

MASTERS THESIS

THE IMPACT THAT THE IMPLEMENTATION OF FLEXICURITY MAY HAVE ON THE TEMPORARY EMPLOYMENT SECTOR IN SOUTH AFRICA

A comparison between the Netherlands and South Africa

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LIST OF ABBREVIATIONS

Association of Personnel Services Organisations	(APSO)
Business Unity South Africa	(BUSA)
Centre for development and Enterprise	(CDE)
Commission for Conciliation, Mediation and Arbitration	(CCMA)
Confederation of Associations in the Private Employment Sector	(CAPES)
Confederation of Private Employment Agencies	(Ciett)
Congress of South African Trade Unions	(COSATU)
Dutch Private Employment Agency	(ABU)
European Confederation of Private Employment Agencies	(Eurociett)
German Association of Private Employment Agencies	(BZA)
French Private Employment Agency Association	(PRISME)
German Federation of Trade Unions	(DGB)
Information, Technology and Communication sector	(ICT)
Labour Relations Act of 1995	(LRA)
Multi national corporations	(MNC)
National Council of Trade Unions	(NACTU)
National Economic Development and Labour Council	(NEDLAC)
Polish Private Employment Agency	(ZAPT)
Private employment agencies	(PrEA)
Regulatory Impact Assessment	(RIO)

Skills Education Training Authority	(SETA)
South African Commercial, Catering and Allied Workers Union	(SACCAWU),
Supreme Court of Appeal	(SCA)
Temporary employment sector	(TES)
The Association of Personnel Service Organisations	(APSO)
The International Labour Organisation	(ILO)
The European Commission	(EC)
United Association of South Africa	(UASA)

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A comparison between the Netherlands and South Africa

1. INTRODUCTION

In a globalized labour market only the countries that can respond rapidly to market flexiations will be successful and attract sought-after international investments. Simultaneously this is also the era that the concept of decent work is the motto of workers. The answer of Europe to the tension between labour market flexibility and the demand of workers for more employment security is the concept of flexicurity. The European Commission (EC) considers flexicurity as an integrated strategy to simultaneously enhance flexibility and security in the labour market.¹

The recent invitation of South Africa to join the BRICS-coalition of Brazil, Russia, India and China increased the pressure on the country for a labour law system that is flexible and promote an active labour market policy. At the same time the South African Government is under pressure from organized labour to ensure decent work and to find solutions for the problems of the temporary employment sector (TES).

According to the President of South Africa, Jacob Zuma the goal of the government is clear: "We want to have a country where millions more South Africans have decent employment opportunities, which has a modern infrastructure and a vibrant economy, and where the quality of life is high"² The government released a growth plan last year that has the ambitious goal to create five million jobs by 2020 and bring South Africa's unemployment rate down to 15%.

¹ <http://en.wikipedia.org/wiki/Flexicurity>

² <http://allafrica.com/stories/201102100747.html>

One of the strategies the South African government identified to improve the lives of workers is to review the legislation on private employment agencies (labour brokers).³ This includes proposed amendments to the legislation relating to temporary (fixed term) contracts. The proposals may have drastic implications for workers as the amendments are directed to the improvement of the quality of work life, but the actual effect can be that it will have a detrimental impact on job creation.

The unemployment rate for South Africa is currently 24%.⁴ The unemployment rate is the number of the unemployed people as a percentage of the workforce. The people who gave up looking for a job are not part as the unemployed figure. According to the Centre for Development and Enterprise (CDE)⁵, only 41% of the population of working age (16- 64 years) have a job in the formal or informal sector. The Centre estimates that to reach the international norm of 60% employment, the country would require 19 million jobs that are nearly 50% more than the existing jobs in the formal and informal sector.

China is viewing South Africa as the gateway to the African continent but uncertainty exists concerning the possible effect that these market-unfriendly labour legislation developments may have on possible external investment in the country.⁶

In this thesis it will be argued that to limit temporary posts and outlaw the temporary employment sector will not improve job creation and decent work in South Africa, but will actually accomplish the opposite.

It will be argued that the experience of the EU with flexicurity can be applicable and usable for South Africa in balancing decent work with economic growth, job creation and labour market flexibility. The possible benefits of the implementation of flexicurity on the labour market and decent work will be investigated in this thesis.

³ <http://www.southafrica.info/about/government/statenation2011a.htm>

⁴ http://www.indexmundi.com/south_africa/unemployment_rate.html

⁵ A fresh look at unemployment: A conversation among experts (June 2011) available at <http://www.cde.org.za>

⁶ <http://www.polity.org.za/article/stringent-sa-labour-laws-not-main-barrier-for-international-investment-2011-02-18>

1.1 Research question and method

It may be questioned whether it would be valid to compare two countries if one country is developed and the other developing. The comparison will be valid because the South African economy can be divided in a highly sophisticated 1st world manufacturing industry (e.g. the plants of BMW and Mercedes Benz), an advanced banking sector (e.g. Barclays that invested in ABSA Bank) South African based multi-national corporations (MNC) and a more informal economy. Even Hofstede⁷ indicated, in his power distance research data on South Africa, that his findings are applicable to the developed part of the South African economy. The findings of Hofstede relating to power distance place South Africa together with the Netherlands in the same grouping on the power distance index. In my opinion valid assumptions can be made when the Dutch findings about flexicurity are compared with the situation in South Africa. Power distance is culturally dominated and gives an indication to the extend countries accept that power in organizations is distributed unequally.⁸ The introduction of concepts that are successful in one country to another is always risky if the culture within the two countries differs. My findings may not be as applicable to other developing countries.

The following research questions will be investigated:

Research question 1: Whether the strategy of flexicurity have a positive effect on job security and decent work

Research question 2: Can the temporary employment sector promote decent work?

Research question 3: Will the proposed amendments of the South African Labour Law improve decent work, job creation and the flexibility of the labour market of South Africa?

⁷ Brewster, etal: CIPD,2007: P26

⁸ Brewster, etal:CIPD, 2007: P22

Research question 4. Are the principles of flexicurity transferable from the Netherlands to South Africa?

1.2 Structure of the Thesis

The first chapter will deal with the concept of flexicurity. I shall attempt to put the implementation of flexicurity in perspective, in relation to the implementation of the concept in the European Union (EU). Flexicurity in the Netherlands will specifically be examined. The effect of flexicurity on decent work will also receive attention. The experience of the Netherlands will be examined to determine best practice that can be recommended for South Africa. The effect that flexicurity had played in handling the economic crises of 2008 will also be discussed.

In Chapter 2 I shall examine the role that private employment agencies (PrEA) play in promoting the decent work agenda. The development of the private employment agency field internationally will be examined. The International Labour Organisation's (ILO) Private Employment Agencies Convention, and the EU Temporary and Agency Workers Directive will also be discussed. The criticism on the sector will be examined and the role that the International Labour Organization (ILO) plays in regulating the sector will be investigated.

In Chapter 3 the background of temporary agency work (TAW) in South Africa will be discussed. In the following section there will be comments on the proposed amendments on the South African Labour Relation Act. The implications of the amendments on job creation, job security, decent work and labour market flexibility will also be discussed.

The thesis will conclude with a discussion indicating if flexicurity will be appropriate for the South African situation and recommendations on best practices that may be implemented in South Africa will be made.

2. FLEXICURITY

2.1 What is Flexicurity?

The European labour market is under more pressure than ever before. The challenges include the pressure on the economy of the EU to be competitive in a globalized world which requires more flexible labour markets. Employers demand the effective deregulation of the economy in order to make them more competitive in the global market. In contrast with the modern flexible economic aspirations is the principle of the European Social Model.⁹ The Nice Summit concluded that the European Social Model is characterized by systems that offer high levels of social protection and at the Lisbon Summit, the Member States envisaged that Europe must become the most competitive knowledge-based economy in the world by 2010 while at the same time remain committed to solidarity and equality.¹⁰ The European social model emphasizes increased labour security and social cohesion. Workers are demanding more employment security in a climate of rapid structural change and job reallocation. Europe is also confronted with low population growth and an ageing population.

In industrialized countries it is believed that waged employment hinders flexibility and the flexibility is proposed as the remedy against rising unemployment. According to De Gobb¹¹ the strategy is the lowering of hiring and firing costs by the introduction of flexible work arrangements. The labour market is becoming more flexible primarily through relaxed conditions for the termination of the employment relationship and the introduction of limited term employment.¹² Flexicurity as a strategy is effective to jointly manage the inherent insecurities of the employer and employees. Employers must manage their risk in a globalized economy by matching a weakening market position due

⁹ Kaia Philips and Raul Eamets, *Approaches to flexicurity: EU models*, European Foundation for the improvement of Living and Working Conditions, 2007: P 1

¹⁰ <http://www.law.wisc.edu/ils/wisgar/hardandsoftlaw.pdf>

¹¹ De Gobb, NS, *Flexicurity in developing countries: Perceptions and determining factors*; Employment Policy Department, ILO, Geneva: P6

¹² De Gobb, NS, *Flexicurity in developing countries: Perceptions and determining factors*; Employment Policy Department, ILO, Geneva: P6

to increased competition and new technological progress with the quantitative and qualitative change in the labour market. The employment security of workers is at risk due to the response of employers to adapt to the requirements of the global market.¹³

The revised Lisbon Strategy of 2005, balanced increased economic growth, productivity and competitiveness with jobs creation. This can be attained by improving labour market flexibility, while combining it with increased social protection for workers. The Lisbon strategy for growth and jobs highlights the importance to improve the adaptability of workers and enterprises¹⁴. EU Integrated Guideline No 21 for growth and jobs for the period 2005-2008, promotes “flexibility combined with employment security and reduce labour market segmentation, having due regard to the role of the social partners”.¹⁵

The balance between labour market flexibility and social security is described using the concept of flexicurity.¹⁶ The concept of flexicurity which is a combination of the words flexibility and security is currently the standard strategy of the management of the European labour market. The EU promotes flexicurity as a strategy to be used in the individual Member States to improve labour productivity, increase employment and guaranteed long-term growth and social cohesion.¹⁷

The March 2006 Presidency Conclusions of the European Union is an indication that flexicurity principles are at the core of the EU labour market policy. These conclusions guide the Member States to use integrated flexicurity principles in their labour market reform strategies. According to the aforementioned Conclusions, the benefit of a flexicurity strategy is that employees and organizations are more adaptable and responsive to labour market fluctuations. The EU believes that flexicurity increases

¹³ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P14

¹⁴ Bovenberg L and Wilthagen T, On the Road to Flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market mobility, September 2008 : P2

¹⁵ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P4

¹⁶ <http://www.eurofound.europa.eu/pubdocs/2007/84/en/1/ef0784en.pdf>

¹⁷ Kaia Philips and Raul Eamets, Approaches to flexicurity: EU models, European Foundation for the improvement of Living and Working Conditions, 2007:P 1

productivity in the workplace and that the goals of competitiveness, employment and social security can simultaneously be attained.¹⁸

According to the Report by the European Expert Group on Flexicurity, flexicurity can be described as: "policy strategy to enhance - at the same time and in a deliberate way, the flexibility of labour markets, work organizations and employment relations - on the one hand, and security — employment security and social security — on the other"¹⁹.

