social tourism in contrast was legally rendered impossible. The entitlement to social benefits would rise with the number of month a worker would be employed in the Netherlands - temporary workers thus perhaps never acquire the necessary rights. Instead of granting free movement of workers according to Regulation 1612/68 in May 2004, the Netherlands discussed<sup>55</sup> about the confinement of work permits for CEE-workers to 22.000, based on the CPB-assessment. After a year, in May 2005, the number of dispensed work permits should be evaluated again, in case of exceedance before that date, correspondingly earlier. After the motion (*'motie'*) of two Members of Parliament from the Christian Democrats and the Liberal Conservatives (*VVD*) however, claiming a 'flexible system of work permits (*'tewerkstellingsvergunningen'*) including the obligation for employers of a labour market survey (*'arbeidsmarkttoets'*)<sup>56</sup>, the fixed number of work permits was abandoned. On 13 February 2004, State Secretary Rutte announced the compromise: The Netherlands

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<sup>51</sup> Dutch Bureau for Economic Policy Analysis, provides the Dutch government, policy-makers and societal organisations with economic analyses

<sup>52</sup> CPB Notitie, 'Arbeidsmigranten uit de Midden- en Oost-Europese toetredingslanden', 14 januari 2004, 8-9; SZW, 'Uitbreiding van de EU: voor- en nadelen van een direct vrij verkeer van werknemers', officiële bijlage, 23 januari 2004; See also, TK, vergaderjaar 2003-2004, 29407, nr. 1, 23 januari 2004

<sup>53</sup> SZW, n. 52 above

<sup>54</sup> Figures, *Eurostat*:

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=em071>

<sup>55</sup> TK, Handelingen 2003-2004, 3 februari 2004, nr. 46, pag. 3144-3171

<sup>56</sup> TK, 29407, nr. 2, 3 februari 2004, 'Motie van de leden Visser en Bruls'

would adopt a flexible transitional regime in which employers would rather easily obtain work permits for sectors with noticeable labour shortage<sup>57</sup>.

It was not before 25 April 2007 that the Dutch Parliament determined the transitional regime and approved the free movement of CEE-workers<sup>58</sup>. From first May 2007 on, the Dutch labour market was open for migrant workers from the eight countries that acceded to the EU in 2004. 'The Poles' however, were already there. They came via other legal, quasi-legal, and illegal routes, among them Poles with a German passport, CEE-workers with correct work permit, posted workers, ostensibly self-employed persons, and workers without any papers. It is arguable, whether the transitional regime assisted in social dumping, also ask Howerzjil, De Lange and Pool<sup>59</sup>.

### 2.3 Intricate calculation: soft Figures about CEE-Migration in the Netherlands

Migration from CEE-Countries into the Netherlands is no recent occurrence. For instance the first groups of migrant workers already came before the Second World War to work in the mines of Limburg<sup>60</sup>. In the 1980s and 1990s demand for seasonal labour was increasingly difficult to satisfy. According to estimates, about 50.000 illegal persons<sup>61</sup>, most of them Polish, worked in the horticulture in 1987, but in sectors as gastronomy, cleaning companies and construction, illegal work was also common<sup>62</sup>. Up to that time, this practice was more or less tolerated ('*gedogen*') by the Dutch authorities, but from 1992 on, the issue attracted the notice of media and politics. It was widely debated whether Dutch unemployment could be reduced with seasonal work and unions claimed compliance to collective labour agreements<sup>63</sup>. The common habit among landowners to bypass social contribution and taxes came under criticism. Enforcement of controls and concurrent restrictions of work permits made employment of illegal Poles more difficult<sup>64</sup>. A popular solution was to employ Poles with a German passport. From 1989 on, Germany broadly granted Poles who were of German decent dual

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<sup>57</sup> TK, 29407, nr. 8, 13 februari 2004

<sup>58</sup> TK, Handelingen 2006-2007, 25 april 2007, nr. 66, pag. 3581-3589; TK, Handelingen 2006-2007, 26 april 2007, nr. 67, pag. 3667. VK: Doorduyn, Y., 'Werknemers uit nieuwe EU-landen zijn vanaf mei welkom', *De Volkskrant*, 26 April 2007

<sup>59</sup> Houwerzjil, M., De Lang, T., Pool, C., 'De status aparte van werknemers uit de nieuwe EU-lidstaten', *Migrantenrecht* 20, 5 (2005), 148-156

<sup>60</sup> Corpeleijn, A., 'Migranten en werknemers uit de Oost-Europese lidstaten van de Europese Unie', *CBS, Bevolkingstrends*, 3<sup>e</sup> kwartaal 2006

<sup>61</sup> Odé, A., *Migrant workers in the Dutch labour market today*, Amsterdam, Thesis Publishers, Tinbergen Institute Research Series, 1996, quoted in: Pool, C., 'Hedendaags migratie van Polen naar Nederland', *Justitiële Verkenningen* 29,4 (2003), 63-80

<sup>62</sup> Pool, n. 59 above

<sup>63</sup> De Bakker, E., *De cynische verkleuring van legitimiteit en acceptatie. Een rechtssociologische studie naar de regulering van seizoenarbeid in de aspergeteelt van Zuidoost-Nederland*, Amsterdam 2001, 2-3

<sup>64</sup> *Ibid.*, 105-112



citizenship ('*Aussiedlerstatus*'). Presumably between 6.000 and 20.000 of this group of Poles worked in the Netherlands, often via informal intermediaries<sup>65</sup>. The German nationality equated them with other Germans, who enjoyed free movement of workers at least since 1968. Another way for CEE-jobseekers was – and is - the free movement of services. Unlike free movement of workers, free movement of services was effective with the date of accession. CEE-enterprises, posting their own personnel in the framework of the provisions of services according to Directive 96/71EC<sup>66</sup>, act legally<sup>67</sup>. Confining the number of posted workers via work permits is not in accordance with EU-law. Free movement of services also comprises self-employment, which leaves room for loopholes, e.g., ostensibly self-employment. De Vos speaks in this context from 'a growing grey area where services contracts and employment contracts are barely distinguishable'<sup>68</sup>.

These differences made and still make the assessment of numbers of CEE-workers in the Netherlands extremely difficult. First of all, it has to be distinguished between permanent residents and temporary residents. Moreover, illegal workers form a third group that has to be taken into account. Permanent residents are registered via the municipalities that maintain the *Gemeentelijke Basis Administratie (GBA)*.

The Dutch Statistics Agency (*Centraal Bureau voor de Statistiek, CBS*) refers to data from the *GBA*. The following table shows the figures for first generation permanent residents:

Poland		Romania		Bulgaria		summation
Period	Number	Period	Number	Period	Number	
2000	16.015	2000	3.904	2000	1.656	21.575
2004	20.773	2004	5.791	2004	2.818	29.382
2005	24.566	2005	6.115	2005	3.099	33.780
2006	29.567	2006	6.330	2006	3.320	39.217
2007	34.831	2007	6.726	2007	3.529	45.086
2008	41.533	2008	8.503	2008	7.610	57.646

Table 1: Registered persons in the Netherlands, according to country of origin (only first generation). Figures refer to 1 January of the respective year. Source: CBS/ Statline.

First generation migrants were selected, to establish a close relationship between residents and work migration, as second generation migrants would falsify the picture.

<sup>65</sup> Pool, C., 'Open Borders: Unrestricted Migration?' in Böcker, A. De Hart, B., and Michalowski, I. (ed), Migration and the Regulation of Social Integration, *IMIS-Beiträge* 24 (2004), 203-212

<sup>66</sup> 'Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services', *Official Journal* L 018 , 21/01/1997 P. 0001 – 0006, <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:EN:HTML>

<sup>67</sup> Nicolaïdes, K. and Schmidt, S.K., 'Mutual recognition 'on trial': the long road to services liberalization', *Journal of European Public Policy* 14, 5 (2007), 717-734

<sup>68</sup> De Vos, M., 'Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: a Bermuda Triangle for National Labour Standards?', *ERA-Forum* 7,3 (2006), 356-370

In 2008 about 58.000 persons from first generation Poland, Romania and Bulgaria are permanently living in the Netherlands.

Temporary residents however, do only have to register when they stay longer than four month<sup>69</sup>. Until May 2007 CEE-workers acquired a work permit, unless they had a double passport (e.g., ‘German Poles’ see above). Today, this applies only for Romanians and Bulgarians. The number of work permits issued from 2004 to 2006, respectively for the last-mentioned nationals up to 2007, is mirrored in table 2.

Poland		Romania		Bulgaria		summation	summation all CEE-Countries
Period	Number	Period	Number	Period	Number		
2004	20.190	2004	1.300	2004	400	21.890	26.074
2005	26.079	2005	1.885	2005	544	28.508	31.822
2006	53.981	2006	2.266	2006	739	56.986	61.079
2007	-----	2007	2.569	2007	995	3.564	-----

Table 2: Issued work permits by the CWI (*Centrum voor werk en inkomen*) from 2004 to 2006, respectively for Romania and Bulgaria from 2004 to 2007. Source<sup>70</sup>: De Boom et al.; Van den Berg et al.

According to the rules, employers have to pay tax and social security contributions for their employees. Irrespectively whether an employee requires a work permit, he is registered via a national insurance number (*‘social-fiscaal nummer’/ ‘sofi-nummer’*, since November 2007 *‘Burgerservicenummer’/ ‘BSN’*). Corpeleijn refers to the national insurance number when he concludes a number of 72.000 workers fulfilling 100.000 jobs in 2004<sup>71</sup>. From 2000 to 2004 the number of jobs is tripled<sup>72</sup>. De Boom et al. reason from Corpeleijns’ findings the following: The number of 72.000 workers is three times higher than the number of issued work permits in 2004. When conferring the triplication on the number of work permits issued in 2006 - albeit corrected by subtracting work permits with a short period of validity - the number of temporary residents can be assessed on about 120.000, presumably even higher, on 160.000<sup>73</sup>. It is arguable whether this assessment is too vague and it has to be asked, why De Boom et al. did not continue the assessment of Corpeleijn, in using the national insurances numbers. Another, presumably more accurate, method is used by Van den Berg et al.,

<sup>69</sup> Corpeleijn, n.60 above; See also Directive 2004/38 EC n. 24 above, Article 8, 1: ‘for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities’; In the Netherlands this obligation holds for persons that stay longer than four month, see Van den Berg, N., Brukman, M., and Van Rij, C., ‘De Europese grenzen verlegd. Evaluatie flankerend beleid vrij verkeer van werknemers MOE-landen’, *Regioplan*, Amsterdam 4 juni 2008, 8

<sup>70</sup> De Boom, J., Weltevrede, A., Rezai, S., Engbersen, G., ‘Oost-Europeanen in Nederland. Een verkenning van de maatschappelijke positie van migranten uit Oost-Europa en migranten uit voormalig Joegoslavië’, *Risbo-Report/ Erasmus Universiteit Rotterdam*, April 2008, 104; Van den Berg, n.69 above, 9

<sup>71</sup> Corpeleijn, n. 60 above

<sup>72</sup> Corpeleijn, A., ‘Onderzoeksnotitie: Werknemers uit de nieuwe EU-lidstaten’, *Tijdschrift voor Arbeidsvraagstukken* 23,2 (2007), 177-182.

<sup>73</sup> De Boom, n. 70 above, 106

who did research for *Regioplan*. This Dutch institute which does social-economic policy research, and which rendered an expert opinion on behalf of the Ministry of Social Affairs and Employment and the Ministry for Housing and Regional Development (*Ministerie van Volkshuisvesting en Ruimtelijke Ordening/ VROM*) in 2007<sup>74</sup> and 2008<sup>75</sup>, bases its computation under mere on the registrations of the Central Employer Insurance-Administration (*Uitvoeringsinstituut Werknemersverzekeringen, UWV*). According to the number of compulsory insurance policies, the number of insured CEE-workers rose from 30.000 persons in March 2007, which was before the abolition of transitional provisions in May, to about 75.000 in September. This figure remained equal for March 2008. About 90 percent of this group is Polish. Together with registrations of CEE-enterprisers via the Chamber of Commerce (*Kamer van Koophandel*) and estimations based on interviews with social partners and trade control ('*Arbeidsinspectie*') Van den Berg et al. concludes a number of about 100.000 CEE-workers in the Netherlands<sup>76</sup>. The Dutch government bases policy-making processes on figures in the scale of 100.000 to 120.000 persons and refers to *Regioplan*<sup>77</sup>.

