

The Netherlands

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I. Introduction

In this contribution, we provide an update on developments surrounding the social position of non-employees, especially the solo self-employed, in Dutch labour and social security law. This contribution outlines the most relevant initiatives and obstacles from autumn 2020 until autumn 2024.

The share of the solo self-employed in the Netherlands is large and still increasing. Out of a working population of 9.6 million people, more than 1.2 million (2023) are solo self-employed in their main job.¹ In itself, as long as they are genuinely self-employed, this growth is not problematic, as the Minister of Social Affairs and Employment (SZW) also mentioned in her legislative concept proposal of October 2023 and in other letters to the Parliament.² What is worrisome is the above-average share of solo self-employed persons and the above-average growth of their number in recent years. There is a marked increase in social sectors, such as healthcare, education and childcare.³

This increase in self-employment over the past decade(s) also raises concerns about bogus self-employment. The phenomenon of bogus self-employment as well as the great divide between employees and self-employed workers as regards social security is the reason for a (new) series of measures and investigations, often at the request of the Minister of SZW. Below we first discuss the most relevant measures and/or plans, with some measures building on what had already been introduced before 2020; we

1 <https://www.cbs.nl/nl-nl/dossier/dossier-zzp/ontwikkelingen-zzp#:~:text=De%20grootste%20groep%20zzp'ers,in%20de%20meeste%20bedrijfstakken%20toegenomen> (accessed on 1 September 2024).

2 Concept Memorie van Toelichting, Wetsvoorstel verduidelijking beoordeling arbeidssrelaties en rechtsvermoeden, internetconsultatie, 6 oktober 2023 - 10 november 2023.

3 Concept Memorie van Toelichting, Wetsvoorstel verduidelijking beoordeling arbeidssrelaties en rechtsvermoeden, p. 9: "Aantal zelfstandigen in zorg afgelopen jaar met 22.000 toegenomen", <https://nos.nl/artikel/2498622-cbs-aantal-zelfstandigen-in-zorg-afgelopen-jaar-met-22-000-toegenomen> (accessed on 1 September 2024).

then go on to take a closer look at the case law with a focus on landmark cases on the qualification of dependent self-employed workers.

II. Measures/Plans

1. Web Module for Employment Relationship Assessment

In January 2021, a six-month pilot web module was set up. In this test phase, employers/clients and self-employed workers could practice using the online questionnaire to learn more about the qualification of their (future) employment relationship. The results of the web module were not promising enough as in more than 25% of the cases the qualification of the relationship was not clear. Therefore, after the evaluation of the web module in September 2021, it was decided not to implement the web module as a legal instrument but only as an information tool. Also, this web module is not addressed to the self-employed person himself/herself but is only for the client/employer who wishes to engage a contractor, to see if this can be done outside of a subordinate relationship.⁴

The new government (July 2024) seems to continue this policy and published in September 2024, next to the web module, another instrument: a selection tool for employers *and* workers to help them assess their relationship.⁵ This holistic assessment of the employment relationship entails a list of 10 questions (yes or no) and leads to the result “yes”, “no” or “maybe” there is an employment relationship. In the latter case, it is up to the two parties to discuss whether and how to continue their relationship: as an employee-employer relationship or as a relationship of a self-employed worker with a client. The choice between these two statuses is not optional, as each option leads to a different employment and social security position. In the case of greater embedding in the organisation, the relationship is more likely to qualify as an employee-employer relationship, requiring payment of social contributions and the application of strict labour law rules. In the other case of less embedding of the employee in the organisation

4 <https://beoordelingarbeidsrelatie.nl>; This web module is accessible through the website of the Ministry of Social Affairs and Employment (accessed on 15 October 2024).

5 This is about preventing bogus self-employment: see: Voorkomen van schijnzelfstandigheid. Aanpak schijnconstructies, <https://www.rijksoverheid.nl/onderwerpen/zelfstandigen-zonder-personeel-zzp/voorkomen-van-schijnzelfstandigheid> (accessed on 15 October 2024).

of the employer/client, the relationship is likely to be qualified as real self-employment and therefore an independent status of the worker. Thus, less labour law rules apply (as in the Netherlands rules concerning e.g. safety and noise also apply to self-employed, if they work at the same place as employees), and there is no protection through employee insurances for social risks like sickness, invalidity, unemployment or second pillar pensions. It's up to the self-employed to cover these risks on the private market. There is, however, a public mandatory insurance for health care and the first pillar pension based on the residence scheme.