The EU also defines flexicurity as follows: "Flexicurity is an integrated strategy for enhancing, at the same time, **flexibility and security** in the labour market. It attempts to reconcile employers' need for a flexible workforce with workers' need for security — confidence that they will not face long periods of unemployment".²⁰

Auer²¹ describes the basic form of flexicurity as comprising a "golden triangle of external adjustment between (loose) employment protection, generous unemployment benefits and active labour market policies negotiated by the social partners"

The Danish model of flexicurity has been viewed in recent years as the textbook example of the successful implementation of flexicurity. The Danish model of flexicurity is a combination of a flexible labour market with relaxed or liberal "hiring and firing" procedures, combined with a relatively generous social security system and an active labour market policy.²² This means that the workers' ability to acquire a job (employment security) is protected, rather than the protection of the security of a worker to a specific job. The supporters of flexicurity believe that it is a win-win strategy as the labour market has a need for a trained workforce, that are flexible enough to respond

¹⁸ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P11

¹⁹ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P11

²⁰ <http://ec.europa.eu/social/main.jsp?catId=102&langId=en>

²¹ Auer P and Gazier B, FLEXICURITY AS A POLICY AGENDA, CESifo DICE Report 4/2008: P5

²² Bredgaard T and Larsen F, Comparing Flexicurity in Denmark and Japan, Centre for Labour Market Research at Aalborg University (CARMA) , 2007: P2

successfully to change, while workers need security to equip them to acquire and maintain their skills, in order to remain employed or attain new employment.²³

The European Commission developed in collaboration with Member States, social partners and academics a set of common flexicurity principles that Member States can explore through four components:

- flexible and reliable contractual arrangements
- comprehensive lifelong learning strategies
- effective active labour market policies
- modern social security systems.²⁴

Each Member State is expected to map out its own distinct pathway towards more flexicurity and the European Commission has, for that matter, suggested a set of four ideal typical pathways.²⁵ These pathways will be discussed at a later stage in this document.

The European Council identified eight principles of Flexicurity namely:²⁶

- To create an EU jobs strategy of flexible and reliable contractual arrangements that create more and better jobs, and strengthen the European Social Model. Providing new forms of flexibility and security to increase adaptability, employment and social cohesion,
- To balance the rights and responsibilities employers, workers, job-seekers and public authorities,
- Flexicurity must be adapted to the specific circumstances, labour markets, realities and industrial relations of the Member States,
- Flexicurity within the organization and between organizations must be promoted. Flexible recruitment and redundancy procedures must be accompanied by the

²³ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P9

²⁴ <http://ec.europa.eu/social/main.jsp?catId=102&langId=en>

²⁵ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P11

²⁶ www.xperthr.co.uk/article/78094/eu--commission-proposes-flexicurity-principles.aspx?searchwords=flexicurity

secure movement from one job to another. Decent high quality work places must be directed to the enhancement of skills. Social security must facilitate, not inhibit mobility,

- Flexicurity should promote gender in the workplace by promoting equal access to good-quality employment to both genders. Quality of live programs must offer possibilities to reconcile work and family life. Migrants, young, disabled and older workers must also receive equal opportunities,
- Public authorities and social partners must be committed to a relationship of trust and dialogue where both are prepared to take responsibility for change, and produce balanced policy instruments,
- Flexicurity policies must be developed and implemented with a view to contribute to sound and financially sustainable budgetary policies.

The International Labour Organization (ILO) also encourages a flexicurity approach for the management of the labour market of its member states. The ILO believes that if an enterprise is competitive and is able to react successfully to market fluctuations job creation will benefit. The ILO also believes that labour market flexibility as an isolated strategy will be ineffective if employment security is not also ensured.²⁷ The ILO recommends that workers must receive social security benefits that will encourage them to accept higher mobility and flexibility. Social dialogue must, according to the ILO, be the basis of the flexicurity strategy. Governments, employers and social partners must determine together the policy choices of the "flexicurity" approach.²⁸

Flexicurity is successful as a policy agenda because of its mediating qualities which allow enterprises to adapt to market pressures, but to still maintain employment security. Flexicurity as a strategy of the labour market organization, is not only shaped by market forces alone, but is actually a result of negotiations and trade-offs between the needs of the enterprise and the needs of the employees. The enterprise negotiates for more flexibility and workers will strive for an increase in security. Countries that have

²⁷ <http://www.ilo.org/global/topics/employment-security/lang--en/index.htm>

²⁸ <http://www.ilo.org/global/topics/employment-security/lang--en/index.htm>

been able to organize their labour market in a way that enhance flexibility and security are usually top performers. Countries like Denmark, the Netherlands, Sweden, Finland and Austria appear to perform better than countries without flexicurity strategies when both economic and social indicators are measured.²⁹

2.2 Flexicurity Pathways

The Lisbon strategy for growth and jobs was directed at the improvement of the flexibility and adaptability of employers and employees. Four pathways to manage the specific situation, conditions, opportunities and stumbling blocks in implementing the strategy in Member States, were identified by the European Commission:³⁰

- Pathway 1: Reduce the asymmetries between non-standard and standard employment. Non-standard contracts must be integrated into labour law, collective agreements, social security and life long learning systems. Programs must be considered to make standard employment more attractive for firms;
- Pathway 2: Enhance companies' and workers' adaptability by developing and strengthening transition security;
- Pathway 3: The opportunity for training and the skills gap within the workforce must be addressed by broadening and deepening investments in skills acquisition;
- Pathway 4: Enhance employment opportunities for benefit recipients, prevent long-term welfare dependence, regulate informal work and build up more institutional capacity for change.

²⁹ Auer P and Gazier B, FLEXICURITY AS A POLICY AGENDA, CESi fo DICE Report 4/2008: P5

³⁰ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P4

The European expert group recommends that 'normal' employment must be made more 'flexible', without giving up security and making flexible work more 'normal', in security terms, without reducing flexibility.³¹

As Member States differ in their socio-economic, cultural and legislative setup, the Commission recommends that Member States implement flexicurity with carefully planned and negotiated "combinations and sequences" of policies and measures.³²

The Commission suggests that Member States use the mentioned typical pathways as a framework to analyze their own specific situation to identify their specific challenges. This must be done in consultation with social partners and other stakeholders that can contribute to "design their own comprehensive pathway towards better combinations of flexibility and security".³³ This flexicurity pathway must then be operationalised in flexible and secure contractual arrangements that are beneficial for the employer and employee, through modern labour laws and modern organizations.³⁴

2.3 The Dutch experience

The Dutch labour market is known for its low structural unemployment rate. The Netherlands is often seen as an example of the successful implementation of flexicurity. The Dutch flexicurity policies have been developed purposefully and are focused mainly at the "normalization" of atypical work without the loss of the flexibility of the labour market.³⁵ This strategy was mainly codified in the Flexibility and Security Act³⁶ and in the collective labour agreements for temporary work in the agency sector. The Dutch

³¹ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P4

³² www.xperthr.co.uk/article/78094/eu--commission-proposes-flexicurity-principles.aspx?searchwords=flexicurity

³³ www.xperthr.co.uk/article/78094/eu--commission-proposes-flexicurity-principles.aspx?searchwords=flexicurity

³⁴ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P15

³⁵ Bovenberg L and Wilthagen T, On the Road to Flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market mobility, September 2008 : P6

³⁶ <http://eurofound.europa.eu/eiro/1999/06/inbrief/nl9906146n.htm>

labour market is driven by contractual part-time work, fixed-term work and agency work.³⁷

The Dutch debate regarding temporary work was dominated by the concern that flexibility in the labour market may undermine employment security. The Netherlands believes that changes in the flexibility of the labour market must be accompanied with improved security instruments.³⁸ In the early stage of the European flexicurity debate, the Dutch approach, where relatively good labour market results were attained, served as an example for other Member States.³⁹ In 2008 it was found that 46.8% of the employed labour force worked part-time in the Netherlands.⁴⁰ It is interesting that in the Netherlands, part-time work is regarded as a normal and even a desired type of employment. There is a high percentage of workers that indicate that they prefer this type of employment. In the Netherlands 75% of women work part-time. It is reported that this type of employment enable female workers to combine work and family responsibilities. In addition to this, the percentage of employees with a limited duration contract was 18.1% in 2007. The European Foundation for the Improvement of Living and Working Conditions found that the proportion of part-time workers in the Netherlands increased from 39% to 48.3% from 1999-2009.⁴¹

The flexicurity strategy provides security for atypical workers mainly by strictly applying the *pro rata temporis*-principle.⁴² The legal principle *pro rata temporis* means "being in proportion to the length of time involved (worked)".⁴³ Two Dutch laws that are most relevant in the framework of flexicurity are: the Prohibition of Discrimination by Working Hours Act (Wet Verbod Onderscheid Arbeidsduur; WVOA) and the Adjustment of

³⁷ Bovenberg L and Wilthagen T, On the Road to Flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market mobility, September 2008 : P6

³⁸ Auer P and Gazier B, FLEXICURITY AS A POLICYAGENDA, CESi fo DICE Report 4/2008: P3

³⁹ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁴⁰ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁴¹ <http://www.eurofound.europa.eu/publications/htmlfiles/ef10861.htm>

⁴² Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁴³ <http://www.eurofound.europa.eu/emire/France/PRORATA-FR.htm>

Working Hours Act (Wet Aanpassing Arbeidsduur; WAA). This legislation forbids employers to discriminate between employees on the basis of a possible difference in working hours.⁴⁴ European law also provides protection for part-time workers relating to their remuneration and benefits. Part-time workers are protected by Article 141(2) of the Equal Pay Directive 75/117/EEC. The Directive forbids any discrimination by employers or employees on the grounds of the flexibility of their job relating to all aspects and conditions of remuneration.⁴⁵

As the Dutch system of dismissal protection is strictly regulated for insiders of the labour market, companies frequently use alternative ways to increase the flexibility of their workforce. Companies implement alternative measures by hiring additional workers on fix term contracts or by using temporary employment services (TES). These a-typical workers normally do not have a high level of social- and employment security. Social Security includes elements such as rights to unemployment benefit, pensions and holidays.⁴⁶ The purpose of the Dutch flexicurity legislation is to address the imbalance between an inflexible labour market for the permanent workforce and an insecure dispensation for a-typical workers. The Flexibility and Security Act (1999, Wet Flexibiliteit en Zekerheid) forms the basis of the flexicurity legislation in the Netherlands. The aim of the act is to balance the employers' need for a flexible workforce with the workers' need for a stable income and social security.⁴⁷ The most important aspects of the legislation, are:

- The restrictions on existing agencies were released and the opportunities of the temporary work agencies were enhanced;
- A maximum number of successive fixed term contracts and a maximum on the total length of consecutive contracts of respectively 3 contracts and 3 years was introduced;

⁴⁴ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁴⁵ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/parttimework.htm>

⁴⁶ Per Kongshøj Madsen, Flexicurity – A new perspective on labour markets and welfare states in Europe, CARMA Research Paper 2006:03.: P3

⁴⁷ <http://www.eurofound.europa.eu/eiro/studies/tn0803038s/nl0803039q.htm>

- The legal status of temporary agency workers was improved. The longer the careers of temporary agency workers are, the more the temporary work agency must provide for pensions and education.⁴⁸

The Flexibility and Security Act also provided more certainty relating to the relationship between temporary agency workers and the temporary work agency. The act prescribes that after 26 weeks of work, the employment relationship legally turns into a regular employer-employee relation between the temporary work agency and the temporary worker. The act also includes the role that the social partners can play by indicating that a collective agreement between employers' organizations and labour unions may deviate from these mentioned prescriptions.⁴⁹

From the 1990's the Netherlands made deliberate attempts to stimulate and deregulate temporary agency work and to strengthen the social security position of temporary agent workers.⁵⁰ In this period the amount of jobs increased with 20% and the unemployment rate dropped to just over 2%.⁵¹ This unemployment figure was one of the lowest in Europe. Wilthagen, et al⁵² asked the question if the growth in jobs were due to the Dutch flexicurity strategies or related to the economic boom in the 90's - especially if the downturn in 2000's is considered. According to CBS Statistics Netherlands, the number of people that move from one job to another normally increases in an economic up turn and decline in more difficult times. The job change rate in 2009 was similar to the figure of 2007 when the economy was thriving.⁵³ The reason for this may be that the Dutch economy already recovered in 2009, but the flexicurity policy that resulted that workers were prepared to change jobs definitely, also had an effect on the figures.