What remains, is the question about the number of Romanians and Bulgarians. As European Citizens they are free to enter the Netherlands and to move freely. Thus they are legal migrants at least, albeit free movement of workers is not yet applicable on them. Working without work permit turns them from legal residents to illegal workers. According to the Dutch Statistics Agency (*Centraal Bureau voor de Statistiek, CBS*) about 16.000 first generation Romanians and Bulgarians were registered via the *GBA* on first January 2008<sup>78</sup>. In 2007 about 3.500 work permits were issued<sup>79</sup>. Both numbers combined do not bare the number of temporary residents, however. Van den Berg et al. refuse to give a reliable estimation on the number of illegal working Romanians and Bulgarians<sup>80</sup>. De Boom et al. refer to a number of 20.000 illegal migrants from entire Europe at the moment<sup>81</sup>. In contrast the areas where Poles on the one hand and Romanians and Bulgarians on the other, prefer to settle, are well-known: According to *CBS* Poles live mainly in the area of Brabant and the horticulture areas<sup>82</sup>. Bulgarians

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<sup>74</sup> Van den Berg, N., Brukman, M., Van Rij, C., 'De Europese Grenzen verlegd. Eerste evaluatie flankerend beleid vrij verkeer van werknemers MOE-landen', *Regioplan*, Amsterdam, 13 november 2007

<sup>75</sup> Van den Berg et al. (*Regioplan-Report*), n. 69 above

<sup>76</sup> Van den Berg et al. (*Regioplan-Report*), n. 69 above, 5-10

<sup>77</sup> See, e.g., TK 2007-2008, 29 407, nr. 75 (27 November 2007); TK 2007-2008, 29 407, nr. 81 (16 Juni 2008)

<sup>78</sup> see table 1

<sup>79</sup> see table 2

<sup>80</sup> Van den Berg et al. (*Regioplan-Report*), n. 69 above, 10

<sup>81</sup> De Boom et al. (*Risbo-Report*), n. 70 above, 131

<sup>82</sup> CBS, 'Immigratie trekt aan', *PB08-032*

and Romanians in contrast, establish themselves in the four largest cities, The Hague, Amsterdam, Rotterdam and Utrecht<sup>83</sup>.

To explain the data mentioned above, the following should be taken into account: After May 2007 the legal position of a part of the CEE-workers, e.g., Poles, changed. Persons, who worked as (ostensibly) self-employed or illegal worker before, were more willing to register after that date, enjoying rights connected with their legal status, e.g., benefits of social insurances. Increased registration numbers via *UWV* are thus no indication for migration growth. Figures from the Chamber of Commerce support this assumption: In 2007 the number of polish starters<sup>84</sup> declined sharply by 33 percent, which is a noticeable, reverse trend compared with the total increase in the number of polish workers. In contrast, the number of Bulgarian and Romanian starters dramatically rose to 1.590 starters (746 percent growth), respectively 530 starters (403 percent growth)<sup>85</sup>. The accession of their home-countries on first January 2007 accompanied by concurrent restraint to work, explains these numbers. The dark-figure of ostensibly self-employed among these starters is presumably high, the incentive to work as enterpriser is likely to decrease when free movement of workers is applicable to this group.

The borders' opening, to at least a part of CEE-workers, made facts, e.g., the number of workers, visible. Illegal or semi-legal work-relationships changed into legal contracts. To apply free movement of workers not only improved the legal position of thousands of workers, but is with regard to tax-paying also beneficial for the Dutch state. Certainly the Netherlands attracted additional migrants after May 2007, which can be derived from the increase in permanent residents. The stable legal position may be one reason. More important though, might be the Dutch labour demand. CEE-workers are mainly employed in areas with labour shortage, e.g., agriculture, horticulture, in the meat sector, construction, the metal sector, gastronomy, transport, but in the meantime also increasingly in trade and industry. The dominance of flexible employment relationships is salient: 53 percent of the workers are employed via labour intermediaries respectively recruitment agencies ('*uitzendbureaus*'), but certain sectors

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<sup>83</sup> CBS, 'Immigratie Oost-Europeaanen blijft hoog', 28 November 2007, <http://www.cbs.nl/nl-NL/menu/themas/bevolking/publicaties/artikelen/archief/2007/2007-2334-wm.htm>; See also: NRC:

Weeda, F., 'Haagse wijken in trek bij Bulgaren', *NRC Handelsblad*, 3 May 2008

<sup>84</sup> N.N., 'Rapport Startersprofiel 2007', *Kamer van Koophandel Nederland*, April 2008, 9. The Chamber of Commerce gives a broad definition of starter, which includes all starting enterprisers. Most of them are self-employed persons.

<sup>85</sup> *Ibid.*, 9-11

produce even higher percentages, e.g., 75 percent in the areas of agriculture and horticulture respectively 80 percent in the meat sector<sup>86</sup>.

The present chapter dealt with the principles and backgrounds of free movement of workers that eventually led to the current situation. After many years of debate, CEE-workers from eight 'new' Member States are allowed to work legally in the Netherlands, exercising a fundamental right of EU citizens. Other than Romanians and Bulgarians, abolition of transitional provisions made them workers according to the definition that was developed by the European Court of Justice. The intention to manage migration flows however, in confining free movement of workers in 2004 and facilitating it in 2007, only partially was met. CEE-migrants have been already working in the Netherlands for a long time. The next chapter examines the current situation of CEE-migrant workers living and working in the Netherlands.

### **3 Social Implications and Current Remedies**

Maria do Céu Neves was employed by InterActief, a Dutch labour recruitment agency in Portugal. After 34 hours by bus she arrived in Rotterdam. She signed a Dutch contract. A copy was not given to her, but she did not understand it anyway. The work in the tomato-processing factory was hard, sometimes she worked eleven hours and sometimes she did not work at all. Then she had to hold herself available. The accommodation was shabby and contacts among workers were impeded in moving them from house to house. Do Céu Neves was lucky. After 28 days she was able to quit the job, because her research was finished. In 2007 the Portuguese undercover journalist won with her story<sup>87</sup> the first price of the '*For Diversity. Against Discrimination*' Journalist Award<sup>88</sup>.

Do Céu Neves is no individual case. In the following chapter the social implications of free movement of workers in the Netherlands are described. Paragraph 3.1 addresses the issue work and the measures taken by the Dutch state to tackle exploitation and unfair competition. It is arguable whether the problems are really two sides of the same

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<sup>86</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 15-16

<sup>87</sup> Do Céu Neves, M., 'Portuguese contribute to a new kind of slavery', 18 December 2007, [http://p26604.typo3server.info/fileadmin/content/images/Journalist\\_Award/Articles\\_2007/National\\_Winners/English/PT\\_NW\\_Neves\\_EN\\_OK.pdf](http://p26604.typo3server.info/fileadmin/content/images/Journalist_Award/Articles_2007/National_Winners/English/PT_NW_Neves_EN_OK.pdf)

<sup>88</sup> Europa Press Releases Rapid, 'Portuguese journalist wins this year's 'For Diversity. Against Discrimination' EU press award', *IP/07/1956*, Brussels, 18 December 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1956&format=HTML&aged=1&language=EN&guiLanguage=en>

coin. The following section, paragraph 3.2, deals with housing. The labour recruitment agencies not only provide labour to employers, but they very often also rent accommodation to workers. Furthermore their influence on the political decision-making processes is assessed critical. Why language is important for integration and which solutions are discussed in the Netherlands so far, is described in paragraph 3.3. Special attention is paid to the integration of migrant worker's children. All three topics lead to the conclusion that problems involving the European core principle of free movement of workers should be tackled by cooperation on European level.

### 3.1 The Working Poor

As mentioned in chapter 2.3, sectors of low-skilled labour and flexible employment relationships via recruitment agencies<sup>89</sup> ('*uitzendbureaus*') are characteristic for CEE-workers in the Netherlands. Generally, migrant workers bear more risks to be trapped in vulnerability-vectors, in particular when they entered into an agreement with labour providers<sup>90</sup>, as Eyraud and Vaughan-Whitehead state. According to them, CEE-migrant workers very often face a 'combination of adverse working and living conditions'<sup>91</sup> when employed in the United Kingdom, Ireland and Sweden. The nature of vulnerability is defined by Grimshaw and Marchington. It contains the vectors flexibility, e.g., migrant workers' employment via 'gangmasters' and unsocial working hours, insecurity, e.g., about the amount of working hours to be carried out, undervaluation (remuneration below minimum wage) and poor working conditions, e.g., physical and/ or psychological exhausting work<sup>92</sup>. Work that fulfills these criteria can also be called precarious, determined by Frade and Darmon as 'a variety of forms of employment established below normative standards, which results from an unbalanced distribution towards and among workers of the insecurity and risks typically attached to the labour market'<sup>93</sup>. However, it has to be differentiated between Poles and other EU-8<sup>94</sup> on the one hand and Romanians and Bulgarians on the other hand. Employees

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<sup>89</sup> In the following also referred to as labour providers, labour intermediaries respectively interim work agencies, in the UK also referred to as 'gangmasters'

<sup>90</sup> Eyraud, F., and Vaughan-Whitehead, D., 'Employment and working conditions in the enlarged EU: Innovations and new risks', in *ibid.* (eds.), *The evolving world of work in the enlarged EU*, Geneva 2007, 38-41

<sup>91</sup> *Ibid.* 40

<sup>92</sup> Grimshaw, D., and Marchington, L., 'United Kingdom: Persistent inequality and vulnerability traps', in Eyraud, F., and Vaughan-Whitehead, D. (eds.), *The evolving world of work in the enlarged EU*, Geneva 2007, 549-551

<sup>93</sup> Frade, C., and Darmon, I., 'New modes of business organization and precarious employment: towards the recommodification of labour?', *Journal of European Social Policy* 15 (2005), 107-121

<sup>94</sup> EU-8: CEE-Countries which joined the EU in 2004

without work permit among the latter are illegal workers<sup>95</sup>. The situation of those workers is very often much worse compared to legal migrant workers; this applies for the Netherlands as well as elsewhere. According to Shakhno and Pool, the key differences between the two groups, lie in legal workers being enabled to work according to Dutch law and thus being insured and having a certain choice about what kind of work to accept. Illegal workers are endangered to become 'subjects to mistreatment by some employers'<sup>96</sup>. The relation is akin to what Pijpers described for 'German Poles' and Poles without German passport<sup>97</sup> in the period between the 1990s until the Dutch liberalization: 'the Poles without German passport that followed their fellow villagers to the south-east of the Netherlands remained dependant on the whims and fancies of the gangmasters'<sup>98</sup>. It is impossible to sharply draw a line that splits up legal and illegal workers in those with (more or less) proper and those with poor working conditions. Lack of knowledge about minimum wages or working hours to be absolved for remuneration<sup>99</sup>, fear of dismissal or just being content with less than the minimum wage<sup>100</sup> – the difference to, e.g., Poland is still enormous<sup>101</sup> – are reasons to restrain from complaining. Legality however, obviously improves the situation<sup>102</sup>. Circumvent minimum wages or defraud with working hours as well as poor working conditions are altogether referred to as 'exploitation'<sup>103</sup> - the parallels to Grimshaw and Marchington's definition about vulnerability are salient. Exploitation and unfair competition ('*oneerlijke concurrentie*' or '*oneigenlijke concurrentie*') are two sides of the same coin, Dutch politicians are convinced<sup>104</sup>. Combating unfair competition is thus combating exploitation. Unfair competition means according to Groenewoud and Van Rij reducing costs by employing illegal workers (which are not paid in compliance with minimum wages or collective agreements, the '*collective arbeidsovereenkomst*', '*cao*')

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<sup>95</sup> See chap. 2.3

<sup>96</sup> Shakhno, S., and Pool, C., 'Reverse effects of restrictive immigration policy. Ukrainian migrants in the Netherlands', <http://www.migrationonline.cz>, 9.5.2005, 1-15, also see [http://aa.ecn.cz/img\\_upload/f76c21488a048c95bc0a5f12dece153/Reverse\\_effects\\_of\\_restrictive\\_immigration\\_policies\\_1.pdf](http://aa.ecn.cz/img_upload/f76c21488a048c95bc0a5f12dece153/Reverse_effects_of_restrictive_immigration_policies_1.pdf)

<sup>97</sup> See also chap. 2.2

<sup>98</sup> Pijpers, R.A.H., 'Between fear of masses and freedom of movement: migrant flexwork in the enlarged European Union', doctoral thesis, *Universiteit Nijmegen*, 14 December 2007, 161

<sup>99</sup> See, e.g., NRC: Van der Kolk, H., and Kraamwinkel, M., 'Betaal de Polen behoorlijk en pak de uitzendbureaus aan', *NRC Handelsblad*, 15 December 2007; Trouw: N.N., 'Donner: Beter informeren tegen uitbuiting Polen', *Trouw*, 22 January 2008;

<sup>100</sup> See, e.g., Trouw: Kooi, Z., "'Polen soms tevreden met de helft van het minimumloon'", *Trouw*, 29 April 2008

<sup>101</sup> In the first half year of 2008, the minimum wage in the Netherlands was 1335 Euro, in Poland it was 312,70 Euro. Source: *Eurostat*.