In summary, the web module and the new selection tool are not legal instruments but supportive and informative aids for assessing the nature of the employment relationship, having their origins in a law from 2016 aimed at preventing bogus self-employment.⁶ However, during the long period of their development a moratorium on the active enforcement activities by the competent tax authorities has been applied, rather increasing the risk of such bogus self-employment to occur. It was only in the autumn of 2024 that it was decided to lift the moratorium (as from January 2025). This will require the parties involved to take responsibility for choosing the correct status of their relationship.⁷ Companies and organisations that hire people as self-employed for work that they do not perform independently will then again be subject to fines and surcharges. In the period preceding this date, there has been a considerable degree of concern among both contractors and clients. The government is aware of these concerns and has committed to a more risk-based enforcement strategy in the first year with a focus on obvious situations of abuse and false self-employment. Only at later stage all solo self-employment arrangements shall be reviewed.

2. Reports of Government Advisory Bodies Aiming at Major Labour Market Reforms

Under the Rutte III government (2017-2021, early resignation) the Minister of Social Affairs and Employment (*Koolmees*) tasked various bodies to

6 Onderwerpen. Zelfstandigen zonder personeel (zzp), <https://www.rijksoverheid.nl/onderwerpen/zelfstandigen-zonder-personeel-zzp/nieuwe-maatregelen-zzpers-en-opdrachtgevers> (accessed on 7 April 2025).

7 Vanaf 1 januari 2025 volledige handhaving op schijnzelfstandigheid. Nieuwsbericht, <https://www.rijksoverheid.nl/actueel/nieuws/2024/09/06/vanaf-1-januari-2025-volledige-handhaving-op-schijnzelfstandigheid> (accessed on 15 October 2024).

come up with labour market reform proposals. We discuss the three most relevant here.⁸

Under the Rutte IV government (2022-2023, early resignation) the new Minister of Social Affairs and Employment (*Van Gennip*) continued the work of her predecessor, with some delay and obstacles due to the difficult coalition negotiations and the aftermath of the corona pandemic.

a) Report of Borstlap Commission – January 2020

The official cabinet reaction to the report of the *Borstlap* Commission and the report of the WRR (below) dates from November 2020.⁹ In his reaction, the Minister of Social Affairs and Employment stated:

“The challenge is also to ensure that these recommendations are taken into account in the long-term reforms. However, making the labour market future proof with institutions that contribute to a better balance between employees and other workers is a matter of years. A key message of the reports is that much of the cause of the labour market gap lies in our own laws and regulations. This offers a perspective: it means that we have the power to move towards a labour market that works for all – although the challenge is extremely complex. Beacons need to be changed, and that takes time, also given the effort required to implement.”

b) Report of WRR – January 2020

The report of the Netherlands Scientific Council for Government Policy (WRR) focuses on the search for the conditions for decent work for all. It claims that the Netherlands is not at the forefront of decent work; and that the Netherlands is one of the countries where social security for the self-employed is least regulated. The WRR, just like the OECD, emphasises

8 For an overview of all the reports concerning solo self-employed and labour market reforms, see: Montebovi, Saskia, *ZZP en sociale zekerheid in Nederland*, Tilburg 2021, pp. 67-151.

9 Letter from the Minister of Social Affairs and Employment to the Parliament: “De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport nr. 102 “Het Betere Werk”, 11 November 2020.

that the Netherlands is at an important juncture where urgent decisions need to be taken about the type of labour market desired for the future.¹⁰

c) Report of SER – June 2021

The Netherlands Tripartite Social and Economic Council (SER) published a socio-economic policy advice for 2021-2025.¹¹ In addition to recommendations for the labour market in general and for investment in a broad-based welfare system, the SER made specific proposals for the self-employed: a system of compulsory insurance for incapacity for work, a general safety net (based upon the COVID income support measures), improved second and third pillar pension coverage, and collective bargaining and the legal presumption of employment to prevent bogus self-employment of low-paid workers.

These three reports were eagerly awaited in 2020 and 2021, as they focused explicitly on the labour market reforms that Dutch society had increasingly been calling for. One of the most recent noteworthy and promising developments is the draft law of 6 October 2023, aimed at the clarification of the assessment of employment relations. Below we discuss this bill in more detail.