Is the positive effect of flexicurity sustainable, especially if it is taken into account that the basis of flexicurity is that it is flexible? Wilthagen, et al quotes de Beer who has the

48 <http://www.eurofound.europa.eu/eiro/studies/tn0803038s/nl0803039q.htm>

49 <http://www.eurofound.europa.eu/eiro/studies/tn0803038s/nl0803039q.htm>

50 Wilthagen, Ton C.J.M., Houwerzijl, Mijke, Houwing, Hester and Van Velzen, Martijn, Flexicurity in the Dutch Temporary Work Sector: A Positive Sum Game?, 2005: P21

51 Wilthagen, Ton C.J.M., Houwerzijl, Mijke, Houwing, Hester and Van Velzen, Martijn, Flexicurity in the Dutch Temporary Work Sector: A Positive Sum Game?, 2005: P21

52 Wilthagen, Ton C.J.M., Houwerzijl, Mijke, Houwing, Hester and Van Velzen, Martijn, Flexicurity in the Dutch Temporary Work Sector: A Positive Sum Game?, 2005 P21

53 <http://www.cbs.nl/en-GB/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2011/2011-015-pb.htm>

opinion that the flexibilisation of the Dutch labour market increased the responsiveness of the system to the economic cycle. This means that the Dutch labour market will effectively follow the trends of the economic cycle. What is also very interesting is that the number of PrEA's declined in the 90's after the flexicurity legislation was introduced. According to Wilthagen, et al it is not clear if the decline of TAW jobs was due to the new legislation or an economic downturn. A number of temporary contracts were not renewed due to the fact that it must now be converted in to permanent contracts after the prescribed period. The costs of TES are also increased due the principles of flexicurity that are focused at the improvement of working conditions. In practice it is also reported that employers are hesitant to offer less skilled workers open ended contracts and more experienced workers are continuously replaced by fresh, new and inexpensive workers.

As can be seen in Wilthagen, et al⁵⁴ ABU an employer's organization in the TES sector commissioned a study on the effects of flexicurity on the sector. The study found that an economic downturn will have a negative effect on the use of TES. It was also found that in times of economic upturn the effect of the flexicurity legislation on job creation is much smaller.

Wilthagen, et al believes that the introduction of Flexicurity legislation represents a well balanced trade-off in the TES sector. The trade-off is between a flexible workforce and the employment security for TES workers. The flexibility benefits include that employers can have more flexibility relating to their employment figures and that it is slightly easier to end a standard employment relationship. The liberalization of the TES sector also improved the social security of TES workers.⁵⁵ Temporary positions in the Netherlands are also regularly a stepping stone to a open ended contract.

54 Wilthagen, Ton C.J.M., Houwerzijl, Mijke, Houwing, Hester and Van Velzen, Martijn, Flexicurity in the Dutch Temporary Work Sector: A Positive Sum Game?, 2005 P21

55 Wilthagen, Ton C.J.M., Houwerzijl, Mijke, Houwing, Hester and Van Velzen, Martijn, Flexicurity in the Dutch Temporary Work Sector: A Positive Sum Game?, 2005 P22

As in all dynamic labour markets there are also challenges for the Dutch system.⁵⁶ With the effect of globalization and the ageing of the Dutch society within the framework of the current financial crisis, new strategies must be developed to improve labour market performance and enhance labour market participation. The Dutch Committee on Labour Market Participation, recently made policy proposals to reform the labour market.⁵⁷ These proposals are directed at the second typical pathway as identified by the European Commission on flexicurity - as discussed earlier. The proposals include tangible suggestions to further enhance flexicurity with better transition security and labour market mobility. As the dismissal protection in the Netherlands is fairly strict, employers, with the concept support of the Ministry of Social Affairs and Employment, are campaigning that less strict rules on dismissals will benefit job creation. Employers will more easily increase their workforce if there is a reduction in anticipated firing costs in the instance of an economic downturn.⁵⁸ The trade unions, as can be anticipated, are not supporting these labour market reforms because they believe that it will not improve job creation, but will only have a negative effect on employment security. According to Bovenberg, et al⁵⁹ the social partners are currently less convinced that mutually beneficial solutions are possible in the labour market than they were in the 1990s. The recent initiative of the Minister of Social Affairs and Employment with the introduction of a Committee on Labour Market Participation is encouraging. The committee will make suggestions on broad labour market issues. In June 2008 the recommendations of this committee were published, and it proposed that the labour market participation rate must be increased to 80 percent by 2016.⁶⁰

According to the committee, the character of the Dutch labour market is changing radically. In the future, demand will exceed supply in respect of both the quantity and quality of the workforce. The Dutch economy needs more workers, and those workers

⁵⁶ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁵⁷ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁵⁸ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁵⁹ Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESi fo DICE Report 4/2008: P9

⁶⁰ Towards a future that works, Main Recommendations Committee on Labour Market Participation, 16 June 2008

need to be more employable. According to the findings of the committee these needs will require that the labour market must be restructured. In the next few decades the focus of the management of the Dutch labour market must be on employability and work security.⁶¹ The proposals imply that labour market reforms must simultaneously improve workers security with a more liberal labour market strategy.

According to Bovenberg, et al⁶² the committee suggests a three-track approach. The first track addresses the importance to facilitate and stimulate the ability of vulnerable groups to find a job or to work more hours. It is proposed that if employers hire long-term social security recipients, the organization will receive temporary wage cost subsidies. The employers will also be covered by a so-called no risk policy and secondment arrangements. The recipients of the benefit will in their turn have an obligation to participate and part-time workers will be encouraged by tax incentives to expand their number of working hours. The strategy will be combined with initiatives to improve facilities for combining work and family life.⁶³

The second track will give employers, employees and municipalities more responsibility at a decentralized level for ensuring the employability and transitional security of workers. The parties on decentralized level will receive new instruments that can be utilized to promote employability and employment security namely employment insurance and work budget.

2.3.1 Employment Insurance:

This bold and future directed proposal involves that the Unemployment Insurance Scheme must to be turned into an Employment Insurance scheme. This scheme will enable the prevention of unemployment and facilitate the transition to a new job. Employers will be required, in the case of redundancy, to continue to pay 80 to 100 percent of the worker's remuneration for a maximum of six months from the date that

⁶¹ Towards a future that works, Main Recommendations Committee on Labour Market Participation, 16 June 2008

⁶² Bovenberg L, Wilthagen T and Bekker S, FLEXICURITY: LESSONS AND PROPOSALS FROM THE NETHERLAND, CESifo DICE Report 4/2008: P9

⁶³ Bovenberg L, Wilthagen T, On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market, European Journal of Social Security, Volume 10 (2008), No. 4: P 335

the worker receives a notice. This period is called a transfer period and the intention of the period is that the worker must fully dedicate himself or herself to finding new employment.⁶⁴ If the worker does not find new employment in the transfer period, he will be deemed as dismissed. Before the dismissal is effective, the efforts of both the employer and worker must be evaluated. After this period the unemployed worker enters a reintegration process where the sector of industry must cover the financial responsibility and private or public reintegration organizations will be contracted to assist the worker to acquire a new position. In the occurrence that the employee, after six months, still was not able to secure a new job, the responsibility is shifted to the municipality.

This new system will bring the Netherlands in line with other industrialized economies in relation to employment protection legislation. It is proposed that the current system of the pre-emptive testing of dismissals by the public employment services must be abolished. In the new system, the effected employee may, during the notice period, challenge the reason the employer gives for the proposed dismissal in court. The notice period to follow this process period is however shortened to only one month. According to Bovenberg, et al⁶⁵ is this concept - of attaching more emphasis to the price of laying off people than to the legal procedures - consistent with the economic theory.

2.3.2 Work Budget

The Work Budget will have a larger scope than the current life-course saving scheme. An interesting proposal is that this scheme can also be used to provide additional income in the instance of job transitions, where the employee begins his own business, possible part-time retirement, training, unpaid leave, or even a new job or position with lower earnings.⁶⁶ What is also important in the ambit of this paper is that the work

⁶⁴ Bovenberg L, Wilthagen T, On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market , European Journal of Social Security, Volume 10 (2008), No. 4: P 335

⁶⁵ Bovenberg L, Wilthagen T, On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market , European Journal of Social Security, Volume 10 (2008), No. 4: P 337

⁶⁶ Bovenberg L, Wilthagen T, On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market , European Journal of Social Security, Volume 10 (2008), No. 4: P 338

budget will also be applicable to flexible workers and fixed contract workers. Both the worker and the employer will make financial contributions to the Work Budget.

2.3.3 The state pension age

The third and last track includes the proposal to gradually raise the official pension age as from 2016 by one month per year. This would mean that by no longer than 2040 the retirement age will be 67 which in turn is in line with the population's increasing life expectancy.⁶⁷

The three tracks are dependent on each other. With the improved participation of all groups in the labour market it is envisaged that their spending on social security will stabilize. The Dutch Committee accepts that the conversion to the labour law system will be gradual and it will only be realized if major stakeholders such as political parties, the government, employers and workers and their organizations, courts and various labour market services, support the changes⁶⁸

2.4 Flexicurity and Decent Work

In the next section the issue whether flexicurity is compatible with the decent work agenda will be discussed. Promoting the concept of decent work is one of the core functions of the ILO. The ILO believes strongly that work is a central aspect of the wellbeing of people, because work provides an income and promotes "broader social and economic advancement".⁶⁹ The decent work agenda is directed at the promotion of the opportunities to acquire decent work. The term decent work reflects the freedom, equity, security and human dignity of workers.⁷⁰ Decent work is summarized by the four

⁶⁷ Bovenberg L, Wilthagen T, On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market, *European Journal of Social Security*, Volume 10 (2008), No. 4: P 335

⁶⁸ Bovenberg L, Wilthagen T, On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market, *European Journal of Social Security*, Volume 10 (2008), No. 4: P 335

⁶⁹ <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

⁷⁰ Massimiani C, *Flexicurity and Decent Work in Europe: can they co-exist?*, Faculty of Law – University of Catania, 2008, P2

strategic objectives by the ILO namely job creation, guaranteeing rights at work social, protection, and social dialogue.⁷¹

The European Employment Strategy, as a sub-strategy of the Lisbon Agenda, included flexicurity guidelines.⁷² To evaluate the question whether these flexicurity guidelines and the decent work agenda are complimentary or maybe conflicting, the Council Conclusions on Decent work for all of 2006 must be discussed. These Conclusions highlight however, that the competitiveness of the EU must be strengthened in a socially sustainable way. Strategies to improve productivity must be balanced with the improvement of decent work and the quality of working life agenda. The flexicurity strategies must include health and safety at work, life-long learning, good working relations as well as better reconciliation of work and private life.⁷³ According to the mentioned Conclusions flexicurity strategies, must also be directed at all forms of discrimination as well as promoting the social integration of vulnerable groups.

Flexicurity does not imply that permanent contracts are not supported, and that non-permanent employment is the future. In terms of the decent work debate, flexicurity must address the gap between permanent and non-permanent work, facilitate the smooth and timely evolution from unemployment into employed and support the transition into decent employment.⁷⁴ The European Expert Group on Flexicurity believes that the strategy focuses on improving and safeguarding peoples' ability to "enter, remain and progress" in employment throughout their life-cycle. According to the ILO⁷⁵ the flexicurity approach is in line with the ILO Decent Work concept but, it recommends that the right balance regarding decent work is not to be found by companies or the public sector alone, but through social dialogue.⁷⁶ According to Massimiani⁷⁷, decent work is part of the EU strategy. He refers to the agreement of the

⁷¹ <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

⁷² Auer P and Gazier B, FLEXICURITY AS A POLICYAGENDA, CESi fo DICE Report 4/2008: P7

⁷³ http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/lsa/91954.pdf

⁷⁴ European Expert Group on Flexicurity, Flexicurity Pathways – Turning hurdles into stepping stones(2007) P4

⁷⁵ <http://www.ilo.org/public/english/region/eurpro/budapest/employ/flex/index.htm>

⁷⁶ http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_093856/lang--en/index.htm

⁷⁷ Massimiani C, Flexicurity and Decent Work in Europe: can they co-exist?, Faculty of Law – University of Catania, 2008, P2

European social partners of 18th October 2007: “Key challenges facing European Labour markets: a joint analysis of European social partners”. The agreement links flexicurity with the quality of work because the agreement guarantees “good working conditions”.