<sup>102</sup> See Shakhno n. 96 above; Pijpers n. 98 above

<sup>103</sup> See, e.g., TK, vergaderjaar 2007-2008, 29407, nr. 76, 5

<sup>104</sup> See, e.g., TK, vergaderjaar 2007-2008, 29407, nr. 92, Motie van het lid Spekman C.S.

and hence gaining a comparative advantage that differs up to six or seven hours a week<sup>105</sup>. Unfair competition could also refer to competition between Dutch and CEE-workers for employment (resulting in replacement of Dutch workers ‘*verdringing*’). Generally, replacement of workers is not applicable however<sup>106</sup>, given the low unemployment rates<sup>107</sup>. As mentioned in chapter 2.3, CEE-workers are represented above average in the recruitment agencies sector. According to Pijpers, ‘International Employment Agencies’ (recruitment agencies that hire workers outside the Netherlands, e.g., Poland) emerged in the agricultural sector. Workers came for the harvest season, cutting asparagus, picking strawberries or mushrooms. Later the agencies extended labour provision to other sectors, e.g., industrial mass production or construction. They also began to arrange accommodation or transport to the work places<sup>108</sup>. In 1998, the Dutch parliament accepted a law annulling licensing obligations for labour intermediaries (‘*WAADI*’, ‘*Wet Allocatie Arbeidskrachten door Intermediairs*’). The law was intended to enable a more flexible labour market, facilitating to launch businesses. The loophole also attracted illegal enterprisers, though. On the other hand, the ‘*Flexwet*’ (‘*Wet Flexibiliteit en Zekerheid*’), adopted in 1999, provided social security for workers, e.g., with collective agreements. This provision was rather expensive for labour intermediaries, thus circumventing collective agreements implied a considerable comparative advantage. The incentive to defraud was tempting<sup>109</sup>. Next to the ‘*bonafide uitzendondernemingen*’, thus bona fide recruitment agencies, mala fide agencies, ‘*malafide uitzendondernemingen*,’ emerged. Bona fide agencies comply with the Dutch law and are commonly registered. Registration however is not necessarily a guarantee for compliance, non-registration no proof for non-compliance<sup>110</sup>. Mala fide agencies are characterized by prevailing of the following attributes: They are very often established for a short time and declare insolvency when called to account for non-compliance. Bookkeeping is incomplete or irreproducible or is completely absent. Working hours

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<sup>105</sup> Groenewoud, M., and Van Rij, C., ‘Naleving van de Wet Arbeid Vreemdelingen in 2006’, *Regioplan*, Amsterdam, 20 September 2007, 28

<sup>106</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 25-28

<sup>107</sup> With 2,8 percent, the Netherlands have currently the second largest unemployment rate in the EU after Denmark. Last year the Netherlands have even been the number one with 3,2 percent. Source: *Eurostat*. See also N.N., ‘Werkloosheid Nederland laagste van de EU’, *Centraal Bureau voor de Statistiek*, Webmagazine 16 Juli 2007

<sup>108</sup> Pijpers n. 98 above, 152-164

<sup>109</sup> Zuidam, M., and Grijpstra, D.H., ‘Over de grens. Een onderzoek naar illegale activiteiten op het gebied van uitzendarbeid’, *Eindrapport in opdracht van de Algemene Bond Uitzendondernemingen*, Leiden, 1 April 2004, 30-31

<sup>110</sup> Dijkema, J., Bolhuis, P., and Engelen, E., ‘Grenzen verleggen. Een onderzoek naar grensoverschrijdende arbeidsbemiddeling in 2006’, *Eindrapport in opdracht van de Algemene Bond Uitzendondernemingen* (Ecorys-Report), Leiden, 4 Oktober 2006, 21



are partly unrecorded (moonlight work), or assigned to another worker, e.g., a legal worker. Social insurance contributions and taxes are paid incorrect. CEE-workers without language-knowledge are urged to sign a Dutch contract that fools him out of a part of his money<sup>111</sup>. De Boom et al. additionally report on non-remuneration, irregular working hours, and dismissal in case of illness or accident at work<sup>112</sup>. The Ministry of Social Affairs and Employment refers to different reports, issued on behalf of the largest associations of the recruitment agency sector<sup>113</sup> itself, the *Algemene Bond uitzendondernemingen (ABU)* and the *Vereniging van Internationale Arbeidsbemiddelaars (VIA)*, assessing the number of mala fide agencies in the Netherlands at in between 1500 (*VIA*) to 6000 (*ABU*) in 2006.<sup>114</sup>.

When deliberating the approval of free movement of workers for EU-8 migrant workers, Dutch authorities feared the expansion of mala fide practices. In February 2007, on the verge of opening the borders, they decided to introduce '*flankerend beleid*', a series of accompanying governmental measures in cooperation with the social partners<sup>115</sup>, thus corporate cooperation, respectively tripartism<sup>116</sup>. These measures where to ensure firstly the compliance with legal provisions, inter alia legal provisions with regard to minimum wages, working conditions and working hours, employing foreign workers, secondly the compliance with collective agreements ('*cao*') for employees of labour providers, and furthermore, to analyze risks and exchange of information. Additionally agreements about housing (also see the following paragraph) between employers and authorities should be controlled. Generally, control of compliance with legal provisions is carried out by the '*Arbeidsinspectie*', which is part of the Ministry of Social Affairs and Employment and which can be described as Work Inspection Task Force. The *Arbeidsinspectie* conducts its controls independently, in case of infringement it has the authority to impose fines; however, it also scrutinizes cases of suspicious working conditions, reported by labour unions or employer organizations<sup>117</sup>. In June 2008, the first evaluation of *flankerend beleid* was published. According to this report *Arbeidsinspectie* and social partners 'judge their cooperation as positive [...] improvement however is possible'. Altogether 61 suspicious cases about

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<sup>111</sup> Zuidam n. 109 above, 27-30

<sup>112</sup> De Boom et al., n. 69 above, 111-114

<sup>113</sup> Employer Organisations that represent the recruitment agency sector. For instance: the largest qua turnover is the *Algemene Bond uitzendondernemingen (ABU)*, the *Nederlandse Bond van Bemiddelings- en Uitzendondernemingen (NBBU)* and *Vereniging van Internationale Arbeidsbemiddelaars (VIA)*.

<sup>114</sup> TK, vergaderjaar 2007-2008, 17050 en 29407, nr. 358

<sup>115</sup> TK, vergaderjaar 2006-2007, 29407, nr. 61

<sup>116</sup> corporation and tripartism will be addressed into detail in chapter 4.1

<sup>117</sup> TK, vergaderjaar 2006-2007, 29407, bijlage nr. 61

non-compliance of provisions were reported; in six cases infringement was stated, in twenty cases the case is still pending<sup>118</sup>. Notwithstanding the cautious contentment of the parties involved - compared with the assessed number of mala fide agencies, the success can be judged to be confined.

Another instrument to combat exploitation that was suggested in the eve of liberalization in May 2007 was ‘*inlenersaansprakelijkheid*’, labour users responsibility. Two Members of Parliament, Toon Heerts from the Social Democrats and Ineke van Gent from the Green Party (*GroenLinks*) aimed for this instrument. Their claim in this respect however, was a rather soft stipulation in exchange for approving the legislative initiative to apply free movement of workers, proposed by the Christian Democrat Minister Piet Hein Donner<sup>119</sup>. Heerts and Van Gent tabled a motion calling for a memorandum about the harms and benefits of labour users responsibility. More precisely, this is a legal entitlement for workers with recruitment agency contracts to demand overdue wage payment from the employer that hired him from the agency<sup>120</sup>. The notably soft condition was obviously used to express concerns about workers’ exploitation without wanting to impede the process of liberalization. The rationale behind this stipulation is the idea to prevent labour users to hire workers for remarkably low prices that are enabled only by exploitation of this worker and thus supporting this exploitation. Without labour users responsibility, the hiring employer has no incentive to take the situation of his employee into account and choose likely the cheapest on the market<sup>121</sup>. Minister Donner however, turned out to be ‘no advocate of legal labour users responsibility with regard to remuneration’. According to him ‘administrative bothering’ (*administratieve rompslomp*) distorts labour market flexibility. Labour users should remain unstressed with information about minimum wages, hence remuneration should remain the task of the labour provider alone<sup>122</sup>. The recruitment agency sector completely agrees with Minister Donner. To outsource payroll accounting is according to the ABU one of the main advantages for labour users. The labour user does not know

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<sup>118</sup> ‘Evaluatie Kader voor samenwerking tussen het Ministerie van Sociale Zaken en Werkgelegenheid en de Sociale Partners ten behoeve van de handhaving van regelingen bij grensoverschrijdende arbeid’, June 2008,

[http://www.stvda.nl/~media/Files/Stvda/Convenanten\\_Verklaringen/2000\\_2009/2008/20080600.ashx](http://www.stvda.nl/~media/Files/Stvda/Convenanten_Verklaringen/2000_2009/2008/20080600.ashx), 3-4

<sup>119</sup> Minister of Social Affairs and Employment

<sup>120</sup> TK, vergaderjaar 2006-2007, 29407, nr. 69, 25 april 2007, ‘Motie van de leden Heerts en Van Gent’

<sup>121</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 41-42

<sup>122</sup> TK, vergaderjaar 2006-2007, 29407, nr. 73, 14 augustus 2007

how much of the total sum, paid to the agency, is spend for labour costs<sup>123</sup>. Of course the agencies also have a vivid interest not to reveal their costs and benefits.

It was also the ABU that convinced Minister Donner of the recruitment agencies sector's suggestion to support draft law concerning self-regulation of the sector<sup>124</sup> as a solution for unfair competition and exploitation at the same time. Donner agrees for instance on the claim for commitment to registration and also on a kind of obligation for certification through the back door: According to the ABU-plan labour users that hire from agencies which denied the NEN 4400-1 certification, are by all means responsible due to wages – other than labour users that only sign contracts with NEN-certified agencies<sup>125</sup>. This plan however, is not without weaknesses: According to Van den Berg et al., the NEN-certification focuses mainly on a correct accountancy<sup>126</sup>, the compliance to legal provisions, for instance minimum wages and taxes. Other non-legal provisions, as compliance to collective agreements, are not controlled. Unions report incidences of unwritten arrangements between agency and employee that forces the latter to work extra hours unpaid<sup>127</sup>.

Comparing and assessing labour users responsibility on the one side and the obligation to register and factually also to certify on the other, the following main difference due to combating exploitation and unfair competition can be stated: Labour users responsibility is primarily an instrument to combat exploitation, as it provides the worker with a legal entitlement. As a side-effect it also supports fair competition, because labour users would generally not dare to hire workers via mala fide agencies - they could be hold accountable for the wages. In contrast, registration and NEN-certification are instruments which concentrate on coping with unfair competition. The worker has no legal entitlement. Of course, exploitation will become more difficult in cases of severe defraud. Cheating with unpaid extra hours or non-compliance with non-legal provisions, like collective agreements however, are not covered, the main point is an accurate accountancy. Thus combating exploitation and unfair competition is related, but does not necessarily have to be the same.