In short, since 2018, many reports to and letters from the Minister have been published.¹² Two parliamentary dossiers that have received the most attention in the last few years are the “self-employment” dossier (31 311) and the “labour market policy” dossier (29 544).¹³ At the time of finishing in autumn 2024, the new government has just completed its first 100 days and is still looking for a direction for the time ahead. The balance in the coalition government of four parties is delicate: two entirely new political parties (BBB and NSC) and the radical right Freedom Party of Geert Wilders (PVV) and the conservative-liberal political party (VVD) are in a

10 WRR Report: pp. 5, 38, 86.

11 SER Advice 21/08, Zekerheid voor mensen, een wendbare economie en herstel van de samenleving, June 2021.

12 There are regular updates from the Minister to the Parliament about the progress on the labour market package development, see also: *Montebovi, Saskia*, ZZP en sociale zekerheid in Nederland (fn. 8), pp. 177-188; Letter from the Minister of Social Affairs and Employment, 3 April 2023: “Voortgang uitwerking arbeidsmarktpakket”.

13 Kamerstukken II, 31 311, Werken als zelfstandige; Kamerstukken II, 29 544, Arbeidsmarktbeleid.

constant search for how to deal with each other in a complex political and social context.

3. Incapacity for Work – A Compulsory Scheme for Public Insurance

As mentioned in the previous contribution (2020), the solo self-employed cannot rely on any public insurance scheme against the risks of illness (short-term) or incapacity for work (long-term). The first signs of the re-introduction of a state insurance scheme were seen in the 2019 pension agreement. The idea was to set up a separate insurance for the self-employed in which they would be compulsorily but minimally insured against disability. Early in 2023, the Minister of Social Affairs and Employment announced the intention to further develop a particular proposal and to introduce it within one to two years. At the time of writing this has not yet been done.

This ministerial intention for a proposal is based on the March 2020 proposal of the Stichting van de Arbeid, another advisory body to the government.¹⁴ Some main features of the intended ministerial proposal are: a separate arrangement for the solo self-employed, a waiting period of 52 weeks, a standard benefit of 70% of the last earned income but with a limit of € 30,000 gross per year, a benefit of maximum € 1,650 gross per month, an insurance premium at 8% of the income, and also a re-integration procedure. So far, only these broad outlines have been presented, and there is no agreement on the concrete elaboration and details of this plan. Moreover, this proposal for a public disability scheme for the solo self-employed immediately provoked many reactions, mostly critical and dissatisfied.

A salient detail is that the Borstlap Commission, as well as other advisory bodies, advised the Minister not to create a separate scheme for the self-employed, but to create a disability scheme for all working people.¹⁵ This plea for more contract-neutral basic insurance for all workers seems a bridge too far at this point. Indeed, for the short term, a separate system for the self-employed, next to the employee schemes, may be the most feasible option. It is up to the new government, installed in July 2024, to manage this politically sensitive issue.

14 Stichting van de Arbeid, *Keuze voor zekerheid. Zelfstandigen standaard verzekeren tegen langdurig inkomensverlies door arbeidsongeschiktheid*, 3 maart 2020.

15 Commission Borstlap, *In wat voor land willen wij werken?*, 2020; ONL-AVV-VZN – Sociaal Akkoord 2021, p. 4 and p. 16-17; WRR nr. 102, *Het betere werk. De nieuwe maatschappelijke opdracht*, 2020.

4. Representation of the Self-Employed

The classic Dutch consultation structure in policy and politics is based on the employee-employer model and thus excludes the self-employed. Recently, this has changed. For example, until 2023 the Social and Economic Council of the Netherlands (SER), which is an authoritative advisory body for the Dutch government and Parliament, included only employers, employees and independent experts. Yet, since 2023, also the self-employed are represented and have a voice in the SER.¹⁶

5. Platform Work and Qualification by Presumption of Law – Legislative Proposal October 2023

To date, the Dutch government has not yet introduced any measure specifically for platform workers. However, in 2019, MP Van Dijk presented an initiative paper called “Reclaiming the Platform Economy” in which he pointed out how much the platform economy was putting pressure on the entire social security system, and that therefore action was urgently needed.¹⁷ In his plea for decent work at fair wages, for all workers, he emphasised that the correct qualification of the employment relationship between a platform and its worker was essential but hard to prove for the worker. That is why he proposed the reversal of the burden of proof. Thus, for the qualification of the employment relationship, the platform worker is by definition an employee unless the platform company proves that he is self-employed. These ideas, which strongly resemble the later proposal of the EU Platform Workers Directive¹⁸, have not yet materialised in the statute book, nonetheless they have certainly sown the seeds of debate about platform work and vulnerable self-employed workers.