Kraamwinkel, et al⁷⁸ make the observation that decent work is not in the agenda of the Europe 2020 strategy. These authors argue that because the focus of the strategy is on more work that is more flexible, the important issue of the quality of the work is ignored. If the Agenda for new skills and jobs of the Europe 2020 initiatives is considered it is clear that Kraamwinkel, et al are not correct in arguing that decent work is not part of the 2020 strategy. The Commission proposed actions in the Agenda for new skills and jobs that will ensure decent working conditions while improving the quality of employment legislation.⁷⁹

In the ambit of decent work there are two elements that must not be confused namely: the need of the worker for more flexible work and the need of the employer for a flexible workforce. There are employees reporting that a flexible contract give them more freedom. According to the Federatie Nederlandse Vakbeweging (FNV), it is mostly the highly skilled and desired workers who are in a strong negotiation position, that report that flexible contracts give them more freedom.⁸⁰ The FNV believes that most PrEAs do not provide their employees with flexibility in their permanent contracts. According to the FNV a flexible contract for most of TES workers does not result in freedom. TES workers must go where and when as the PrEAs prescribes. The negative aspect of TES work is that a worker is paid per assignment and that the worker is not sure what their next assignment is going to be. It is also reported that the TES worker can experience stress and fatigue as they continually move from one contract to the next. There is also truth to the other side of the coin that flexible working patterns can make

⁷⁸ Zeggenscap, Over Arbeidverhoudinge, 21 E Jaargang Nr3, September 2010: P20

⁷⁹ <http://ec.europa.eu/social/main.jsp?langId=en&catId=958>

⁸⁰ Zeggenscap, Over Arbeidverhoudinge, 21 E Jaargang Nr3, March 2010: P10

new work opportunities available, can allow the incomes of families to be supplemented and to may reconcile family/work responsibilities.⁸¹

2.5 Flexicurity and the Private Employment Agency Sector

The impact of the private employment agency sector on the flexicurity strategy will be discussed in the next section. According to Denis Pennel, managing director of the European Confederation of Private Employment Agencies (Eurociett), the temporary agency sector is central in the flexicurity debate in Europe.⁸² Pennel remarks that the sector offers flexibility and security for both workers and businesses. The private employment agency sector improves the transferability of the rights of agency workers. The fact that agency workers' rights are transferred with him or her from one company to the next, has a huge impact on the workers' job security.

On 28 February 2007, Eurociett and Uni-Europa, a european trade union federation, agreed on a European-level Joint Declaration on Flexicurity.⁸³

The Declaration, affirms that TAW can contribute considerably to the flexicurity agenda, namely:

- Creating the possibility for workers to progress from unemployed to employed, for example helping jobseekers entering or re-entering the labour market;
- facilitating the transition of young workers between their education and first job;
- TES can facilitate the supply and demand of the labour market;
- The progression from temporary contracts to open-ended contracts is facilitated by TES;

⁸¹ Brewster,etal:CIPD,2007; P176

⁸² http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁸³ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/Eurociett_Uni-Europa_joint-declaration_on_Flexicurity_28-02-07.pdf

- To assist with the improvement of the work– private life balance. This is possible by providing flexible working time possibilities when it is needed;
- To enhance the principle of equal treatment;
- That TES must not replace striking workers with temporary Agency Workers;
- It must be clearly indicated that agency workers are employed by the PrEA - they must carry all obligations as employers in terms of Labour Law.

It is also worthwhile to look at the recommendations of Eurociett on how the implementation of flexicurity can be improved, as this will also improve our understanding of the realities of the strategy:

- To promote TES more actively as an appropriate way to implement a flexicurity approach;
- To improve the access to the labour market for outsiders (long-term unemployed, returning women, first-time entrants, elderly people), by making effective use of the stepping stone capabilities of private PrEA;
- The benefits of the ratification of the ILO Convention no181 on Private Employment Agencies should be promoted within the EU (and actually in all the industrialized economies). According to Eurociett the convention is based on a flexicurity approach;
- Governments must consider the modernization of their labour laws in order to bring legal certainty to flexible- work contracts and employment relationships;
- A modern approach is needed for the re-evaluation of social protection, pensions and health as Europe recovers from the economic crisis. This is also inline with the Dutch efforts to adapt their labour legislation;

- The importance of social dialogue in the implementation of flexicurity.⁸⁴

The Lisbon employment taskforce, chaired by Wim Kok, found that TES can be an effective stepping stone for outsiders into the labour market and consequently increase job creation. If the PrEA'S act more as human capital managers than mere manpower suppliers, the sector can play an important role in the balancing of the security and flexibility of the labour market.⁸⁵

Private Employment Agencies can assist employers with a statutory answer to their flexibility requirements. Private Employment Agencies can make a substantial contribution to the profitability of their clients' business if they can assist the companies with a quick response to personnel needs.⁸⁶

In the flexicurity strategy Private Employment Agencies can provide the following Services: temporary agency work, permanent recruitment, outplacement, interim management, executive search and training. Private Employment Agencies can be the key pin in the labour market were people who are looking for work (the "outsiders") can be transformed in people who are employed (the "insiders").⁸⁷

In the next paragraphs instances where Private Employment Agencies had a positive effect on flexicurity will be discussed:

- In 2006 Federgon, the Belgian Private Employment Agency Association and Trade Unions, established a training fund for temporary agency workers. The objective for this training fund is to assist temporary agency workers to improve their skills level through training interventions. The purpose of the program is to improve the opportunities of the TES workers to be placed in assignments. This training also equips the TES workers with scarce skills that are urgently needed in the labour market.⁸⁸

⁸⁴ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁸⁵ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁸⁶ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁸⁷ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁸⁸ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

- In the United Kingdom, the UK Private Employment Agency Association, together with Job Centre Plus and the National Public Employment Services, signed in 2005 the groundbreaking Pan Industry Diversity Pledge. It is applicable to the public and private recruitment industry and encourages the utilization of diverse pools of candidates. Truly diverse workforces are believed to be the key to success and will improve social cohesion in the UK.⁸⁹

- In Germany the German Association of Private Employment Agencies (BZA) and the German Federation of Trade Unions (DGB) signed a framework collective agreement on general working and employment conditions. This agreement will enable the TES sector to operate efficiently. This agreement introduced a working time account that enables a flexible assignment planning process. In terms of this process the volume of working hours can be adjusted to suit the needs of both the client and employee. This agreement improves employment security and job creation while limiting the risk of dismissals - due to seasonal or short time underemployment. The principle is that the employee receives a steady flow of income while his working hours, on the working time account, may deviate. Periods of down time can be balanced out by overtime hours in the course of the year.⁹⁰

- Since 1992, the French Private Employment Agency Association (PRISME) and trade unions established a social fund for TES workers. The purpose of this fund is to enhance social benefits for the temporary agency workers. Examples of these benefits are: subsidies to support scholarship and university fees for their children, financial guarantees to get housing, security to obtain a consumer credit and complementary private health insurance.⁹¹

⁸⁹ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁹⁰ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁹¹ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

- The Dutch Private Employment Agency Association (ABU) and trade unions signed a collective labour agreement which will span over several years that awards extra pension schemes for temporary agency workers.⁹²
- In Poland the Polish Private Employment Agency Association (ZAPT) and the Public Employment Services, have initiated an agreement where they co-operate to assist job-seekers to re-integrate into the labour market.⁹³

3. THE ROLE OF TEMPORARY EMPLOYMENT SERVICES

The world of work is in a era of economic liberalism and globalization. The labour market is confronted by declining employment opportunities in the formal economy. The need for a flexible labour market created a opportunity for Temporary Work Services (TES) to establish itself as a mayor actor in the labour field. **PrEAs** can be defined as intermediaries between workers and employers, with the stated goal of matching the companies' needs with the workers' skills and interests.⁹⁴

Temporary Agency Workers are defined as: “Workers with either a contract for service or a contract of employment with the agency who finds them work. Such workers may be able to use it to try out different kinds of work, as a stepping stone to the job they want, as a way of entering or re-entering the job market, working more flexibly to suit their circumstances, and/or to move jobs easily and at short notice. However, they may have less control over their work, more pressure and shift work, and fewer rights than regular staff colleagues. The user enterprise has the flexibility to stop temporary work, and the agency may be liable for unfair dismissal or redundancy pay”.⁹⁵

⁹² http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁹³ http://www.eurociett.eu/fileadmin/templates/eurociett/docs/position_papers/Leaflet_Contribution_of_PrEAs_to_Flexicurity.pdf

⁹⁴ <http://www.wisegeek.com/what-are-employment-agencies.htm>

⁹⁵ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

PrEAs play a significant role in a dynamic and flexible labour market. PrEAs are successful because of their ability to provide services to a swiftly developing and increasingly flexible labour market. According to Jeffrey⁹⁶, atypical employment grew fast in the past decade, due to the needs of a modern knowledge-driven and services-dominated economy that requires job flexibility. Temporary employment is often the only cost effective solution for seasonal, cyclical, or project-based work.⁹⁷ There are 72,000 private employment agencies globally that provide jobs for 9 million agency workers that are employed on a full time basis and the PrEAs employ over 741,000 internal staff in 169, 000 branches. The Annual turnover for the private employment agency industry amounts to 203 Billion Euros.⁹⁸ There are two main reasons for the growth of the TES sector. Firstly, there is a perception that the PrEAs can relieve the enterprise from the administrative burden of complying with the employment laws, and secondly, that PrEAs often create a network of specialist employees in the information economy that can be placed at a client's organization on short notice to be utilized at the highest level of efficiency.⁹⁹

The role of PrEAs must not be underestimated because the sector not only provides employment opportunities for jobless, but also functions as an instrument to develop the employability of the workers. As it will be discussed later in this thesis, PrEAs can definitely contribute to the improvement of the working conditions of TES workers.¹⁰⁰ It will be indicated that PrEAs plays an important role in the modern labour market and must be regulated, not restricted. Agency work has the "efficiency and flexibility" to place workers where they are needed most. PrEAs has the skill and ability to rapidly identify the needs of the market. The PrEAs identify the skills needed, train the job seekers and provide the human resources just in time. The PrEAs are experts in assisting their clients with the transition from unemployment to employed. The PrEAs also facilitate the transition of workers from one job to another. According to the report,

⁹⁶ <http://www.iol.co.za/business/business-news/decent-work-demand-is-selfish-1.1023879>

⁹⁷ <http://www.iol.co.za/business/business-news/decent-work-demand-is-selfish-1.1023879>

⁹⁸ http://www.ciett.org/fileadmin/templates/eurociett/docs/press_releases/100114_press_release_Ciett_annual_report.pdf

⁹⁹ <http://www.labourbroker.co.za/Articles/Labour%20Broking-%20A%20South%20African%20Perspective.pdf>

¹⁰⁰ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

37% of agency workers are unemployed before they are placed by an agency. If a worker was once placed by an agency the percentage of workers that were unemployed before placement falls with 15%. Pennel is of the viewpoint that by creating opportunities for job seekers, the agency work industry improves the chances for workers to find permanent employment.¹⁰¹

The important role that the TES sector plays is indicated by the following statistics:

- PrEAs had a total worldwide turnover of € 203 billion in 2009,
- Japan, the USA and the UK leads the PrEAs penetration globally by a total annual, sales revenues, accounting for 24%, 22% and 12% respectively,
- The leading regional role player is Europe with PrEAs that accounts for 40% of the worldwide sales revenues of PrEAs,
- Almost 9 million agency workers were employed in 2009 globally,
- The penetration rate of agency work in the labour market is 1.7% in Japan, 1.4% in Europe and 1.3% in the USA,
- An interesting trend is that the majority of agency workers are less than 30 years old,
- The success of PrEAs is reflected by the fact that 81% of companies reports that they utilized agency work to manage economic fluctuations.¹⁰²

The mayor role player in the sector is the International Confederation of Private Employment Agencies (Ciett) that was founded in 1967 in Paris, France. The objective of this organization is to promote the common interests of the agency work sector at international level. Ciett has been committed to a more favorable political environment and recognition for the agency work industry. Ciett also implements programs to improve the image of the sector.¹⁰³

¹⁰¹ http://www.ciett.org/fileadmin/templates/eurociett/docs/press_releases/100114_press_release_Ciett_annual_report.pdf

¹⁰² <http://www.ciett.org/index.php?id=163>

¹⁰³ <http://www.ciett.org/index.php?id=35>

The annual economic report of Ciett emphasized the role that the PrEAs played in the recovery of the labour market after the 2008 economic crisis. The report indicates a strong growth in the private employment agency industry just after the economic crises. The TES sector was responsible that in some developed countries there are already similar employment levels as before the crises. The trend is that companies first hire temporary workers to meet new orders when the market recovers, and later consider to employ more permanent workers. Research by Ciett indicates that up to 80% of new jobs would not have realized if agency work were not a labour strategy.¹⁰⁴

The TES sector has an important role to play in the modern day labour economy. As the labour market of the future is rapidly growing and flexible, PrEAs will partner with companies to create more flexible workforces. PrEAs have an important role to play in ensuring that TES workers are sufficiently protected. While ensuring labour flexibility, the job security and employment standards of agency workers must not be neglected. It must be guaranteed that pay, working time, employment opportunities and training of TES workers are in line with permanent workers.