The United Kingdom opened its borders to EU-8 migrant workers already in 2004. Authorities faced problems with regard to illegal practising gangmasters during the last

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<sup>123</sup> Algemene Bond Uitzendondernemingen, 'De ABU is tegen iedere vorm van inlenersaanprakelijkheid voor loonbetaling', *Statmentsheet*, 25 September 2007

<sup>124</sup> TK, vergaderjaar 2007-2008, 17050 en 29407, nr. 358, 19 juni 2008

<sup>125</sup> See nr. 116 above; Bijlage 17050 en 29407, nr. 358

<sup>126</sup> See also NEN 4400-1, Uitleeners en (onder)aannemers – Eisen aan en beoordeling op afdracht van belastingen en sociale lasten en het gerechtigd zijn tot het verrichten van arbeid in Nederland – Deel 1: In Nederland gevestigde ondernemingen. *Nederlands Normalisatie-Instituut*, Delft 2006, 9-14

<sup>127</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 39

years, also before liberalization. On behalf of the House of Commons, a ‘Committee on the Environment, Food and Rural Affairs’ (EFRA Committee) conducted research, but only recommended improvement of compliance due to existing provisions; even registration was not scheduled<sup>128</sup>. In February 2004, the Morecambe Bay disaster occurred: 23 illegal workers, inexperienced in timing the tides, died from drowning when they had to collect cockles<sup>129</sup>. This tragedy was the trigger<sup>130</sup> for passing the Gangmaster Licensing Act in 2004<sup>131</sup>, which came into force in 2005. The Act comprises the establishment of the Gangmaster Licensing Authority (GLA), a Non-Departmental Public Body, which is financed by the Department for Environment, Food and Rural Affairs and is composed of ‘key industry stake-holders and representatives from government and enforcement agencies’<sup>132</sup>. In Article 4 (2) the Act<sup>133</sup> provides that, ‘a person [...] acts as a gangmaster if he supplies a worker to do work to which this Act applies for another person’, thus the Act gives a broad definition of being a gangmaster. According to Article 3 it is applicable to the sectors of agriculture, gathering shellfish and processing or packaging related products. Gangmasters require a license, set out in Article 6 (1). According to Article 15 Enforcement Officers, appointed by the State Secretary of Environment, Food and Rural Affairs, have the right to gain entrance to premises ‘at all reasonable times’, to search into records and to confiscate them, which is set out in Article 16. Working without license can be cursed with imprisonment, provided in Article 12.

When comparing the Gangmasters licensing Act with the NEN-certification plan (cautiously, because the Dutch considerations are in the early stages of development), the following parallels and differences are evident: Both involve economic actors, and both avoid direct provision of legal entitlements to workers. The UK however keeps with establishing the GLA a powerful influence on the enforcement and on further developments. In contrast, according to current Dutch plans, agencies will face enormous differences to act without NEN-certificate - however, it will be no legal obligation to certify. Thus, the government has no direct influence on the constitution of the NEN-Norm, but the recruitment agencies sector has. Another important difference is

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<sup>128</sup> Ryan, B., ‘The evolving legal regime on unauthorized work by migrants in Britain’, *Comparative labor law and policy journal* 27,1 (2006), 27-58

<sup>129</sup> See, e.g., Meadowcroft, J., and Blundell, J., ‘The Morecambe Bay cockle pickers: Market Failure of Governmental Disaster?’, *Economic affairs* 24,3 (2004), 69-71

<sup>130</sup> See, e.g., Williams, C.C., ‘Tackling the Informal Economy: Towards a Co-ordinated Public Policy Approach?’, *Public Policy and Administration* 20,2 (2005), 38-53

<sup>131</sup> Gangmasters (Licensing) Act 2004, [http://opsi.gov.uk/acts/acts2004/ukpga\\_20040011\\_en\\_1](http://opsi.gov.uk/acts/acts2004/ukpga_20040011_en_1)

<sup>132</sup> Rees, D., ‘New measures to tackle exploitation in the UK agricultural industry’, in Kuptsch, C. (ed.), *Merchants of labour*, International Institute for Labour Studies, Geneva 2006, 217-222

<sup>133</sup> See Gangmasters (Licensing) Act 2004, n. 131 above

the power and willingness to control: According to the UK-Act, control is possible ‘at all reasonable times’. In comparison, since 2008, the *Arbeidsinspectie* decided to only control certificated agencies occasionally<sup>134</sup>.

Taking into account that free movement of workers is a core principle of the European Union, it has to be asked, whether there are any provisions on EU level that protect migrant workers from exploitation. Regulation 1612/68 and Regulation 1408/71 outline the scope within the protection of the migrant worker is determined. Regulation 1612/68<sup>135</sup> provides that ‘freedom of movement constitutes a fundamental right of workers and their families’. Non-discrimination and equal treatment with national citizens are the most important elements to ensure this fundamental right. Article 7 for instance states that equal treatment has to be applied ‘in particular as regards remuneration, dismissal, and should [the migrant worker] become unemployed, reinstatement or re-employment’. Furthermore, equal treatment holds true for social and tax advantages and for ‘collective or individual agreement or any other collective regulation’. Thus remuneration below minimum wage or collective agreement or defraud with social security contribution is not only in conflict with National Law, but also with Regulation 1612/68. Enforcement however, certainly combating criminal economic behavior, is within the competence of the National State. The same applies for Regulation 1408/71<sup>136</sup>, which is an agreement about social insurances. While moving between the States, the migrant worker is protected from losing rights on benefits, for instance pensions, and safeguarded against risks like invalidity, sickness or unemployment – here again, provided the employment contract is according to the law.

In 1997, the Economic and Social Committee formulated an opinion on ‘Seasonal labour and migration in rural area: stocktaking and outlook’<sup>137</sup>. Referring to problems as ‘an increase in infringements of regulations laid down by law or collective agreement’ due to sectors with demand of seasonal workers<sup>138</sup>, and also to the low rate of unionization (‘they have no real voice to protect their interests’)<sup>139</sup>, the Committee suggests a dialogue ‘even if conflicting, [...] to arrive at some degree of understandig’ within the interested parties. A dialogue on the EU level is indeed a first step to solve problems the Member State cannot solve alone. The paper will come back to this later.

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<sup>134</sup> TK, vergaderjaar 2007-2008, 17050 en 29407, nr. 358, 19 juni 2008

<sup>135</sup> Compare chapter 2. See Regulation 1612/68 n. 15 above

<sup>136</sup> Compare chapter 2. See Regulation 1408/71 n. 20 above

<sup>137</sup> Economic and Social Committee, ‘Opinion of the Economic and Social Committee on ‘Seasonal labour migration in rural areas: stocktaking and outlook’’, *Official Journal* C355, 21/11/1997 P. 0051

<sup>138</sup> *Ibid.*, para 4.1

<sup>139</sup> *Ibid.*, para 7.1.4

### 3.2 Standardized Crowded Housing

The topic ‘housing’ was already touched in the last chapter: Pijpers<sup>140</sup> explained that recruitment agencies in the agriculture began to provide accommodation and transport. Migrant workers need - preferably low priced - accommodation in their host state quickly, especially when they only come for a few month. Actually, housing of migrant workers turned out to be a lucrative business, sometimes even with higher profit margins than with providing work. Very often agencies rent houses and keep a part of the remuneration back. The higher the number of migrants, living in such a house, the higher is the gain for the agency<sup>141</sup>. Different types of accommodation are in use: Single family houses<sup>142</sup> and flats, accommodation units next to the working place, caravans on the campground<sup>143</sup>, converted monasteries<sup>144</sup> and hotels<sup>145</sup>, and many more<sup>146</sup>. Here again, it has to be distinguished between mala fide and bona fide housing. The landlords of mala fide housing are also called ‘*slumlords*’ or ‘*slum landlords*’, ‘*huisjesmelkers*’ in Dutch. *Huisjesmelkers* are typically owner of houses, renting them to economically deprived or other vulnerable persons for a high rent without investing in maintenance<sup>147</sup>. Next to Dutch *huisjesmelkers*, that kind of source of income is also popular among second generation immigrants that work in the characteristic sectors for migrant workers, thus Poles are awaited to belong to the prospective group of *huisjesmelkers*. Again, illegal workers are the most vulnerable hirers, as they face difficulties to find an accommodation on the regular housing market<sup>148</sup>. Not rooms, but beds or even mere mattresses are to hire<sup>149</sup>. Very often the shelters are outpriced, in bad hygienic conditions and the over-occupation is accompanied with lack of privacy<sup>150</sup>.

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<sup>140</sup> See chap. 3.1

<sup>141</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 52

<sup>142</sup> VK: De Graaf, P., ‘N-Limburg: prop huizen niet vol Polen’, *De Volkskrant*, 12 September 2007

<sup>143</sup> NRC: Kamerman, S., ‘Die caravans belemmeren altijd het uitzicht’, *NRC Handelsblad*, 13 Augustus 2007

<sup>144</sup> VK: Dinjens, M., and Van Hoek, M., ‘Tien vierkante meter per Pool’, *De Volkskrant*, 11 Augustus 2007

<sup>145</sup> Trouw: Nourhussen, S., ‘Polen weten wat ze waard zijn’, *Trouw*, 21 July 2007

<sup>146</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 49-51

<sup>147</sup> Ferwerda, H., Staring, R., De Vries Robbé, E., and Van de Bunt, J., ‘Malafide activiteiten in de vastgoedsector. Een exploratief onderzoek naar aard, actoren en aanpak’, *Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC)*, 2007, 5; Trouw: Van Haastrecht, R., ‘Met z’n negenen op een etage voor 2200 euro. Huisjesmelkers gedijen dankzij de arbeidsmigratie’, *Trouw*, 21 November 2007

<sup>148</sup> Ibid., 44; Engbersen, G., Van San, M., and Leerkes, A., ‘A room with a view. Irregular immigrants in the legal capital of the world’, *Ethnography* 7,2 (2006), 209-242

<sup>149</sup> Ibid., 52; Kromhout, M.H.C., Wubs, H., and Beenackers, E.M.T., ‘Illegaal verblijf in Nederland’, *Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC)*, 2008, 26

<sup>150</sup> Ferwerda, n. 147 above, 30

The above mentioned development about agencies organizing accommodation for migrant workers provided them with an advantage of practice experience about this issue. ‘Bona fide’ sector representatives are only too pleased to stress their responsibility due to accommodation, as this provides them with influence and affords them with the opportunity to effectively bring in their expert knowledge<sup>151</sup>. The Ministry of Social Affairs and Employment on its part is only too pleased to stress the ‘moral responsibility of the employer’<sup>152</sup> for housing, as the Dutch public is dissatisfied with the busy housing market<sup>153</sup>, and citizens are for instance annoyed about overcrowded single-family houses used as boarding houses with often changing inhabitants<sup>154</sup>. For trouble solving, government and social partners cooperate again within the framework of *flankerend beleid*<sup>155</sup>. ‘Bona fide’ housing was defined by the VIA, one of the recruitment agency sector representatives<sup>156</sup>. The definition was adopted by the Ministry for Housing and Regional Development (*VROM*)<sup>157</sup> and the Association of Dutch Communities (*VNG*)<sup>158</sup>, which indicates a common factsheet<sup>159</sup>. To comply with the standard, employers have to take 10 to 12 square meters per worker into account. If more than two persons live in a room, the inhabitants should be asked for agreement. Not more than eight persons should share a toilet and a shower. The rent should not be higher than 45-65 Euros per week. A person in charge should attend the accommodation daily and mediate in case of bothered neighbors. Fire provisions have to be complied with and accommodation rules should also exist in the home countries’ languages of the inhabitants.

*Flankerend beleid* also stresses that housing is a ‘task and responsibility’ of the employer. Binding agreements between Dutch authorities and employers were not made so far; the standards for accommodation of CEE-workers however were included in the

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<sup>151</sup> See, e.g., Gibcus, T., “‘De Uitzendbranche, de normen en de werknemers uit Midden en Oost Europa’”. Wat kan de uitzendbranche voor gemeenten betekenen? *Notitie Algemene Bond Uitzendondernemingen*, 31 januari 2008

<sup>152</sup> See, e.g., TK, vergaderjaar 2007-2008, 29407, nr. 75, 6

<sup>153</sup> See, e.g., Trouw: Van Meteren, W., ‘Woningmarkt onder druk door komst Polen’, *Trouw*, 20 July 2007; VK: Dinjens, M. and Van Hoek, M., ‘Kloosters bevolkt door Polen’, *De Volkskrant*, 1 Augustus 2007

<sup>154</sup> VK: De Graaf, P., “‘Dit riekt naar huisjesmelken’”; Een Pools gezin zouden we niet erg vinden, maar “dit lijkt wel matrassenverhuur”, *De Volkskrant*, 14 September 2007

<sup>155</sup> See TK 29407, nr. 77 above; ‘Evaluatie Kader voor samenwerking tussen het Ministerie van Sociale Zaken en Werkgelegenheid en de Sociale Partners ten behoeve van de handhaving van regelingen bij grensoverschrijdende arbeid’, nr. 118 above

<sup>156</sup> About VIA (*Vereniging van Internationale Arbeidsbemiddelaars*) see nr. 113 above

<sup>157</sup> Ministry for Housing and Regional Development<sup>157</sup> (*Ministerie van Volkshuisvesting en Ruimtelijke Ordening/VROM*)

<sup>158</sup> *Vereniging van Nederlandse Gemeenten* (represents the interests of communities)

<sup>159</sup> VROM, VIA, VNG, ‘Factsheet Huisvesting Arbeidsmigranten. Huisvestingsvormen’, April 2008

collective agreements of the recruitment agency sector<sup>160</sup>. The corporate agreements also serve as basis for communities that struggle with the consequences of crowded accommodation of CEE-migrants in already deprived districts with different ethnic minorities, which holds true for Rotterdam and The Hague<sup>161</sup>, or annoyance of Dutch citizens in residential areas (see above). 53 Communities, representatives of the Ministry of Social Affairs and Employment, the Ministry of Housing and Regional Development and Social Partners met on a summit conference on housing and integration problems for the first time on 12 December 2007 in Rotterdam<sup>162</sup>. The summit which was called ‘*Polentop*’<sup>163</sup> in the news, served as forum to exchange experience; further meetings are planned. Instruments for communities to get a handle on their respective situation are for instance to demand a license for hiring out single rooms instead of complete flats, the prohibition of running boarding houses in certain areas, and to control the distribution of housing space or health- and safety provisions (according to the legal provisions ‘*Huisvestingswet*’ and ‘*Woningwet*’). Cooperation with the tax authorities provide communities with address data by now<sup>164</sup>. In case of illegal housing however, these instruments are powerless. Last year Rotterdam closed 230 illegal boarding houses, this year already 170 so far. 5000 Eastern European migrants are registered; probably another 1000 non-registered are living in this city. Rotterdam claims for accommodation near the workplaces, as a high number of CEE-workers living in Rotterdam is working in the surrounding rural areas, and the city is generally strictly enforcing provisions in case of mala fide infringements<sup>165</sup>.