In June 2022, the cabinet responded to this initiative to regulate platform work and agreed upon the urgent need for clarification and improvement

16 Wie zitten er in de SER?, <https://www.ser.nl/nl/ser/over-ser/wie-zitten-er-in-de-ser> (accessed on 1 September 2024); Benoeming nieuwe Kroonleden Sociaal-Economische Raad, <https://www.rijksoverheid.nl/actueel/nieuws/2023/11/24/benoeming-nieuwe-kroonleden-sociaal-economische-raad> (accessed on 1 September 2024).

17 Kamerstukken II, 2018-2019, 35 230, nr. 2, Initiatiefnota van het lid Gijs van Dijk over De hervorming van de platformeconomie, <https://zoek.officielebekendmakingen.nl/kst-35230-2.pdf> (accessed on 1 September 2024).

18 Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, COM/2021/762 final.

concerning the position for platform workers. In that same reaction, the Minister also referred to the reports of the *Borstlap* Commission and the WRR.¹⁹ The former Minister of Social Affairs and Employment considered several measures and intentions on national as well as European level. She emphasised the interdependence of different policies and that reforms would take time.

However, there seems to be a new dot on the horizon with the October 2023 bill proposal.²⁰ This bill aims to clarify employment relationship assessments and introduce a legal presumption. In fact, the draft law of 6 October 2023 first introduces some additional criteria to clarify the distinction between employees and (pseudo) self-employed workers. Second, the proposal reintroduces the concept of rebuttable presumption.²¹ This time it applies not only to platform workers, but to all workers below a certain hourly rate. The proposal sets € 33 per hour as the threshold below which a worker is legally considered to be an employee.²² The employer or client who wishes to refute the worker's claim can do so by providing evidence.

The proposal was submitted to the Council of State by the former Minister of Social Affairs in June 2024 and is also supported by the new Minister of Social Affairs. At the time of finishing this article, autumn 2024, this bill is now before the Advisory Division of the Council of State for independent advice. It remains to be seen if and when the next labour market reforms will take place.

19 Kamerstukken II, 2021-2022, 35 230, nr. 4, Initiatiefnota van het lid Kathmann over De hervorming van de platformeconomie, <https://zoek.officielebekendmakingen.nl/d-ossier/kst-35230-4.html> (accessed on 1 September 2024).

20 The official title of the proposed Act is: Bill to Clarify the Assessment of Employment Relationships and Legal Presumption.

21 Concept Legislative Proposal in order to clarify the employment relationship by changing the Civil Code, Voorstel van wet, Wijziging van Boek 7 van het Burgerlijk Wetboek in verband met het verduidelijken van wanneer sprake is van werken in dienst van een ander in de zin van artikel 610 van Boek 7 van het Burgerlijk Wetboek en het invoeren van een rechtsvermoeden (Wetsvoorstel verduidelijking beoordeling arbeidsrelaties en rechtsvermoeden), internetconsultatie, 6 oktober 2023 - 10 november 2023.

22 See proposal: new article 7:610aa BW.

III. Case Law

The previous contribution (2020) pointed at the ad hoc character and even contradictory nature of the jurisprudence on the qualification of the employment contract dealing with cases “on the brink of solo self-employment”. Thus, it was pointed out that on 23 July 2018, the Amsterdam District Court was of the opinion that a Deliveroo worker did not have employee status in view of the clear intention of the parties expressed in the agreement²³, while on 15 January 2019 the Court changed its mind and reached the decision that such a worker was deemed to be an employee, this time going beyond the mere formal expression of the intention of the parties and carefully looking at the material conditions of the case.²⁴

It is actually in this latter Deliveroo case, initiated by the main Dutch Union Federation FNV, that the Netherlands Supreme Court (*Hoge Raad*) would eventually give a new twist to its framework for interpreting formal employment contracts, thereby re-affirming the second judgement of the local Amsterdam court. This is the case of Deliveroo Netherlands B.V. against *Federatie Nederlandse Vakbeweging* of 24 March 2023.²⁵

In order to fully understand the new strand in the case law, it is necessary to first of all point at another case which came before the *Hoge Raad* in 2020.²⁶ This dealt with the qualification of an employment relationship of a woman who received social assistance from the City of Amsterdam. She carried out work for this municipality as part of a re-integration programme, while retaining her right to benefit. The worker claimed to be formally employed by the municipality on the basis of an employment contract and was therefore to receive a proper wage. In her lengthy conclusion, Procureur-General *De Bock* argued that the material aspects of an employment relationship should be leading, rather than the intention of the parties as expressed in the written terms of the employment contract itself. This new approach was accepted by the *Hoge Raad*. The written text of the contract serves to know what rights and duties the parties have agreed upon, but for the qualification of the employment relationship, the intention of the parties is no longer relevant. Only the substantial requirements apply (i.e. work, wage and subordination).