3.1 Private Employment Agencies in the Europe Union (EU)

The TES industry in Europe is a good indication of the direction that the global labour market is heading in the future. The PrEA industry in the EU accounts for 40% of the global turnover of the industry. In EU Member States approximately 4 million people are employed daily by temporary work that accounts for about 2 % of the total employment in the region. It is interesting to note that agency work has been the most expediential increasing form of employment in the EU since 1990.¹⁰⁵

It is important to be clear about what is seen as temporary agency work in the EU as this thesis examines temporary agency work in the Netherlands. EU Directive

¹⁰⁴ http://www.ciett.org/fileadmin/templates/eurociett/docs/press_releases/100114_press_release_Ciett_annual_report.pdf

¹⁰⁵ http://www.ciett.org/fileadmin/templates/eurociett/docs/press_releases/100114_press_release_Ciett_annual_report.pdf

91/383/EEC defines **temporary agency work** as: "...a temporary employment relationship between a temporary work agency, which is the employer, and a worker, where the latter is assigned to work for and under the control of an undertaking and/or establishment making use of his or her services (the user company).¹⁰⁶

As discussed earlier is the reason for the rapid growth in employment agency work, related to the need for the labour market to be flexible, and this is also applicable to the EU. The trend is that a large amount of temporary agency work is done by low-skilled workers, but it is apparent that more assignments nowadays are especially for skilled technicians and professionals. The regulation of agency work differs in Member States from detailed regulations to the self-regulation by the industry. Some Member States introduced legislative regulations and others decide to follow the path of collective agreements or even codes of conduct. In the EU the focus is not only directed at the employment relationship in agency work, but also on the third party user of the services provided by the agency.¹⁰⁷

The European social partners already identified a need for a framework agreement on temporary work in the late 1990's. The social partners, through a process of social dialogue, could not reach an agreement on temporary work by May 2001. The European Commission adopted a proposal for a Directive on Temporary Agency Workers in March 2002. The proposal introduced the principle of equal treatment, where temporary agency workers are entitled to the same remuneration and basic working conditions as permanent workers, if they function in the same or similar jobs in a company.¹⁰⁸

The EU Temporary and Agency Workers Directive (2008/104/EC) was accepted in November 2008. The directive prescribes the principle that temporary workers must enjoy equal pay and basic conditions as permanent employees, if they are in the same business and do the same work. When the Directive was proposed in 2002, the British,

¹⁰⁶ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/temporaryagencywork.htm>

¹⁰⁷ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/temporaryagencywork.htm>

¹⁰⁸ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/temporaryagencywork.htm>

German, Danish and Irish governments blocked the realization until 2008. The EU directive on temporary agency work came into force on 5 December 2008 and the Member States received three years to integrate the provisions and requirements into their national law.¹⁰⁹

The directive has the following main objectives:

- Equal treatment for agency workers, regarding to employment status and security from the first day of employment, unless there is social partner derogation (Article 5). The right to benefit from labour law, equal pay and social protection are specifically included ;
- Respect for established social standards in user firms through equal treatment as regards pay and conditions;
- Recognition of the temporary agency sector as a legitimate and professional business, by removing unnecessary restrictions, permits and bans (Article 4);
- The right of agency workers to be informed about permanent employment opportunities in the user undertaking (Article 6);
- Equal access to collective facilities in the user enterprise;
- Improved access to training and childcare facilities in periods between assignments, to enhance employability.¹¹⁰

Some Member State developments in the PrEA sector as identified by the ILO will now be discussed briefly:¹¹¹

Belgium has relaxed some sectoral and occupational restrictions in recent years. Agency work was previously regulated substantially in the country. The restrictions on contracting temporary workers in the agriculture, hotel and catering sectors were lifted

¹⁰⁹ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/temporaryagencywork.htm>

¹¹⁰ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/temporaryagencywork.htm>

¹¹¹ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

in 2005 and in the construction sector since 2001. Temporary agency work (TAW) is still unlawful in certain dangerous jobs. In the public sector TAW may only be used for the replacement officials that are already on contract.

In Spain the law reform of 1999 prohibits the assignment of temporary workers to dangerous occupations and to the public service. Regulations in the construction sector are aimed at reducing the accident rates of temporary employment that has limit the effect of the use of PrEA in the sector.

In Portugal, agency workers may be contracted in dangerous sectors, for example construction.

France has no specific restrictions. However in the public sector the preference is to use less expensive forms of temporary work than agency work.

In Germany, PrEAs were not allowed to provide workers for blue-collar jobs in the construction sector until 2004. In practice collective agreements may still exclude agency workers because collective agreement must include the user company and the PrEA. This may limit the penetration of agency workers.

In Norway, the government may prohibit agency work for some categories of employees or in certain areas, if deemed necessary but it has not happened yet in practice.¹¹²

3.2 The European Framework Agreement on fixed term work

This thesis investigates the issue of the protection of TES workers and the European Framework Agreement gives valuable insight in attaining this goal. The term Framework Agreement refers to an agreement reached by the social partners in a process of social

¹¹² <http://www.ciett.org/index.php?id=35>

dialogue and it is intended to provide an outline of general principles to be implemented in the Member States.¹¹³

In 1997 a European Framework Agreement was agreed by the social partners where rights for part-time workers were established. The Framework Agreement provides for the equal treatment of part-time workers with comparable full-time workers. The Framework Agreement was transformed into Council Directive 97/81/EC of 15 December 1997.¹¹⁴

In 1999 another Framework Agreement was reached on fixed-term work. It requires employers to treat workers on fixed-term contracts no less favourably than permanent workers doing generally comparable work in the same organization. Discrimination is not permitted in the terms of the contract, training opportunities, or access to a permanent post. If a fixed-term worker is re-employed under repeated fixed-term contracts, there is after four years a legal presumption that the employee is permanent. This Framework Agreements resulted that the European Parliament adopted Council Directive 99/70/EC of 28 June 1999 that extended the equal treatment principle to temporary agency workers. This directive prescribes that by January 2011, sooner in some member states, agency workers will be entitled to equal treatment compared with full-time counterparts that must include pay, access to training and trade union rights.¹¹⁵

3.2 The real employer in Temporary Employment Services

In TES there is a triangular employment relationship. The employment relationship is established where a provider supplies a worker to a user. According to the ILO this triangular relationship can lead to legal difficulties.¹¹⁶ The worker may find himself in the

¹¹³ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/frameworkagreements.htm>

¹¹⁴ http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/c10822_en.htm

¹¹⁵ http://www.socialistsanddemocrats.eu/gpes/media3/documents/2898_EN_Leaflet_Europe_protects_EN_web.pdf

¹¹⁶ <http://www.ilo.org/public/english/standards/reln/ilc/ilc95/pdf/rep-v-1.pdf>

position that he must report to two or even more employers. If there is doubt who the real employer is, it is more difficult for the worker to enforce his/her rights. In terms of labour law employers are primarily responsible for the rights of their employees, whether they are a contractor, an employment agency, a cooperative or any other employing enterprise or entity. Here the definition of an employee is important: "...an employee is generally described as a worker who performs services in exchange for remuneration and in a relationship of subordination toward his/her contract party".¹¹⁷

The user of the labour plays an important role in ensuring the rights of the workers such as limits on working hours, rest breaks, paid leave, etc. The current system in South Africa, as in many other countries, makes the user together with the PrEA legally obligated to uphold the rights of the workers. According to the ILO Depending on the circumstances and national law, the user and the PrEA may bear joint and several liability that have the practical effect that the worker can claim against both or either of them without distinction. The triangular relationship is a result of the flexibilisation of the modern labour market. The ILO is of the opinion that in relation to the triangular relationships, countries must endeavor to clarify the law to ensure that employees are clear who the employer is, what their rights are and who is responsible adhere to it.¹¹⁸

3.4 Private Employment Agencies Convention, 1997

According to the ILO temporary agency work can be an effective "stepping stone" for the jobless and new entrants into the labour market. The ILO recommends that PrEAs must act more as human capital managers, rather than mere manpower suppliers. As human capital managers these agencies can also play the role of mediators and facilitators in the recruitment and management of both qualified and unqualified staff.

¹¹⁷ Blanpain R (ed); Comparative Labour Law and Industrial Relations in Industrial Market Economies, Kluwer Law International, Alphen aan den Rijn, 2010 : P344

¹¹⁸ <http://www.ilo.org/public/english/standards/reln/ilc/ilc95/pdf/rep-v-1.pdf>

The companies can decide to outsource the traditional recruitment functions to PrEA that also have a positive effect on job creation.¹¹⁹

The General Conference of the ILO decided in 1997 to revise the Fee-Charging Employment Agencies Convention of 1949 by adopting the Private Employment Agencies Convention. The reason for this decision was that PrEAs operates in a radically different environment today than in 1949. The ILO recognizes in the convention the importance of PrEAs in an effective labour market. The importance of the need to protect workers against abuses was emphasized by the ILO. The ILO also recognized the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue in adopting this Convention.¹²⁰

The ILO had identified in the ambit of the rapid development of PrEAs in the 1990's a need for new international labour standards. The role of PrEAs in the labour market was also increasingly a point of debate between governments, employers and trade unions. It also became clear that standards were necessary to protect worker rights and job security. The International Labour Conference, developed the Private Employment Agencies Convention, 1997 (No. 181), and Recommendation No. 188. As a result of the discussions, the International Organization of Employers (IOE), the International Confederation of Trade Unions (ITUC) and 30 governments from all around the world agreed on the proposals.¹²¹ As the interests of employers were covered by the Convention, it was considered as a major improvement on Convention No. 96 because the importance of flexibility in labour markets was recognized. Convention No. 96, 1949 regulated Fee-Charging Employment agencies. The trade unions also supported the new standards because it protected temporary and migrant workers.