European legislation does not consider the special circumstances of housing via the employer. Generally, Regulation 1612/68<sup>166</sup> provides that a migrant worker has to be equalized with nationals due to all ‘matters of housing, including ownership of the housing he needs’ [Article 9 (1)]. Furthermore the worker has to be considered on waiting lists and treated in the same way due to benefits and priorities, if and when such lists exist [Article 9 (2)]. Article 10 obligates the worker to arrange accommodation that

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<sup>160</sup> ‘Evaluatie Kader voor samenwerking tussen het Ministerie van Sociale Zaken en Werkgelegenheid en de Sociale Partners ten behoeve van de handhaving van regelingen bij grensoverschrijdende arbeid’, nr. 118 above, 6-7

<sup>161</sup> See, e.g., NRC: Hoogstad, M., ‘In Rotterdam-Zuid wachten geen gouden bergen. Toestroom Oost-Europeaan. Gemeenten praten bij ‘Polentop’ over overlast, maar particulieren profiteren van goedkope arbeid’, *NRC Handelsblad*, 11 December 2007

<sup>162</sup> Van den Berg et al. (Regioplan-Report), n. 69 above, 58

<sup>163</sup> See, e.g., NRC: Hoogstad, M., ‘Weer verrast door arbeiders die blijven. Polentop. Minister Donner geeft gemeenten voorlopig geen financiële en juridische hulp’, *NRC Handelsblad*, 13 December 2007

<sup>164</sup> TK, vergaderjaar 2007-2008, 29407 nr. 76, 20 December 2007

<sup>165</sup> Trouw: Van Haastrecht, R., ‘Rotterdam wil Oost-Europese immigratie niet alleen dragen’, *Trouw*, 13 June 2008

<sup>166</sup> See Regulation 1612/68 n. 15 above



is 'considered as normal for national workers in the region where he is employed' [Article 10 (3)]. This provision however does not contain commitment for the agencies that act as landlords. It is arguable which decision the European Court of Justice would take if a worker would bring an action to a court and could prove the dependence on his approval of the accommodation to be employed. After all, the accommodation is part of the remuneration very often and as mentioned above, the gains for the (also bona fide) agencies are not negligible. But these considerations are hypothetical.

The situation in the Netherlands is difficult, the housing market in the rather small country with 16,4 million inhabitants<sup>167</sup> is tight, and cheap accommodation is scarce. Communities try to meet the expectations and need of Dutch citizens and numbers of different ethnic minorities. On the other side, there are the needs of migrant workers. Their manpower is welcomed and they are expected to integrate in the Dutch society in a positive manner, Rotterdam however tries to confine their number, albeit for understandable reasons. The influence of the recruitment agency sector with regard to standards is conflicting. From an economic point of view accommodation should meet the legal provisions, but then as inexpensive as possible. It is arguable, whether accommodation is an expense factor only, or if further attributes, as quality of life should be taken into account and who represents these interests. The United Kingdom is considerably larger than the Netherlands, the problems due to housing are not that visible and salient, but apart from that they are alike<sup>168</sup>. An approach to common problem solving on the European level due to comparable conflicts will be discussed in another chapter.

### 3.3 Integration in Dutch

Bulgarian migrants are well integrated in the *Schilderswijk* in The Hague. They have no language difficulties and accommodation and jobs are relatively easy to obtain. Engbersen et al., attributes this integration to 'informal market relations', facilitated by the circumstance that a subgroup of Bulgarians belong to a Turkish speaking minority in their home country, which grants them access to the Turkish dominated local market and neighborhood networks in The Hague<sup>169</sup>. The irregular housing market provides

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<sup>167</sup> CBS: N.N., 'Statistisch Jaarboek 2008', *Centraal Bureau voor de Statistiek (CBS)*, Den Haag 2008, 37

<sup>168</sup> See, e.g., Spencer, S., Ruhs, M., Anderson, B., and Rogaly, B., 'Migrants' lives beyond the workplace. The experiences of Central and East Europeans in the UK', *Joseph Rowntree Foundation*, 2007,38-50

<sup>169</sup> Engbersen et al, n. 148 above

migrants with floors, rooms or (bunk) beds in ‘sleeping houses’ and semi-legal employment agencies are too willing to employ illegal workers<sup>170</sup>.

Language obviously is the key to integration; this applies for illegal networks as well as for desirable integration in the Dutch society. In October 2007 the Dutch Parliament discussed about a compulsive integration- and naturalization-course, ‘*inburgeringscursus*’, for CEE-migrants, which includes the acquisition of the Dutch language<sup>171</sup>. Non-EU Citizens are obligated to follow such a course and to pass an exam<sup>172</sup>. To apply such rules on European Citizens however, would have been in conflict with European Law, and that was why the Dutch authorities hesitated<sup>173</sup>. Apart from the prohibition to impede free movement of workers, the European Union has always respected the different languages of its Member States<sup>174</sup> and has valued language-knowledge as important mean for integration, as can be seen from the ECJ’s dictum in *Groener* in 1989.

Anita Groener, a Dutch citizen, worked as part-time teacher at the College of Marketing and Design in Dublin and applied for a permanent full-time post. Although the teaching was in English, Irish authorities insisted on knowledge in Gaelic. The Court approved the requirement of Gaelic knowledge ‘as a means of expressing national identity and culture’, and because ‘Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the school’<sup>175</sup>. Two conclusions can be drawn in the light of this judgement: Firstly, language requirements outweighed the removal of movement barriers in this case and secondly, language was seen as irreplaceable mean to integration, although the language was not required for the work as such. The Court of Justice does not have to follow previous rulings. It can be assumed however, that the suggestion to discuss language requirements for migrant workers on EU level could be successful.

The Dutch Ministers of the Department of Social Affairs and Employment, Piet Hein Donner, and of the Department of Housing and Regional Development, which is also

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<sup>170</sup> Leerkes, A., Engbersen, G. and Van San, M., ‘Shadow Places: Patterns of Spatial Concentration and Incorporation of Irregular Immigrants in the Netherlands’, *Urban Studies* 44,8 (2008), 1149-1516

<sup>171</sup> See, e.g., VK: De Graaf, P., and Meerhof, R., ‘Kamer wil dat ook Polen inburgeren’, *De Volkskrant*, 12 Oktober 2007

<sup>172</sup> Michalowski, I., ‘Integration Programmes for Newcomers – a Dutch Model for Europe?’, in Böcker, A. De Hart, B., and Michalowski, I. (ed), *Migration and the Regulation of Social Integration*, *IMIS-Beiträge* 24 (2004), 163-175

<sup>173</sup> TK, vergaderjaar 2007-2008, 29407, nr. 75, 27 november 2007

<sup>174</sup> See, e.g., Horspool, M., ‘Over the rainbow: Languages and law in the future of the European Union’, *Futures* 38,2 (2006), 158-168

<sup>175</sup> Case 379/87, ‘Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee’. Judgement of the Court of 28 November 1989, para 18, para 20, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0379:EN:HTML>

the Department for Habitation, Neighborhoods and Integration ('Wonen, Wijken en Integratie'), Ella Vogelaar, decided that *inburgeringscursussen* for CEE-migrants should remain voluntarily, but not for free. Generally, volunteers have to pay an amount of 270 Euros<sup>176</sup>. The offer for CEE-workers however was considered to be made part of the collective agreements for recruitment agency workers and the responsibility for the rights and duties for an *inburgeringscursus* should be shared between 'the Dutch State, employers, communities and CEE-citizens'. Furthermore, within the framework of *inburgering*, integration and participation, active attendance in parishes, sports clubs and other leisure activities that could help to integrate in the Dutch Society, should be facilitated<sup>177</sup>. In June 2008, Donner and Vogelaar emphasized the successful integration of permanent CEE-residents, however considered elementary Dutch skills and basic knowledge about the Netherlands as important for temporary workers, too<sup>178</sup>. With regard to *inburgeringscursussen* they signalized that funding was available by now and that unbureaucratic offers will be made<sup>179</sup>.

With a minimum wage of 1335 Euros (rent has to be deducted) and the motivation to primarily save money for the family or a future in the home state, it would have been unrealistic to enforce a course that costs 270 Euros. By offering the *inburgeringscursus* for free however and by placing it within the framework of collective agreements, it has a genuine chance. It is positively noticeable that for the first time cooperation between not only the Dutch State, employers and communities are scheduled, but that CEE-workers are included (see above).

The success of permanent integration of a worker is dependant to a high degree on the right of free movement of his family, in order to join him to the host state. In establishing 'Directive 2004/38 EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', the Community ensured this basic condition of integration, in defining 'family member'<sup>180</sup> in a broad way: According to Article 2 (2), 'family member' includes the spouse or partner out of a partnership which can be regarded as 'equivalent to marriage', children younger than 21 or dependant family members (e.g., handicapped children older than 21), which also applies for children or dependants of the spouse or partner and 'dependent direct relatives in the ascending line' (e.g., old parents in need of care).

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<sup>176</sup> TK, see n. 173 above

<sup>177</sup> TK, vergaderjaar 2007-2008, 29407, nr. 76, 20 december 2007, 6-7

<sup>178</sup> TK, vergaderjaar 2007-2008, 29407, nr. 81, 16 juni 2008

<sup>179</sup> TK, vergaderjaar 2007-2008, 29407, nr. 82, 24 juni 2008

<sup>180</sup> Directive 2004/38 n. 24 above

Supporting the worker's integration in the host state by joining him with his family members makes sense only if family members themselves have the chance to integrate. Here the European Community turned its attention to the integration of children that have to go to school in the host state. 'Council Directive 77/486 EEC of 25 July 1977 on the education of the children of migrant workers'<sup>181</sup> provides in Article 2 that schools in the host state have to teach 'adapted to the specific needs of such children [...] the official language or one of the official languages of the host state'. According to Article 249 TEC directives are 'binding as to the result to be achieved [...] but shall leave to the national authorities the choice of form and methods'.

The Netherlands implemented Directive 77/486 with Article 34 of the '*Regeling bekostiging personeel primair onderwijs 2008-2009 en aanpassing bedragen leerlinggebonden budget voortgezet onderwijs 2008-2009*'<sup>182</sup>, a regulatory provision of Ministry of Education, Culture and Science (*Ministerie van Onderwijs, Cultuur en Wetenschap*). Schools can apply for 1.208,65 Euros for the teaching and language education for children, in the first year of their residence in the Netherlands. Additionally an amount of 36,93 Euros is set aside for material. For schools that never taught children from other states of origin before, a singular payment of 4.882 Euros is scheduled.

'*De Kameleon*' in Rotterdam Carnisse, urban district Charlois, is a primary school with 10 year experience in the education of children without Dutch language skills. Charlois is a deprived district, 40 children of the altogether 220 children are from CEE-countries, 16 of them are at the moment in remedial classes, '*schakelklassen*', together with 12 children of non-EU origin. A *schakelklas*, which concentrates on teaching Dutch, costs 40.000 Euros a year. Commonly a child learns Dutch within one ore one and a half year in such a class. *De Kameleon* projects two additional classes in the next term, furthermore the project '*schakel plus*', for children that need additional language support. The luxury of *schakelklassen* is funded by the Community Rotterdam - the amount of about 35.000 Euros via the regulatory provision for 28 children would even not have been enough for one class<sup>183</sup>.