23 ECLI:NL:RBAMS:2018:5183.

24 ECLI:NL:RBAMS:2019:189 and 2010.

25 ECLI:NL:HR:2023:443.

26 ECLI:NL:HR:2020:1746. *Hoge Raad*, 6 November 2020 (X/Gemeente Amsterdam).

As a matter of fact, the outcome of the latter case was that the re-integration worker did not have an employment contract in view of the fact that no wages had been paid. Whatever can be said of the tautological nature of this argument,²⁷ the new interpretation of the *Hoge Raad* would allow for another way of qualifying new types of labour relationships, such as the ones carried out by platform workers. This brings us back to the Deliveroo case of 24 March 2023, generally seen as the test case for assessing the legal nature of platform work.

Procureur-General *De Bock* now advised the *Hoge Raad* not to look so much at the criterion of subordination of the employee (the power of the employer to give instructions). The starting point should be whether the work is embedded in the organisation of the job provider. Points of view in this regard would include: (i) whether core activities are involved, (ii) whether the work has a structural character and (iii) what the organisational framework is within which the work is carried out (place of work, working hours, etc.). However, *the Hoge Raad* ruled otherwise. Pending the recent endeavors of the Netherlands and the EU legislator to come up with its own solutions, it would stick to its established case law that due consideration should be given to all circumstances of the case. Embedding the work in the organisation of the job provider was one of these circumstances but not the starting point for assessing whether there is a relationship of authority. Nonetheless, the *Hoge Raad* highlighted a number of points that had not been so clearly stated in previous case law: whether the worker behaves as an entrepreneur in society (e.g. fiscal status, the number of clients and the duration for which the worker commits himself to a particular client); the freedom of the worker to decide as to how the work is performed; and the practical relevance of formal contractual conditions for the employer. In doing so, the *Hoge Raad* has shown itself more receptive to include new types of labour into the formal employment relationship. Merely manipulating the written terms of a contract is no longer conducive to shutting the door to such relationships.

IV. Conclusion

Platform work has been high on the political agenda for quite some time. Various measures and plans have been introduced, including the Web Mod-

27 Cf. the critical comments by Driessen, M.J.A.C., in TRA 2021/21.

ule for Employment Relationship Assessment and a new selection tool, which aimed to help employers and self-employed workers understand their employment relationships. However, the results were not promising enough to implement it as a legal instrument. Additionally, reports from government advisory bodies, such as the Borstlap Commission, WRR, and SER, have emphasised the need for labour market reforms and better social security for the self-employed. A draft law from October 2023, which intended to introduce a legal presumption for platform workers below a certain hourly rate and an improved assessment framework for the employment relationship, has not yet been adopted. The courts, however, seem to be more sensitive to the gap in social protection between employees and non-employees. The trend in case law is to interpret the formal employment contract more broadly and include new forms of labour, in particular platform work. In the landmark Deliveroo case of 24 March 2023, the *Hoge Raad* reaffirmed that all circumstances of a case should be considered when assessing whether an employment agreement exists. The approach of the *Hoge Raad* to assess in this context (apart from classical criteria like subordination and integration in the organisation) also whether the worker behaves as an entrepreneur leaves room for the lower courts to reassess the situation of platform workers also in other areas.

In anticipation of the new law, proposed in October 2023, to provide a clear assessment framework for employers, employees and self-employed persons, which is currently before the Council of State for consultation, the existing 2016 law will be enforced from 1 January 2025. From that date, therefore, the tax authorities will start to inspect businesses and check whether existing self-employment contracts are in fact genuine self-employment contracts. If not, fines and surcharges will follow. It is the responsibility of the parties to choose the correct status of their relationship.

In short, it is still uncertain how the labour market reforms initiated by previous governments will work and, in particular, whether the vulnerable social position of the self-employed will be improved.