According to the ILO, Convention No. 181 balances the enterprises' need for a flexible workforce with the needs of workers for employment security, a safe work environment and decent work conditions. Convention No. 181 sets the general guidelines for the

¹¹⁹ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹²⁰ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University; 2011:P 297

¹²¹ http://www.ciett.org/fileadmin/templates/ciett/docs/press_releases/Ciett_Press_Release_-_ILO_Workshop_C181_26-10-09.pdf

regulation, placement and employment of workers by PrEAs. ILO Member States are advised to utilize the principles of the convention to develop applicable policies and legislation to regulate PrEAs. The procedures and mechanisms may include the registration and licensing of agencies.¹²²

The Convention came into effect in May 2000 and by July 2009, 21 countries had ratified it. The reason why the ratification figure is relatively low may be because this Convention was not part of a ratification campaign. There are 25 countries that are still bound by Convention No. 96, and they have indicated intent to ratify Convention No. 181.¹²³

The Convention applies to all private employment agencies and according to Article 2 the purpose of the Convention is “to allow the operation of private employment agencies as well as the protection of the workers using their services”. Article 4.2 of the Convention allows a member state to (after consulting with the most representative organizations of employers and workers) prohibit PrEAs, under specific circumstances, from functioning in respect of certain categories of workers or branches of economic activity, in the provision of one or more services.¹²⁴ This exclusion may be appropriate in cases where private agencies abused their duties, and member states view that workers are better protected by public employment services. The ILO strongly expressed the opinion that the exclusion of private agencies from recruitment operations requires that public employment services are actually capable of providing them. The member states’ financial resources and the acceptance of the unemployed of utilizing public employment services will be deciding factors in the decision, if the exclusion of private agencies will be accepted. The ILO is of the opinion that where jobseekers prefer private agencies to public services, PrEAs must be allowed. But the key element here is that the participation of the PrEAs in the labour market must be regulated.¹²⁵

¹²² <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹²³ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹²⁴ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University: 2011:P 298

¹²⁵ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

According to Convention No. 181, Art. 1 the following definition is applicable to a **PrEA** :
 “Any enterprise or person, independent of the public authorities, which provides one or more of the following labour market functions:

(a) Services for matching offers of and applications for employment; (b) services for Employing workers with a view to making them available to a third party (“user Enterprise”); and/or (c) other services relating to job seeking, such as the provision of Information that do not aim to match specific employment offers and applications”.¹²⁶

Article 3 of the Convention states that the legal status of the PrEAs shall be determined by the national law and practices in the member state after consultation with the most representative organizations of employers and workers. Member states must implement a system of licensing or certification of PrEAs, if it is not already regulated by national law or practices.¹²⁷

Article 4 contains a very important prescription that it must be ensured that workers recruited by PrEAs must not be denied the right of freedom of association and the right to bargain collectively.¹²⁸ Article 5 reaffirms the principle of equality of opportunity and treatment on the basis of race, color, sex, religion, political opinion, national extraction, social origin or any other form of discrimination. This prohibition shall not include targeted programs to assist the most disadvantaged workers. Child labour is also prohibited in article 9 of the Convention.¹²⁹ Article 7 includes a critically important prescription that PrEAs may not charge directly or indirectly any fees or costs to the workers.¹³⁰ The Convention is prescriptive that member states must adopt necessary

¹²⁶ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹²⁷ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University; 2011:P 298

¹²⁸ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University; 2011:P 299

¹²⁹ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University; 2011:P 299

¹³⁰ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University; 2011:P 299

and appropriate measures to provide adequate protection to prevent abuses of migrant workers recruited or placed by PrEAs.¹³¹

Member states must, in accordance with national law and practice, take the necessary steps to ensure adequate protection of the agency workers. The member states must protect the following rights of the agency workers:

- (a) freedom of association;
- (b) collective bargaining;
- (c) minimum wages;
- (d) working time and other working conditions;
- (e) statutory social security benefits;
- (f) access to training;
- (g) occupational safety and health;
- (h) compensation in case of occupational accidents or diseases;
- (i) compensation in case of insolvency and protection of workers claims;
- (j) maternity protection and benefits, and parental protection and benefits.¹³²

Article 13 of the Convention promotes cooperation between the public employment service (PES) and PrEAs in order to improve labour market efficiency. The national labour market administrator in the member state will remain responsible for formulating the labour market policy. The ILO prescribes as best practice that a member state shall, after consulting the most representative organizations of employers and workers, formulate and implement programs to promote cooperation between the PES and

¹³¹ R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University; 2011:P 299

¹³² R Blanpain; International Labour Law and Globalisation: Textbook; Tilburg University ; 2011:P 300

PrEAs. This cooperation can be non-commercial or commercial. In non-commercial cooperation will the parties will exchange information on labour related issues e.g. vacancies. Commercial cooperation could include outsourcing of functions such as training of the unemployed to private employment agencies. Ongoing communication can facilitate cooperation between the public and the private sector. According to the ILO will the quality of cooperation depend on the amount of trust private and public actors may have in each other.¹³³

The ILO believes that the Convention can be a driving force for: “job creation, structural growth, improved efficiency of national labour markets, better matching of supply and demand for workers, higher labour participation rates and increased diversity”.¹³⁴ The Convention provides a guideline for regulation, licensing and self-regulation for the PrEA sector. The aim of the Convention is the effective protection of workers against unfair practices.

The ILO states that the ratification of the Convention and the adoption of the principles in national legislation and practices will address the following important aspects of agency work:

- Equal pay, opportunities and security for permanent and agency workers that do the same work in the same company;
- Safety and health issues created by unscrupulous providers or users of temporary agency workers;
- Discouraging human trafficking; and promoting cooperation between public and private employment services.¹³⁵

¹³³ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹³⁴ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹³⁵ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

3.5 Private Employment Agencies and decent work

Decent work is one of the principles that the ILO is actively promoting. To acquire and keep a decent job sums up the aspirations of most people in their working lives. But what is a decent job?

- Opportunities for an individual to be employed in a job that is productive and delivers a fair income;
- That provide security in the workplace and social protection for their families;
- That workers have prospects for personal development and social integration;
- That workers have the freedom to express their concerns and to bargain collectively about issues that affect their lives and;
- That men and woman must have equality of opportunities.¹³⁶

If the occupational level of the typical agency worker is examined, are between 83% and 31% of the agency workers are lower skilled. In Austria 83%, in Belgium 63%, in Denmark 31%, in France 44%, Germany 32; and in the Netherlands 32% of the TES workers are lower skilled workers. This emphasizes the important role that PrEAs play in the debate of ensuring decent work for middle and low skilled workers.

The Private Employment Agencies Convention is one of the strategies of the ILO to impact national economies to promote the Decent Work Agenda, by ensuring acceptable rights and working conditions. The ILO aims to assist member States to establish clear and effective provisions and structures in the registration and licensing of agencies, which will support the Ilk's Decent Work Agenda.¹³⁷

Articles 4, 5, 9 and 11 of the Convention contain prescriptions relating to the protection of the rights of the agency workers. These rights cover the fundamental rights at work, such as freedom of association, collective bargaining, equality of opportunity and treatment, and eliminating child labour. Article 8 provides special protection for migrant

¹³⁶ <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

¹³⁷ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

workers. Paragraph 6 of the Recommendations of the ILO states that: “private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.”¹³⁸

According to the ILO PrEAs must give attention to the following aspects of the Decent Work Agenda:

Minimum wages, working time and other working conditions;

- Statutory social security benefits;
- Access to training;
- Occupational safety and health;
- Compensation in cases of occupational accidents and diseases and insolvency and protection of workers’ claims; and
- Maternity protection and benefits.¹³⁹

4. TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

To understand the situation in South Africa it is important to keep in mind that Convention 181 of the ILO uses the term “Private Employment Agency” (PrEA) to cover two services that the agencies can deliver. Firstly a system where organizations offer services for matching the job offers of employers with the available labour, without becoming a party to the employment relationship, and secondly agencies which employ workers with a view of making them available to a third party (the user organization) to work there under the supervision of the third party. The second category is currently referred to in the LRA as “labour brokers” or TES.¹⁴⁰ It is also the TES system that is fiercely criticized by trade unions. What is also interesting here is that in speeches of the

¹³⁸ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹³⁹ <http://www.ilo.org/public/english/dialogue/sector/techmeet/wpeac09/wpeac-ip.pdf>

¹⁴⁰ Benjamin, P; Borat H and van der Westhuizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 31

Department of Labour the comment is often made that the government wants to ban TES to be in line with ILO conventions. But it is clear that Convention 181 permits and regulates TES.

The Private Employment Sector in South Africa is currently regulated by the Skills Development Act of 1998.¹⁴¹ These agencies have to register with the Department of Labour. The Association of Personnel Services Organisations (APSO) is one of the major actors in the recruitment industry.¹⁴² APSO is internationally recognised as the representative for the TES industry internationally through its membership with CIETT. The Confederation of Associations of the Private Employment Sector (CAPES) was established in February 2001 with the purpose to bring all relevant private employment associations together and to address self-regulatory issues. Lower-skilled unemployed people generally utilize the services of the labour centres provided by the public service, and more highly skilled work seekers make frequently use of the services of private agencies. According to Du Toit¹⁴³ the major issues in the industry are at present the casualisation of labour and the externalisation of labour.

TES is commonly known in South Africa as Labour Brokering and it is at this stage legal and in some degree regulated.¹⁴⁴ The TES sector is the subject of heated debate and already in 2009, the National Economic Development and Labour Council (NEDLAC) engaged in talks about new rules on TES. NEDLAC is the vehicle where government, labour, business and community organizations endeavor to co-operate on economic, labour and developing issues, through problem solving and negotiation. Due to the sensitive and emotional loaded nature of the TES debate, it is understandable that NEDLAC could not reach an agreement in that stage. According to van Eck¹⁴⁵ the largest trade union federations such as the Congress of South African Trade Unions

¹⁴¹ Dr R. du Toit, A Review of Labour Markets in South Africa: Career Guidance and Employment Services, HSRC October 2005, accessed at http://www.hsrc.ac.za/research/output/outputDocuments/3626_DuToit_Careerguidanceandemployment.pdf

¹⁴² Dr R. du Toit, A Review of Labour Markets in South Africa: Career Guidance and Employment Services, HSRC October 2005, accessed at http://www.hsrc.ac.za/research/output/outputDocuments/3626_DuToit_Careerguidanceandemployment.pdf

¹⁴³ Dr R. du Toit, A Review of Labour Markets in South Africa: Career Guidance and Employment Services, HSRC October 2005, accessed at http://www.hsrc.ac.za/research/output/outputDocuments/3626_DuToit_Careerguidanceandemployment.pdf

¹⁴⁴ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

¹⁴⁵ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

(COSATU) and the National Council of Trade Unions (NACTU) support the abolishment of the TES system. On the other side of the spectrum organized business and the Federation of Unions of South Africa (FEDASA) supported the continuation of the system.¹⁴⁶ Interesting enough there are also attempts in South Africa's neighbour country Namibia to ban TES. In Namibia the Supreme Court of Appeal (SCA) recently found that a "blanket" ban on labour broking is unconstitutional in terms of there legal framework.¹⁴⁷

Labour broking in South Africa is characterized by a contract between the PrEA and a client where labour is provided to a client. The client pays an in all inclusive fee to the PrEA, for the labour supplied. TES is at present regulated by section 198 of the Labour Relations Act of 1995 (LRA) and it is not necessary for the labour broker to register at the Department of Labour.¹⁴⁸

The term "Labour Broker" was introduced by the 1983 amendments to the LRA. In these amendments the Labour Broker was deemed to be the employer of the workers if they placed them with their clients, and was responsible to remunerate the employees. According to Benjamin, et al¹⁴⁹: although the 1983 amendment made it clear who the employer of these indirect employees was, it also led to other problems. Employees became vulnerable to be abused by unprofessional "fly-by-night" labour brokers. In the instance where the Labour Broker neglected to pay the workers, the workers had no claim against the client, as the client was not their employer. As it is possible for the Labour Broker to operate without significant assets or infrastructure, it is possible for them to simply disappear without fulfilling their obligations to their workers. Benjamin, et sums it up that the risk of non-compliance by a Labour Broker is borne by the employees and not the client. The reality of the Labour Broker structure at that stage was that the relationship with the workers was structured in such a way that these

¹⁴⁶ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

¹⁴⁷ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

¹⁴⁸ http://www.ilera-online.org/15thworldcongress/files/papers/Track_5/Thur_W4_LE%20ROUX.pdf

¹⁴⁹ Benjamin, P; Borat H and van der Westhuizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 31

workers were regularly excluded from statutory wage-regulating measures. This made the Labour Broker option for employers very attractive because the Labour Broker option was cheaper.