Children in the rural areas are not so fortunate. A language teacher travels from village to village. Nine children of CEE-origin in Heerwaarden and five non-Dutch

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<sup>181</sup> 'Council Directive 77/486 of 25 July 1977 on the education of the children of migrant workers', <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0486:EN:HTML>

<sup>182</sup> 'Regeling bekostiging personeel primair onderwijs 2008-2009 en aanpassing bedragen

leerlinggebonden budget voortgezet onderwijs 2008-2009', *Staatscourant* 10 april 2008, nr. 70

<sup>183</sup> telephone conversation with Kees Liekens, internal Coach CEE-children, Basisschool 'De Kameleon', Carnisse-Charlois, 7 July 2008

children in Ammerzoden (villages that belong to the community Maasdriel) are visited two times a week for half an hour. The funding for the next term is unclear. Because of their language deficits, the children remain among themselves<sup>184</sup>.

The examples show that the funding provided by the State is not sufficient. In contrast to urban schools in deprived areas, schools without experience and additional funding are overstrained. This is mainly the case in the rural areas, in which CEE-workers come as harvester, but remain in the Netherlands to work subsequently for instance in the food processing industry<sup>185</sup>. Altogether 7.000 children of CEE-workers attended their parents in the Netherlands by now<sup>186</sup>. Migrant children with lack of language skills, isolated because of the language barrier, inexperienced teachers, and lack of funding are problems, the United Kingdom also struggles with. 942,64 Pounds, about 1270 Euros<sup>187</sup> are scheduled for 'EAL Children', children with 'English as additional Language'. The increase of school aged children from CEE-countries since May 2004 overwhelms schools in the UK<sup>188</sup>.

Given the problems due to integration are related to an EU-principle – the free movement of workers – the persons involved are EU-citizens and the problems affect all Member States, cooperation is useful. The present chapter dealing in its paragraphs with problems due to work, housing and integration came for all three issues to the conclusion, that problem solving is also a task of the European level. The next chapter examines which methods are qualified to tackle this task. The suggestion of State Secretary Frans Timmermans, to use the Open Method of Coordination for an exchange of best practices<sup>189</sup>, will be taken into account, as well as the approach the International Labour Organization generally favors for policy-making processes relating to employment and social affairs.

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<sup>184</sup> telephone conversation with Helma Bakker, deputy headmaster, Openbare Tweestromenschool, Basisschool te Heerwaarden, 1 July 2008; telephone conversation with Henk Savelkoul, deputy headmaster, RK Basisschool De Schakel, Ammerzoden, 1 July 2008

<sup>185</sup> See, e.g., NRC: Weeda, F., 'Op maandag drie Poolse kinderen erbij', *NRC Handelsblad*, 1 October 2007

<sup>186</sup> See, e.g., TK, vergaderjaar 2007-2008, 29407, nr. 76, 20 december 2007

<sup>187</sup> Budget Statement: 2007/08 Financial Year, Summary of overall delegated budget by individual Common Funding Formula factor, Department of Education, [http://www.deni.gov.uk/part\\_3-3.pdf](http://www.deni.gov.uk/part_3-3.pdf)

<sup>188</sup> See, e.g., N.N., 'Schools overwhelmed as 1 in 5 speak English as second language', *Mail Online*, 29 September 2006, <http://www.dailymail.co.uk/news/article-407711/Schools-overwhelmed-1-5-speak-English-second-language.html>

<sup>189</sup> TK, vergaderjaar 2007-2008, 31202, nr. 25, 14 mei 2008

## **4 How to tackle transnational Problems**

Migrant Workers are EU-citizens. They are provided with basic rights that allow them to enter a host state, to work there, to stay. There are permitted to take their family with them, a spouse, a partner, children, persons with own needs. It is arguable though, whether the host state really provides the capacity to meet the needs of this person subgroup. This chapter deals with the question which regime is suitable to tackle apparently national problems in which supranational provisions are involved. Paragraph 4.1 scrutinizes tripartism as problem solving regime. Yet while self-regulation looks back on a decent tradition in Western European nation states, it is arguable whether it is applicable to conflicts the paper is dealing with, as well on the national as on the European level. Another resort could be the Open Method of Coordination (OMC), a soft law approach, which was introduced to solve problems related to political sensitive issues on voluntary basis. Whether OMC is applicable on the interrelating problems due to work, housing and integration, is examined in Paragraph 4.2.

### **4.1 Organizing Interests**

The problems related to work, housing and integration need regulation. In the chapters above, measures adopted by the Dutch State are described and assessed. It is arguable though, whether a Nation State is capable and legitimate to tackle problems alone that involve Citizens from other Nation States.

When moving from one State to another, migrant workers cross the today invisible borders within the European Union. They live and work as European Citizens in another State but remain National Citizen of their State of Origin. Notwithstanding European Union Law equalizes them with National Citizens to a large extend, essential differences remain. Articles 17-22 TEC comprise the provisions with regard to European Citizenship. According to Article 17 European Citizenship complements National Citizenship, but does not replace it. Article 19 provides European Citizens with passive and active suffrage in their host country, but this right only applies for municipal elections and elections to the European Parliament. National parties and politicians do not have to take EU Citizens as voters into account, although they live and work in their districts. A vacuum emerged, which is filled willingly by economic actors. Regulating housing demand in the Netherlands gives an illustrative example: As long as migrant workers illegally entered the country, authorities ignored the topic of housing and concentrated on the issue of confinement of migrants instead.

Accommodation was organized by the recruitment agencies themselves. Today they present complete solutions and standards, which are accepted by Dutch authorities that primarily take the interests of Dutch citizens – their voters - into account.

Senior ILO official Jean-Michel Servais, too, is convinced that the ability of the state to act is confined by the internationalization of the market economy. If Member States fail to cooperate, lobbying and political pressure will replace common decisions. He therefore claims for social policies European tripartite, thus corporate, negotiations, collective action that leads to compulsive agreements between employers and employees<sup>190</sup>. Is tripartism on the European level a possible solution? Therefore the paper concentrates on tripartism respectively corporatism and generally organization of interests on the national level first, as basis to scrutinize the suggestion for the European level.

On national level, this form of problem solving is widely accepted in Europe, especially in the Netherlands where it is also referred to as ‘Polder Model’. The ‘Accord of Wassenaar’ in 1982 is a popular example as the negotiated agreements produced wage moderation, saved and even created jobs and calmed down inflation<sup>191</sup>. To reach a fair and successful agreement however, certain conditions have to be met. Democratic corporatism, defined by Lijphart et al. as instrument which requires ‘national, specialized, hierarchical and monopolistic peak organizations’ that are incorporated in concertation (which is the ‘process of policy formation and implementation’)<sup>192</sup>, bases on actors that are able to organize and represent their interests. It presupposes negotiation partners, which are roughly equally strong. Without balance of power however, corporatism or tripartism degenerates into farce. Ost, e.g., writes about corporatism in CEE-countries: ‘While the façade of tripartism is present throughout the region, with duly constituted commissions holding regular meetings bringing together formal representatives of the state, trade unions, and employers, this is no position to bring about the politically stabilizing and economically inclusionary class compromise that was West European neocorporatism’s great achievement.’<sup>193</sup> Next to the weakness of class consciousness, Ost complains the absence of ‘authoritative representatives of labor’. While labour in Western European Countries is represented well, this does not

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<sup>190</sup> Servais, J.M., ‘Quelque réflexions sur un modèle social européen’, *Relations industrielles* 56, 4 (2001), 701-719

<sup>191</sup> Andeweg, R.B., ‘From Dutch Disease to Dutch Model? Consensus Government in Practice’, *Parliamentary Affairs* 53 (2000), 697-709

<sup>192</sup> Lijphart, A., and Crepaz, M.M.L., ‘Corporatism and Consensus Democracy in Eighteen Countries: Conceptual and Empirical Linkages’, *British Journal of Political Science* 21,2 (1991), 235-246

<sup>193</sup> Ost, D., ‘Illusory Corporatism in Eastern Europe: Neoliberal Tripartism and Postcommunist Class Identities’, *Politics and Society* 28 (2000), 503-530

apply for migrant workers in those countries. An explanation is given by Olson. Migrant workers have common interests by all means; they are not organized however and have no lobby that advocates their needs. They hence belong to the “forgotten groups”, those, who suffer in silence<sup>194</sup>. Inability to organize is according to Winter and Willems, referable to inter alia problematic group attributes like lack of encompassment and high fluctuation. Furthermore, lack of resources and failure of group identity constitute ‘weak interests’<sup>195</sup>. All these attributes apply to CEE-workers in the ‘old’ Member States: They come to improve their standard of living, thus bring no (financial) resources with them. Different legal status makes their group inhomogeneous, EU-8 Nationals enjoy the freedom to apply for a job without restrictions, while Romanians and Bulgarians need work permits or work illegal, a fact that makes them more vulnerable – and thus for some employers all the more attractive<sup>196</sup>: The interests of EU-8 Nationals have to be seen apart from Romanians and Bulgarians, as they partly even compete with each other. Permanent residents have other needs (e.g., education of their children) than seasonal workers that require for instance temporary housing that is inexpensive but nonetheless regular. Latter belong to the ‘fluctuant’ group. Dundon et al., trace the migrant workers’ inability to organize, back to exploitation and intimidation, on social exclusion and the lack of knowledge about the benefits and chances of joining a union. The requirement of a work permit keeps them dependant on their employers. The authors criticize the powerful influence of economic representatives: ‘the movement of labour will be increasingly organized by entrepreneurial groups of both a legitimate and criminal nature, and take place outside traditional channels and beyond the regulatory control of industrial relations institutions’<sup>197</sup>. If the employer side plays such an important role, the role of the host state unions should be scrutinized. Could they constitute the lobby, Olson refers to? The role of the unions is ambivalent. According to Schmidt, labour unions have a tradition of international solidarity. They are not convinced of the states’ capability to control migration. To gain migrants as members could enhance the labour unions’ position and organizing them also provides a mean to control them. On the other side, mistrust

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<sup>194</sup> Olson, M., *The Logic of Collective Action, Public Goods and the Theory of Groups*, Cambridge 1965, 165-167

<sup>195</sup> Willems, U., and Von Winter, T., ‘Soziale Marginalität und kollektives Handeln, Bausteine einer Theorie schwacher Interessen’, in *ibid.* (eds), *Politische Repräsentation schwacher Interessen*, Opladen 2000, 14-19

<sup>196</sup> See, e.g., NRC: De Vries, G., ‘De tuinder heeft nu liever Roemenen’, *NRC Handelsblad*, 13 August 2007

<sup>197</sup> Dundon, T., González-Pérez, M.A., and McDonough, T., ‘Bitten by the Celtic Tiger: Immigrant Workers and Industrial Relations in the New “Glocalized” Ireland’, *Economic and Industrial Democracy* 28,4 (2007), 501-522



remains with regard to competition and potentially worsening working conditions and also the question why to protect the interests of all workers instead of only their own<sup>198</sup> (a fact Olson referred to as ‘free rider’<sup>199</sup> problem).

The ambiguity also becomes clear by Olson: ‘Labour unions, for example, sometimes advocate the “solidarity of the working class” and demand the closed shop<sup>200</sup>, yet set up apprenticeship rules that limit new “working class” entrants into particular labor markets’<sup>201</sup>. The host state labour unions provide hence no reliable solution in advocating the interests of migrant workers.

This and the lack of inclusiveness in policy making processes on the national level – the Dutch State at least intends to involve migrants due to the integration topic, which is not self-evident – leaves only the supranational level as suitable arena. It has to be doubt however that transferring the conflicts to a European tripartite panel would solve the above mentioned problems of weak interest representation, lack of organization and inhomogeneity of migrant workers. Apart from the structural weakness of Central and Eastern European labour representation described by Ost, trade unions from ‘old’ and ‘new’ Member States would have to speak with one voice to be a powerful negotiator towards employer organizations. Opposing interests (e.g., resulting from wage differentials) however undermine solidarity, generally different ‘national institutions, regulation regimes and traditions’ hamper cooperation<sup>202</sup>. This argumentation fits in the inability of the European Trade Union Confederation (ETUC)<sup>203</sup> to take any measures beyond the adoption of the resolution ‘Towards free movement of workers in an enlarged European Union’ in 2005, claiming the participation of social partners on all levels<sup>204</sup>. Thus the conditions for balanced bargaining between equal social partners that result in fair collective agreements are simply not given. Nonetheless problems relating to the principle of free movement of workers remain transnational problems and should be solved commonly. Member States themselves should develop common standards, as National Citizens from all Nation States, regardless of living in their states of origin or

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<sup>198</sup> Schmidt, V., ‘Temporary migrant workers: Organizing and protection strategies by trade unions’, in Kuptsch, C. (ed.), *Merchants of labour*, International Institute for Labour Studies, Geneva 2006, 191-206

<sup>199</sup> Olson, n. 194 above, 76-91

<sup>200</sup> the ‘closed shop’ refers to compulsive, thus inclusive membership

<sup>201</sup> Olson, n. 194 above, 39

<sup>202</sup> Deppe, F., ‘Der Umbau des Sozialstaates in Europa und die Probleme der Gewerkschaften’, in Baum-  
Ceisig, A. and Faber, A. (eds.), *Soziales Europa? Perspektiven des Wohlfahrtsstaates im Kontext von  
Europäisierung und Globalisierung*, Wiesbaden 2005, 87-88

<sup>203</sup> the umbrella association of trade unions from all Member States

<sup>204</sup> ETUC, ‘Towards free movement of workers in an enlarged European Union’, Resolution adopted by  
the ETUC Executive Committee, Brussels 2005, <http://www.etuc.org/a1898>

as migrant worker in a host state, are represented by their Nation State within the Institutions of the European Union.

#### 4.2 Discussing OMC

Member States were always hesitating to give up competencies to the supranational level. Since processes of globalization produce external effects however, they have to take a decision from time to time which Dahl described in the context of the Maastricht negotiations as ‘fundamental democratic dilemma’: Member States have the choice to preserve their authority, with the effect, that they cannot solve cross-border problems effectively. Alternatively they use economies of scale and ‘increase the capacity of a large political unit’ by transferring competences to the EU-level. This however diminishes proportionally their influence as individual Nation State<sup>205</sup>.

In 2008, State Secretary for Foreign Affairs Frans Timmermans considered cooperation on EU-level to solve integration problems due to free movement of CEE-workers. First of all he pointed out: *‘Integratie en inburgering zijn nationale competenties en dienen dit naar de mening van het cabinet te blijven’*<sup>206</sup> (Integration and naturalization are competencies of the Member State, which shall, according to the cabinet, remain unchanged). Within the framework of the ‘Open Method of Coordination’, Timmermans suggested to exchange best practices with other Member States, to support mobility and participation of EU-workers. Actually, the Open Method of Coordination (OMC) is a compromise in decision-making: It enables cooperation within fields that belong to the core principles of States without giving up competences. Instead, it relies on ‘the agreement of a common set of goals’ on the one hand and on ‘naming and shaming’, a kind of soft pressure, on the other<sup>207</sup>. Its main disadvantage compared to usual Community policy making processes is that Member States decide themselves which measures they finally implement; maintaining the status-quo is possibly the consequence. Political sensitive issues however, would, without the condition of voluntariness, presumably never be discussed on the European level, which also indicates the position of State Secretary Timmermans. Additional strong points are also highlighted by De Búrca and Zeitlin: ‘OMC encourages convergence of national objectives, performance and policy approaches rather than specific institutions, rules and programs, this mechanism is particularly well suited to identifying and advancing

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<sup>205</sup> Dahl, R.A., ‘A Democratic Dilemma. System Effectiveness versus Citizen Participation’, *Political Science Quarterly*, 109,1 (1994), 23-34

<sup>206</sup> TK, vergaderjaar 2007-2008, 31202, nr. 25, 14 mei 2008

<sup>207</sup> Hix, S., *The political system of the European Union*, Basingstoke 2005, 247

the common concerns and interests of the Member States while simultaneously respecting their autonomy and diversity'<sup>208</sup>.

OMC was first introduced on the Lisbon Summit in March 2000, its forerunners however can be traced back to concepts of 'post-Maastricht', 'post-Amsterdam' or even to ideas formulated in the Rome Treaty<sup>209</sup>. Employment and economic policy were designated fields of voluntary coordination processes in a period before OMC even had its name, in the 1990s. Since the Lisbon summit the instrument was thought to be suitable for fields within competitiveness policies, like 'information society', 'enterprise policy', and 'research and development' on the one hand and welfare policies respectively policies that improve social cohesion, like 'education and training', 'combating social exclusion' and 'social protection' on the other. In the meantime, it can be found in areas like 'immigration and asylum', 'industrial policy', 'youth policy' and 'disability policy'<sup>210</sup>.

According to the Presidency Conclusion of the Lisbon Summit in March 2000, OMC contains the following attributes: Firstly, a 'strategic goal' is formulated by the Member States. Exchanging 'best practice' will help to develop their respective policies. Secondly, 'fixing guidelines' and 'timetables for achieving the goals which they set in the short, medium and long terms' help preventing the goal from being postponed and forgotten in the long run. Thirdly, to ensure that best practices deserve their name, benchmarks 'against the best in the world' are to be arranged to compare the practices, the judgement however, has to be adjusted to the 'needs of different Member States and sectors'. Fourthly, when implementing guidelines, the national and regional differences have to be respected. Fifthly, 'periodic monitoring, evaluation and peer review' are scheduled, to ensure 'mutual learning processes' between participating Member States<sup>211</sup>.

To apply OMC to the problems related to free movement of workers, it has to be defined, to which policy fields the three topics work, housing and integration belong. The latter, 'integration', is a field, Timmermans himself suggested to apply OMC to. It can be assigned to the field of combating social exclusion. Furthermore with regard to children of CEE-workers, it concerns the field 'education'. 'Housing' refers to 'social protection', but it can also be regarded from the viewpoint of social exclusion, as

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<sup>208</sup> De Búrca, G., and Zeitlin, J., 'Constitutionalising the Open Method of Coordination. What Should the Convention Propose?', *Centre for European Policy Studies (CEPS)*, Policy Brief No. 31, March 2003, 2

<sup>209</sup> Craig, P., *EU Administrative Law*, Oxford 2006, 191

<sup>210</sup> De Búrca, n. 208 above; Bórras, S., and Jacobsson, K., 'The open method of coordination and new governance patterns in the EU', *Journal of European Public Policy* 11,2 (2004), 185-208

<sup>211</sup> European Council n. 5 above, para. 37

improper housing adds to this problem. ‘Work’ comprises two conflicting fields, first exploitation and second unfair competition. To combat exploitation is a task of ‘social protection’, in contrast, unfair competition is part of the economic related policies. All three topics can be subsumed under migration.

To create a design for a hypothetical ‘Free Movement of Workers’ OMC’, the processes and functioning of existing OMCs in the fields that come into question are scrutinized in the following. While in some cooperation regimes OMCs have a clear legal basis in the Treaty, an explicit reference in others is absent<sup>212</sup>. The cooperation in economic policies for instance, is provided in Article 99 TEC. According to this provision, the Member States shall coordinate their economic policies with the Council. The Council formulates draft broad guidelines for the Member States, referring to the recommendations of the Commission and arranges the guidelines with the European Council. The process results in a recommendation to the Member States that implements their policies, ideally in taking the recommendations of the Council into account. On the basis of reports, the Council monitors the implementation in the Member States. For a multilateral surveillance, the latter inform the Commission about major measures within the field of economic policies and if these measures are not in accordance with the broad policy guidelines, naming and shaming instruments can be used (making recommendations to the Member State public). While the cooperation in economic policies is relatively tightly regulated in the Treaty, other OMCs do not dispose of such a well-defined legal basis, which is for instance the case for the OMCs in social inclusion<sup>213</sup> and in immigration<sup>214</sup>. The OMC in poverty and social inclusion e.g., bases on Articles 136, 137 and 144 TEC, the latter establishing a ‘Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission’. The Commission is entitled to monitor and promote the developments and to devise reports and formulate opinions. Velluti remarks the lack of a legal basis for the OMC in immigration, however subsumes it under Articles 61 TEC and Articles 63 (3) respectively (4) TEC. These Articles provide ‘flanking measures’ adopted by the Council, inter alia combating crime, strengthening administrative cooperation or setting out standards for entry and residence respectively measures defining rights for Third Country Nationals.

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<sup>212</sup> Heidenreich, M., and Bischoff, G., ‘The Open Method of Co-ordination: A way to the Europeanization of Social and Employment Policies?’, *Journal of Common Market Studies (JCMS)* 56,3 (2008), 497-532

<sup>213</sup> Ibid., 508-510

<sup>214</sup> Velluti, S., ‘What European Union Strategy for Integrating Migrants? The Role of OMC Soft Mechanisms in the Development of an EU Immigration Policy’, *European Journal of Migration and Law* 9 (2007), 53-82, see 71

The unequal legal status of different OMCs is criticized by Heidenreich, as this ‘influences [...] the development of the co-ordination processes: ‘whilst there are concrete guidelines for economic and employment policies, only general target areas (‘objectives’) are defined in other fields (for example in the OMC inclusion)’<sup>215</sup>. Generally, OMC gives the European Council, thus the head of states and highest representatives of the Member States, the leading role<sup>216</sup>. The OMC in economic policies entitles the Council, thus the Ministers for Economic Affairs and Finance Ministers, which also provides the Member States with a superior role<sup>217</sup>. In contrast, the European Employment Strategy (EES, the OMC in employment) entitles the Commission<sup>218</sup>, thus the representative of the Community. The immigration OMC was composed by the Commission which has a strong role in monitoring, evaluation and peer review, whereas the Council adopts guidelines and determines timetables for achieving goals<sup>219</sup>. Additionally Committees, part of all OMCs and positioned in between Council and Commission, comprise generally Members of the Commission and of the Member States, prepare the decisions and establish a close connection between Commission and Member States<sup>220</sup>.

The different problems related to free movement of workers could either divided, and be treated in different OMC frameworks, e.g., social protection and immigration (which deals with Third Country Nationals so far<sup>221</sup>). The rather strong role of the Commission would have a positive influence on problem solving, as free movement of workers is a supranational principle. In this case coordination between the different OMC regimes would be recommendable. Caviedes for instance advises ‘pooling’ of information<sup>222</sup>. Or, given the complexity of the issue with closely interdependent subproblems and intersections (e.g., employers which are landlords at the same time, rent as integral part of remuneration), a new integrative and multidisciplinary OMC in free movement of workers could be adopted. This however would require the amendment of the treaty in order to provide a sound legal basis.

In the previous chapter, it was reasoned why a powerful participation of social partners in respect of EU-migrant workers, produces, from a perspective of equal

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<sup>215</sup> Heidenreich et al. n. 212 above, 508

<sup>216</sup> Bórras et al., n. 210 above, 198

<sup>217</sup> see Article 99 TEC

<sup>218</sup> Bórras et al., n. 210 above, 198

<sup>219</sup> Velluti, n. 214 above; Caviedes, A., ‘The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?’ *Journal of European Public Policy*, 11,2 (2004), 289-310, see 296

<sup>220</sup> Bórras et al., n. 210 above, 198; Heidenreich et al., n. 212 above, 509

<sup>221</sup> See Velluti, n. 214 above; Caviedes, n. 219 above

<sup>222</sup> Caviedes n. 219 above, 302

representation and legitimacy, questionable policy results. Within the framework of self-regulation, tripartism not only constitutes such a powerful participation, but also tends to give the state a rather minor role due to political substance. Streeck and Schmitter for instance admit: 'It is true that an associative social order implies a devolution of state functions to interest intermediaries'<sup>223</sup>. This however does not necessarily imply the entire exclusion of social partners. Member States and European Institutions should have the guidance and the balance of power has to be ensured, though. The conception of OMC indeed includes a broad range of actors and follows the principle of subsidiarity, according to the above mentioned Presidency Conclusion: 'the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnerships',<sup>224</sup>.

Participation in OMC regimes is not specified. According to De la Porte and Nanz, participation 'should be possible throughout the policy chain – from agenda-setting to implementation and monitoring – and in all fora: committees subordinate to the relevant Council formations, indicators' working groups, peer review processes'<sup>225</sup>. They critically remark the rather weak participation of social partners for instance in the European Employment Strategy, but also stress an enhanced participation at the national level. Social partners and civil society would have 'some say', however the 'overall dynamics [...] in particular the objective setting and benchmarking, remains centralized and top-down rather than decentralized and bottom-up'<sup>226</sup>. The rather weak participation of social partners, otherwise from the perspective of democracy and legitimacy critical, is in this respect not necessarily a problem, as outlined earlier.