When the LRA of 1995 was promulgated, the term TES was introduced. According to the LRA, 1995, the TES is the employer of the workers, if the workers are under the supervision of the client, but the employees' remuneration is channeled through the agency. According to Benjamin, et al¹⁵⁰ the intention of Section 198 of the LRA was to regulate the employment of employees that are supplied by TES to clients to perform temporary work, but the consequences was in reality that it led to indefinite temporary employment relationships. This had negative consequences for the labour rights of the TES workers. In South Africa there are large enterprises that employ their entire workforce through TES. Benjamin, et al¹⁵¹ also reports that there are case laws where employers moved their entire work force to TES in order to receive the benefits of cheaper temporary workers. Section 198 of the LRA is then used by employers to deny employees the protection of labour legislation and the benefits of collective bargaining. Employers may use the TES system to apply less favourable terms and conditions of employment to certain workers and normally it is the more vulnerable workers that are affected by this .¹⁵² Section 198 also had the effect of the increasing "casualisation" of work that had become a feature of the South African labour market over the past decade.¹⁵³

¹⁵⁰ Benjamin, P; Borat H and van der Westhuizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 31

¹⁵¹ Benjamin, P; Borat H and van der Westhuizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 31

¹⁵² Benjamin, P; Borat H and van der Westhuizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 32

¹⁵³ <http://www.pmg.org.za/report/20110413-presentation-proposed-labour-law-amendments-2011-adoption-outstanding>

In 2009 the Department of Labour released figures that indicated that employees employed through TES are remunerated significantly less favourable than employees with open ended contracts.¹⁵⁴

During the recent deliberations at NEDLAC, Cosatu and Nactu reiterated their position that TES should be banned as they see it as immoral and that it "reduces the human dignity of workers and their families".¹⁵⁵

The Confederation of Associations in the Private Employment Sector (CAPES) calculate that more than 3.5 million workers have been placed by TES since 2000 and that half of these workers were previously unemployed. CAPES suggest that there are currently 849 646 labour broker workers in South Africa.¹⁵⁶ Labour brokers contributed R415 million to the National Skills Fund in 2008/2009. CAPES estimates that TES place more than 500 000 TES workers per day and according to them 32% of the workers receives permanent contracts each year. Labour brokers also enable more than 20 000 learnerships per annum in there sector. According to Van Eck¹⁵⁷, CAPES support the adoption of regulations that comply with ILO conventions. CAPES makes the following suggestions: that a regulatory body must be established within the Department of Labour that consists out of trade unions and employer organizations; that TES should be bound by bargaining council agreements if they are applicable, and that this regulatory body must have the power to implement proper enforcement and deregistration of non-complying labour brokers.¹⁵⁸

¹⁵⁴ <http://www.uif.gov.za/media-desk/media-statements/2009/minister-to-accelerate-campaign-on-labour-brokers>

¹⁵⁵ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

¹⁵⁶ <http://www.skillsportal.co.za/page/human-resource/302500-Brokers-hit-back-against-myths-of-labour-broking>

¹⁵⁷ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

¹⁵⁸ <http://www.skillsportal.co.za/page/human-resource/302500-Brokers-hit-back-against-myths-of-labour-broking>

5. PROPOSED AMENDMENTS TO THE SOUTH AFRICAN LABOUR RELATIONS ACT

The South African Minister of Labour, Mildred Oliphant published in the Government Gazette of 17 December 2010 proposed amendments to the Labour Relations Act, 1995 (Act 66 of 1995) (LRA)¹⁵⁹. These amendments will also be tabled to NEDLAC for consideration.

According to the Government Gazette, these proposed amendments have as purpose the alignment of labour legislation to ensure decent work through regulating sub-contracting, contract work and outsourcing.

Article 198 of the LRA, 1995 currently describes TES as: any person who, for reward, procures or provides workers to a client, to render services to-, or perform work for the client and are remunerated by the TES. A very important stipulation is that the TES and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes any collective agreement or labour legislation.¹⁶⁰ Benjamin, et al states that 2.1 million employees are employed on fixed-term contracts in South Africa.¹⁶¹

The proposed amendments intend to repeal Section 198 and the legislator motivated this proposal on the perception that there is confusion as to the real employer and that labour brokers misused this situation. According to the explanatory notes to the proposed amendments, Labour Brokers manipulated this section and by repealing this section the problems with labour brokers can be addressed. Labour Courts according to the legislator also have difficulties in determining the real employer. In the proposed

¹⁵⁹ General Notice, South African Government Gazette, 17 December 2010, no. 33873: P3

¹⁶⁰ Labour Relations Act, 1995 (act 66 of 1995), Republic of South Africa

¹⁶¹ Benjamin, P; Bhorat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 23

Employment Services Bill¹⁶² both Private and Public Employment Services will be regulated. The Employment Services Bill will be discussed later in this document.

The amendments propose a system of indefinite employment, where an employer employs a worker on a fix term, the employer will be required to give a justification why the post can not be permanent. A proposed amendment to the LRA aims to stop the practice of repeatedly contracting employees for short-term periods. The practice of repeated contracting employees for short-term periods will be prohibited. Valid reasons for a fix term contract may for

example, be the completion of a building project and to replace somebody that is on maternity leave. The purpose of this amendment is to ensure that workers are not deprived of the security benefits of an open ended contract. This would only apply to employees that receive remuneration that are below a threshold determined by the Minister of Labour.¹⁶³

According to the government the review of the labour law dispensation was due to a growth of “non-standard” forms of employment in South Africa. The amendments are according to the Government directed to enhance the effectiveness of the labour institutions like the Commission for Conciliation, Mediation and Arbitration (CCMA) and to realize the country’s obligations as a member of the International Labour Organisation (ILO).¹⁶⁴

The Department of labour has adopted eight strategic objectives to guide their activities over the next five years, namely:

- Contribute to employment creation;
- Promote employment equity in the labour market;
- Protecting vulnerable workers;

¹⁶² Employment Services Bill , South African Government Gazette, 17 December 2010, no. 33873: P87

¹⁶³ General Notice, South African Government Gazette, 17 December 2010, no. 33873: P3

¹⁶⁴ <http://www.labour.gov.za/media-desk/media-alerts/labour-law-public-comments2019-deadline-looms>

- Strengthening multilateral and bilateral relations;
- Strengthening social protection;
- Promoting sound labour relations;
- Strengthening the capacity of labour market institutions;
- Strengthening the institutional capacity of the department.¹⁶⁵

The Department of Labour plans to promote decent work, and to develop a policy framework for the provision of public employment services. According to the Department the development of public employment services will enable the government to maintain a database of job seekers and job opportunities, and to act as a matching agent for the placement of job seekers. The Department plans to consult with the social partners during the 2011/12 financial year and there after to present the new bill to Parliament. The improved access of workers to income protection services and the reintegration of workers into the labour market, will also receive attention.¹⁶⁶

The effectiveness of the new labour law policies will be measured against their ability to stimulate job creation. In South Africa it is, as in Europe, a hot debate if job creating may be at the expense of employment security or acceptable conditions of employment. President Jacob Zuma in his June 2009 State of the Nation Address stated that the “creation of decent work will be at the centre of our economic policies”.¹⁶⁷

¹⁶⁵ <http://www.labour.gov.za/media-desk/speeches/2011/speech-by-the-minister-of-labour-mildred-nelisiwe-oliphant-at-the-annual-labour-policy-conference>

¹⁶⁶ <http://www.labour.gov.za/media-desk/speeches/2011/speech-by-the-minister-of-labour-mildred-nelisiwe-oliphant-at-the-annual-labour-policy-conference>

¹⁶⁷ <http://www.labour.gov.za/media-desk/speeches/2011/speech-by-the-minister-of-labour-mildred-nelisiwe-oliphant-at-the-annual-labour-policy-conference>

5.1 The Proposed Employment Services Bill

According to the preamble, the Bill must, among other strategies, establish public employment services; provide for the registration of private employment agencies and provide for the establishment of the Employment Services Board.¹⁶⁸

The following two definitions are important in analyzing the new proposed legislation:

Employee: means any person who is employed by or works for an employer and who receives or is entitled to receive remuneration **and** who works under the direction or supervision of an employer.

From this definition it is clear that any person or organization that provides work to another person and directly supervises such a person, is considered to be the employer. The client of a Labour Broker would therefore be considered to be the employer and not the Labour Broker or a third party.¹⁶⁹

Private Employment Agency (PrEA): means any natural or juristic person who procures for or provides to an employer; other persons who render service or perform work for the employer.¹⁷⁰

Chapter 2 of the Bill contains the purpose of the proposed legislation:

- promote the employment of citizens;
- improve access to the labour market for work seekers;
- provide opportunities for new entrants to the labour market to gain work experience;
- improve employment prospects of persons with disabilities;

¹⁶⁸ Employment Services Bill , South African Government Gazette, 17 December 2010, no. 33873: P87

¹⁶⁹ <http://humanresourcesouthafrica.co.za/amendments-to-labour-legislation>

¹⁷⁰ Chapter 1, Employment Services Bill , South African Government Gazette, 17 December 2010, no. 33873

- improve employment prospects of work-seekers and employees facing retrenchments;
- facilitate access by work seekers to training and;
- promote employment growth and workplace productivity.

The establishment of public employment services is provided for in Chapter 5. These services must connect work seekers with the available employment opportunities; register work seekers; register job vacancies and other placement opportunities; facilitate the placement of work seekers with employers or in other placement opportunities and advice workers on access to social security benefits.

Chapter 3 addresses the functioning of PrEAs. In terms of Section 15 of the proposed Bill, the Minister of Labour may prescribe the criteria for the registration and licensing of private employment agencies. The prescribed purposes of the PrEAs must carefully be evaluated in line with the problem statement of this thesis. Chapter 3 provides that the functions of private employment agencies are **limited** to:

- matching work seekers;
- referring workers to employers;
- career information including vocational counseling, assessment of work seekers to determine suitability, and offering other related life skills to secure employment.¹⁷¹

It is clear from this description that the functions of the PrEAs do not include TES Work or, in other words, the functions of Labour Brokers are not included. The reason for my finding is that according to the prescribed functions, the PrEAs are only matching and referring possible workers to employers and are not the employer of the workers. The reason for this stipulation, is that according to the government is it not clear who the real employer is in TES. If the purpose of the new PrEAs is only limited to refer workers to employers, there can be no uncertainty who the real employer is. Although the goal of

¹⁷¹ Chapter 3, Employment Services Bill , South African Government Gazette, 17 December 2010, no. 33873

this Article may be noble, it will be indicated later in this thesis that this prescription will limit job creation and is actually contrary to the provisions of ILO Convention 181.

Schedule 2 of the Bill contains a transitional provision that the existing TES, as described in section 198 of the LRA, will continue to exist for a period of three years from the date of commencement of this and must register in terms of this Bill.¹⁷²

5.2 The NEDLAC process on the proposed labour law amendments

As was mentioned above the proposed amendments in the labour legislation was also tabled at NEDLAC. NEDLAC indicated that the committee intends to re-write the amendments and the proposed legislation.¹⁷³ Up to June 2011, NEDLAC did not make any statement on the progress that they made in reaching an agreement on the issue of labour law amendments. The reason for this stems from the divisive opinions that the social partners have within NEDLAC. Business groups proposed that the legislation must be withdrawn and their motivation is that the amendments increase labour costs and cut, rather than create jobs. The Labour Minister, Mildred Oliphant, said in an interview with Financial Mail in March that the amendments are only proposals and if the social partners want to change it, this can take place in NEDLAC.¹⁷⁴

5.3 Evaluation of the proposed amendments to the South African Labour Legislation

Any evaluation of the proposed amendments must be in the framework of its contribution to the South African Government's objective of more jobs that includes decent work and sustainable livelihood.