It would be unfair, to judge the success of a method that bases on voluntariness in counting the number of short-run results, trying to trace them back explicitly on the compliance to a distinct guideline. OMC based guidelines and recommendations are hardly directly enforceable. 'Naming and shaming' provide a kind of 'informal sanction', however the focus is on mutual learning<sup>227</sup>, or on 'co-ordinating and monitoring how the existing legislation is being implemented'<sup>228</sup>. Jacobsson points out that the rationale for OMC as coordination regime is 'not a matter of external imposition of norms but of voluntary and gradual acceptance and implementation. An immediate

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<sup>223</sup> Streeck, W., and Schmitter, P.C., 'Community, Market, State – and Associations? The prospective contribution of Interest Governance to Social Order', *European Sociological Review* 1,2 (1985), 119-138

<sup>224</sup> European Council n. 5 above, para 38

<sup>225</sup> De la Porte, C., and Nanz, P., 'The OMC – a deliberative-democratic mode of governance? The case of employment and pensions', *Journal of European Public Policy* 11,2 (2004), 267-288, see 272

<sup>226</sup> *Ibid.*, 284; see also Craig, n. 209 above, 221-224

<sup>227</sup> Heidenreich, n. 212 above, 504

<sup>228</sup> Caviedes, n. 219 above, 301

implementation of common objectives is hardly to be expected, but rather a gradual integration of new norms into present practices in the member states'<sup>229</sup>. OMC will thus not provide standardized solutions for the entire EU straightaway; Member States will not implement best practices right within the next months. Rather, OMC is capable to achieve a change of thinking over time. Housing standards or integration ideas for instance, will be compared under surveillance of the Commission and also scrutinized by Member States that are state of origin of a high number of migrant workers. In a deliberative process, decision makers in EU institutions and committees are confronted with different positions over a longer period of time, perhaps over years. Just because they are not urged to take a decision immediately, they will be engaged with the issues more intensely. Involvement will not only enhance their knowledge but consequently also affect their attitude and thus gradually decision-making, which will eventually be reflected in providing the necessary regulation.

## **5 Conclusion: Why Freedom needs Regulation**

The statement 'why freedom needs regulation' appears contradictory at first glance. Actually, conservative neoclassical economic advocates probably raise a few eyebrows, having Adam Smith's metaphor of the 'invisible hand' of the market in mind. The political economist and moral philosopher affirmed in *An Inquiry into the Nature and Causes of the Wealth of Nations*, which was published in 1776, his concept that state intervention respectively government regulation causes market failure; undisturbed individual self-interest and competition by contrast lead automatically to a well-balanced market that fits the needs of society<sup>230</sup>.

In the first decades European integration was mainly economically motivated. The removal of tariffs and trade barriers was thought to be the basis for prosperity. To consider the economic dimension only however, turned out to be a dead end. The human factor, as part of free movement of factors of production, thwarted theories in taking irrational decisions from an economic point of view. The human factor asks for the consideration of the social dimension and is the reason why in particular the fundamental freedom, 'free movement of workers', needs regulation.

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<sup>229</sup> Jacobsson, K., 'Soft regulation and the subtle transformation of states: the case of EU employment policy', *Journal of European Social Policy* 14,4 (2004), 355-370, see 366

<sup>230</sup> Smith, A., *Der Wohlstand der Nationen. Eine Untersuchung seiner Natur und seiner Ursachen*, München 2001, 371; See also Barnard n. 8 above, 3-4

The paper deals with the social implications CEE-workers are confronted with, when working in the Netherlands. The occurring conflicts however are not typically Dutch, but interchangeable with any other 'old' Member State. Neither the conflicts nor the phenomenon of CEE-workers really began with the liberalization of the Dutch labour market in May 2007, as chapter two showed. The interdependent conflicts were 'pooled' in the issues, work, housing and integration and described in chapter three, as well as the measures, taken by the Dutch State and the provisions on EU level. Where applicable, action of the local level was mentioned. Chapter four examined alternative regimes for problem solving. The overarching research goal was to show, that regulation provides political stability and legal certainty for all parties concerned, as is recapitulated in the following.

### **5.1 Legal Status needs Regulation**

Confusing circumstances with regard to numbers of CEE-workers were described in chapter 2.3. It has to be distinguished between legal and illegal migrants, illegal workers that are legal residents, and also between permanent and temporary residents. In May 2007 the legal status of a part of migrant workers changed. The abolition of transitional provisions shifted EU-8 workers in the Netherlands from tolerated workers under a temporary work permit regulation regime to first-class EU-citizen workers, equalized with workers from 'old' Member States. In contrast, Romanians and Bulgarians, also EU-citizens since 2007, are legal migrants, but only second-class workers, as they require a work permit, just as Third Country Nationals. As a result, unknown numbers of workers evade this system which causes annoying administration for employers. To attain a comparative advantage towards EU-8 which can be employed without work permit, they accept illegal employment and worse conditions, glad to have found their niche on the labour market. Introduction of free movement of workers regulation thus makes an enormous difference for workers on which the respective provisions are applicable, as clearly shows the improvement of the situation of Poles after May 2007 in the Netherlands and the massive replacement from a quasi-legal status, e.g., from ostensibly self-employed starter to employed worker, in the first month after the opening of the labour market for this group. This provided the Dutch state with more transparency at least about EU-8 workers, as well with regard to numbers as due to employment relationships. In contrast, absence of provisions makes the situation for those who are excluded even worse. It can be assumed that Third Country Nationals without work permit, thus illegal migrants and illegal workers at the same time, face the



worst conditions. Thus EU-law, developed by the European Court of Justice that turned out to be an advocate of the citizens, as illustrated in chapter 2.1, is a sound basis for migrant workers, provided it is applicable to them.

In retrospect the drawback of the Cabinet Balkenende due to the liberalization of the Dutch labour market, which was examined in chapter 2.2, was not beneficial, neither for CEE-migrants nor for the Dutch State. Free movement of workers did of course attract additional workers, but made first of all already existing workers visible. In this respect the hesitation<sup>231</sup> about the application of free movement of workers for Romanians and Bulgarians is not comprehensible. The reason for a delay is presumably the Dutch voters' fear of a flood of another migrant workers group, which was also the case for restrictions in the UK and Ireland for these countries in contrast to the liberalization for the EU-8<sup>232</sup>. Overall the main task for the future is to regulate the current minor legal status of Romanians and Bulgarians in applying free movement of workers to them.

## 5.2 Problem Solving needs Regulation

Free movement of workers, provided it is applicable at all, is not solving all problems migrant workers encounter on host state level. Thus further regulation is required, dealing with conflicts that relate to work, housing and integration. CEE-workers in large part fit the definitions of vulnerability from Grimshaw and Marchington respectively the definition of precarious work from Frade and Darmon. Again, illegal workers encounter worse work conditions, but EU-8 workers are also concerned, because of inter alia lack of knowledge about their rights or fear of dismissal. How does the National level tackle exploitation and unfair competition? The paper states in chapter 3.1 that not all instruments are suitable to combat them at the same time. Two regulation regimes are discussed in the Netherlands. *Inlenersaansprakelijkheid* concentrates on exploitation and would furthermore be capable to solve unfair competition. The factual obligation to acquire a *NEN*-certificate is disputable. It is not only unsuitable to combat criminal cheating with, e.g., working hours, but also shifts subtly power from the State to the recruitment agency sector. The decision-making process in the Netherlands is still proceeding, learning from other solutions, e.g., the UK, could be useful.

Housing conflicts are also strongly related to the self-regulation regime of the recruitment agency sector that established standards and often acts as landlord. The

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<sup>231</sup> VK: Meerhof, R., 'Donner mage en zomer lang tobben over de MOE-landers', *De Volkskrant*, 7 July 2007

<sup>232</sup> Woolfson, C., 'Labour Standards and Migration in the New Europe: Post-Communist Legacies and Perspectives', *European Journal of Industrial Relations* 13,2 (2007), 199-218

entanglement of employment and housing, examined in chapter 3.2, is conflicting, not at least because the rent is part of the remuneration. The local level is also involved in housing conflicts and interested in finding solutions with State and recruitment agencies. Municipalities however act not on behalf of the interests of CEE-workers. Rather they are occupied with maintaining deprived districts and anxious about additional minority subgroups in such areas. Municipalities claim hence for restriction, as can be seen from Rotterdam.

This leads over to the next issue, integration, which was described in chapter 3.3. In fields that lack a legal status, informal integration occurs. Although this is an undesirable pattern of integration, the meaningfulness of language knowledge can be observed. This is also true for regular integration in the host state. In this respect the Dutch State acts ideally, in concerning this problem already since several months and in taking CEE-migrants as actors into account. Furthermore problem solving on EU level was suggested which indicates willingness to tackle the problem and a certain openness. The EU-level so far directly addressed the problem of integrating children of migrant workers at school in establishing Directive 77/486. According to Article 249 TEC however, Directives are only binding to the achieved result. National States tend to spend not enough money to ensure the proper education of these children. Rotterdam, concerned with the integration of ethnic minorities, was willing to spend additional money. Furthermore, personal dedication of teachers fills some of the gaps. This however does not substitute the need of effective regulation, not only due to education of children and integration of CEE-migrants, but also with regard to work and housing. Non-Regulation supports illegality and mala fide practices. As 'old' Member States face similar problems and are overstrained to tackle them thoroughly, cooperation on EU-level is suggested. Regulation for problem solving should primarily consider the needs of persons concerned.

### **5.3 Regulation needs Legitimacy**

Chapter 4 deals with the question which regulation regime is suitable to tackle transnational problems. Problems in which EU-migrants are involved can be regarded as transnational, as their EU-citizenship is only complementary. Due to certain rights, e.g., passive and active suffrage on National Level, EU-migrants are not included. This is an important reason why Nation States should not tackle the problems alone. They will always privilege the needs of their own citizens, which are their voters. In contrast, on EU-level EU-migrants are represented via their own head of states. Tripartism, a

solution advocated by the International Labor Organization (ILO), is argued to be no legitimate regulation regime in paragraph 4.1. The reason for this is the unequal balance of power of social partners, more precisely the weak representation of interests of migrant workers.

In contrast, the Open Method of Coordination provides an eligible regime, as is pointed out in paragraph 4.2. It brings Member States together on a voluntary basis, which is a necessary condition for willingness to cooperate in sensitive issues. Voluntariness induces lack of enforcement however, only replaced by ‘naming and shaming’ of Member States that do not comply with recommended guidelines. On the other hand, learning processes should not be undervalued in the long run; they are capable of achieving a change of perspective, the ability to take another’s point of view. The problems related to free movement of workers could either be divided and solved in different existing OMCs, or a complete new ‘OMC in free movement of workers’ could be established, which would have the capacity to address the complexity and the multidisciplinary character of the issue. The common forum makes Member States to representatives of host states and home states at the same time. All Member States should reassess their budget for children of migrant workers. The Netherlands could learn from other solutions to tackle exploitation, on the other side their consideration about *inburgeringscursussen* and the participation of migrants in the field of integration could have role model character. A forum of cooperating Member States is due to the transnational character of the conflicts and given the imbalanced power structure of actors the only regime which is really legitimated to solve problems.

#### **5.4 Regulation develops Integration**

Regulation not only solves conflicts, but also has an integrative function. According to Scharpf, the overemphasis of economic policies compared to social-protection policies on the European level<sup>233</sup> led to a failure of the development of an European identity<sup>234</sup>. Nation States derive their legitimacy from the belief in a ‘thick’ collective identity, which is the so-called input-oriented legitimacy. In contrast, EU-legitimacy is not identity based, but interest based. Output-oriented legitimacy has to be achieved in enhancing the problem solving capacity of national problems. With regard to positive regulation due to social protection policies however, the achievement in output-oriented

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<sup>233</sup> See, e.g., Scharpf, F.W., ‘The European Social Model: Coping with the Challenges of Diversity’, *Journal of Common Market Studies (JCMS)* 40,4 (2002), 645-670

<sup>234</sup> Scharpf, F.W., *Governing in Europe. Effective and Democratic?*, Oxford, 1999

legitimacy failed so far. To enhance output-oriented legitimacy on these policies - here Scharpf suggests a combination of OMC in combination with framework directives<sup>235</sup> – would eventually lead to a stronger collective identity among European Citizens, thus strengthen the ‘*Gemeinschaftskeitsglauben*’<sup>236</sup>.

Further research should scrutinize this hypothesis, in observing the development of regulations. Timmermans scheduled the inception of a possible OMC for September. How willing are the Member States to cooperate on EU level? Which OMC is chosen to tackle the problems? These could be just the research questions to start with. Not until the first regulations have been implemented, Scharpf’s hypothesis could be judged, considering not only the European problem-solving capacity for conflicts migrant workers are involved with, but also the cohesion between EU Citizens.

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<sup>235</sup> Scharpf, F.W., ‘Legitimate Diversity: The New Challenge of European Integration’, *Zeitschrift für Staats- und Europawissenschaften (ZSE)* 1 (2003), 32-60

<sup>236</sup> Scharpf n. 234 above, 8

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