¹⁷² Scedule 2, Employment Services Bill , South African Government Gazette, 17 December 2010, no. 33873

¹⁷³ <http://www.polity.org.za/article/nedlac-to-discuss-labour-bills-2011-02-18>

¹⁷⁴ http://www.fedhasa.co.za/pages/News_Section_Details.asp?NewsSectionID=3&NewsID=4032

The question is however, whether Cosatu's demand for the ban of TES is not fundamentally self-serving?¹⁷⁵ Cosatu, as any trade union confederation, will generally not support the growth of a-typical or casual jobs because this has a negative effect on their bargaining power. Temporary workers are hard to organize in a union. A high percentage of a-typical workers in a labour market also weaken the impact of strikes because non-union members normally ignore a call to strike.¹⁷⁶

Business Unity South Africa (BUSA) is concerned about the economic implications of these proposed amendments. BUSA was created in October 2003 through the merger of the Black Business Council and Business South Africa.¹⁷⁷ BUSA represents South African business on macroeconomic and high-level issues that affect business at national and international levels.¹⁷⁸ The employers' organization has the opinion that the amendments may aggravate rather than alleviate unemployment. BUSA states that the most important issue facing the South African economy today is to improve the conditions that will make greater labour absorption possible. The employers' organization pleads that bureaucratic limitations must not limit job creation and the flexible responses of the labour market to the unemployment challenge.¹⁷⁹

BUSA is of opinion that these amendments, and the proposed new bill, undermine the social dialogue process because it was published before it was tabled at NEDLAC and before an agreement was reached. The employers' organization has the opinion that it is not clear whether the proposed legislation intends to abolish TES or not. The employers organization correctly states that such uncertainty is not good for the economy or for job creation.¹⁸⁰ BUSA makes the statement that these proposed labour legislation amendments are contrary to international trends where employment growth and competitiveness, in relation to the growth of a-typical forms of employment, is

¹⁷⁵ <http://humanresourcesouthafrica.co.za/an-analysis-of-south-africas-new-labour-policy>

¹⁷⁶ <http://humanresourcesouthafrica.co.za/an-analysis-of-south-africas-new-labour-policy>

¹⁷⁷ <http://www.busa.org.za/index.htm>

¹⁷⁸ <http://www.busa.org.za/docs/BUSA%20FINAL%20SUBMISSION%20ON%20LABOUR%20BILLS.pdf>

¹⁷⁹ www.polity.org.za/article/busa-statement-by-business-unity-south-africa-on-the-new-labour-bills-18012011-2011-01-18

¹⁸⁰ www.polity.org.za/article/busa-statement-by-business-unity-south-africa-on-the-new-labour-bills-18012011-2011-01-18

evident. According to BUSA the South African labour market is still recovering from the recent economic and employment crisis. BUSA estimates that the country has lost comparatively more jobs than other developing economies. According to the employers organization, South Africa lagged behind the other BRIC countries if the job creation figures are measured. The employer's organization supports the principles of the ILO relating to the role of atypical employment and private employment agencies in the job market. A failure to provide for labour market flexibility, will according to BUSA, lead to unemployment, automation, mechanization, new technologies and off-shoring.¹⁸¹

Benjamin, et al did a Regulatory Impact Assessment (RIO) of the proposed amendments for the Department of Labour and the Presidency. According to their assessment - the presumption that workers should be employed permanently unless the employer can provide reasons why not - is "very broad and vague" and is open to mis-interpretation.¹⁸² The proposed labour legislation amendments will reduce the flexibility of workers. TES provides for that section of the labour market that desires "flexibility" and temporary assignments. Examples of this sector are first-time work seekers, part-time students, women that have particular needs in respect of family obligations, older persons that do not want permanent placement, and groups of people with specific needs or specialist qualifications or experience. The workers that may benefit from and actually prefer temporary placements are ignored by these proposed amendments. Benjamin, et al correctly state that an effective ban on TES would deprive employees from job flexibility and opportunities to gain experience.¹⁸³

Benjamin, et al are of the opinion that the worker's fundamental right to chose a trade, occupation or profession freely is effected here. If TES is banned in South Africa, the right of the worker to pursue a career of a TES worker is violated. Van Eck¹⁸⁴ is also of

¹⁸¹ <http://www.busa.org.za/docs/BUSA%20FINAL%20SUBMISSION%20ON%20LABOUR%20BILLS.pdf>

¹⁸² Benjamin, P; Borat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 24

¹⁸³ Benjamin, P; Borat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 37

¹⁸⁴ Van Eck, BPS; Temporary Employment Services (Labour Brokers) in South Africa and Nanibië; PER/PELJ 2010 (13) 2

the opinion that this constitutional right will be measured against another right namely "everyone's right to fair labour practice". Section 22 of the Constitution of the Republic of South Africa grants every citizen the right to choose their trade, occupation or profession freely. If the proposed labour law amendments is promulgated it would prevent PrEAs to be the employer of the employees that they place at clients. However, section 36 of the Constitution of the Republic of South Africa prescribes that any right can be limited if the limitation is reasonable and proportional in relation to the purpose that it wants to attain. The question now is whether the proposed amendments will be constitutional or not. Although South African courts are not bound to the findings of international courts the South African Constitutional Court will definitely consider the international legal framework of TES. The ILO, to which South Africa is a member, accepts the functioning of TES in a regulated environment. As the ILO prescribes that the TES may not result in a diminution of the rights of employees, the South African Government will likely argue that due to the negative effect that TES has in South Africa, the ban will be necessary and proportional. It may be argued that the right to fair labour practices in South Africa trumps the right to economic freedom and that the ban on labour broking can therefore be justified. The Constitutional Court will also consider the recent case law of Namibia relating to TES. In December 2009, Namibia's highest court, the Supreme Court, found that the blanket prohibition of TES was a "disproportionate and unconstitutional response to the abuses associated with labour hire".¹⁸⁵

According to Benjamin, et al the banning of TES will limit the flexibility of the labour market and could create disincentives to labour-intensive economic growth.¹⁸⁶ A decline in labour market flexibility could have the effect that employers direct their strategies toward increased mechanization and capital intensive production methods that will be at the expense of job creation. Due to the high percentage of unemployed unskilled or half skilled workers in South Africa, it is important that there is a growth of employment

¹⁸⁵ <http://www.saflii.org/na/cases/NASC/2009/17.pdf>

¹⁸⁶ Benjamin, P; Borat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 38

opportunities in the manual labour market. It is a fact that due to the fluctuations in the demand in the manual labour market, TES is a popular option. If the employers don't have the option of TES, the possibility is excellent that they will invest in more capital intensive production methods that will definitely have a negative impact on job creation. The access of lower skilled workers to potential work opportunities will also be affected because it is more difficult for them to approach individual clients directly for job opportunities without the mediation of PrEAs.¹⁸⁷

The proposed amendments will have the effect that all temporary employees that are placed by PrEAs at a client, and are supervised by the client, will be employees of that client - no matter how short-term their relationship with the client may be.¹⁸⁸ It is clear that the administrative burden the administration of temporary workers entails, that was previously carried by TES, may have the effect that the employer decides to make do without additional workers. If temporary work is banned it will in practice not always mean that more permanent work opportunities are created but employers can use other strategies such as to rearrange work schedules and procedures or to use more capital intensive methods. Employers that require short-term arrangements and flexibility may even choose informal arrangements in the absence of an accessible TES sector.¹⁸⁹ The negative consequences of a growing informal sector is that the sector is unregulated, the workers pay no taxes, the workers enjoy no social protection or security and the informal sector is usually not a stepping stone to permanent work.

The ILO in Pretoria, South Africa, commented on the proposed amendments and stated that the organization remains impartial on the subject, but that there is a specific convention that was adopted by governments, employers and workers relating to

¹⁸⁷ Benjamin, P; Bhorat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 39

¹⁸⁸ Benjamin, P; Bhorat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 39

¹⁸⁹ Benjamin, P; Bhorat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 40

Private Employment Agencies namely, the Private Employment Agencies Convention, of 1997.¹⁹⁰ South Africa, as mentioned previously, did not ratify Convention 181.

The tripartite partners requested the ILO Geneva in October 2009, to promote the ratification of the Private Employment Agencies Convention. Representatives of the South African Commercial, Catering and Allied Workers Union (SACCAWU), United Association of South Africa (UASA), The Association of Personnel Service Organizations (APSO) and the Services Skills Education Training Authority (SETA) from South Africa were in attendance, but the Government of South Africa were not represented.

Vic van Vuuren, Director of the ILO in Pretoria, has the opinion that labour broking can be an important service when properly regulated. The view point of the ILO is that PrEAs can play an important role in the functioning of contemporary labour markets.¹⁹¹

The ILO emphasizes the necessary role of Convention 181 and that the principles of the convention provide a clear framework for regulation, licensing and self-regulation of private employment agencies. Van Vuuren emphasized that the regulation and monitoring of the functioning of PrEAs encourages trustworthiness, guarantees effective protection of workers against unfair labour practices and discourages human trafficking.¹⁹²

The ratification of ILO Convention No. 181 will assist countries to implement the Decent Work Agenda by ensuring the protection of the rights and working conditions of agency workers. According to the ILO "Not all labour brokers are good, and not all labour broking is "vital"; if there is no regulatory framework in place to monitor their operations, there will be, without a doubt, problems with the system".¹⁹³

¹⁹⁰ <http://www.ilo.org/public/english/region/afpro/pretoria/info/press/pr01.htm>

¹⁹¹ <http://www.ilo.org/public/english/region/afpro/pretoria/info/press/pr01.htm>

¹⁹² <http://www.ilo.org/public/english/region/afpro/pretoria/info/press/pr01.htm>

¹⁹³ <http://www.ilo.org/public/english/region/afpro/pretoria/info/press/pr01.htm>

5.4 The reality of the effect of the current South African labour market regulation on job creation

In order to reach international accepted employment rates, South Africa must (even if the working population remains constant at 32.1 million) have a economic growth rate of 7% for 15 years. ¹⁹⁴ The reality of the severe need for employment opportunities indicates that the country can not afford more strict labour market regulation that will stall flexibility.

There is evidence that the labour costs of South Africa are higher than in other developing countries. Unrealistic demands of wage increases by trade unions are one reason that the labour cost of the labour market is not competitive, another reason is the high cost of dismissing unsuitable and unproductive workers. 70% of employers report that they were taken to the CCMA by dismissed employees. The CCMA procedure requires about a week from the schedule of the involved manager to resolve. ¹⁹⁵ The current strict labour law prescriptions are purposeful in securing the rights of workers. Unfortunately it also discourages employers to employ high risk employees such as young people, older people and the long time unemployed. The strict labour law dispensation motivates enterprises to invest in capital based production methods in comparison with labour based production methods. South Africa desperately needs more labour based jobs that will be created only if the labour market becomes more flexible. Unfortunately the proposed labour law amendments will achieve the opposite.

¹⁹⁴ A fresh look at unemployment: A conversation among experts (June 2011) available at <http://www.cde.org.za>

¹⁹⁵ A fresh look at unemployment: A conversation among experts (June 2011) available at <http://www.cde.org.za>

6. EVALUATION OF TRANSFERABILITY OF FLEXICURITY STRATEGIES: THE NETHERLANDS TO SOUTH AFRICA

It will be argued that implementation flexicurity in South Africa will balance the security of workers with the increased flexibility of the labour market in the TES sector. South Africa was selected in my study as a country that can benefit from the implementation of flexicurity, due to the problem that was identified by the Government that workers are increasingly unprotected and exploited in the TES sector, while the government at the same time is confronted by high levels of unemployment. The Government also focuses their strategic objectives on job creation. The flexicurity strategy of the Netherlands was discussed as a possible strategy that can benefit South Africa, because some commentators talk about the Dutch 'miracle' where low unemployment figures are balanced with high social protection and flexibility of the labour market. In the next section the probability will be discussed whether the transfer of the flexicurity strategy from the Netherlands to South Africa will be successful.

Current literature emphasizes the importance of remembering that the transfer of policies is not always a success. Even in Europe the issue was raised if the flexicurity principles, that are successfully implemented in the Netherlands and Denmark are transferable to the rest of Europe. In Europe there are large institutional and regulatory differences between the Member States that resulted in governments questioning the transferability of flexicurity.¹⁹⁶ As an example that the implementation of flexicurity can have different results, the situation in France can be considered. The French government decided in 2006 to implement a strategy to increase the flexibility of the labour market for people younger than 26 years of age. The strategy introduced relaxed measures to terminate the employment of young people that will increase the willingness to hire them. These objectives caused large public protests. The plan also included a somewhat easier access to unemployment benefits for young people. The workers did not observe this strategy as a balance between flexibility and security. The

¹⁹⁶ Ilsøe, A; The Danish Flexicurity Model - a Lesson for the US?; Working paper, May 2007; The Paul H. Nitze School of Advanced International Studies (SAIS) The Johns Hopkins University: P 24

public perceived the plan as an attempt for mere flexibility that would worsen the working conditions for young people. According to Ilsøe¹⁹⁷, a certain degree of trust in increased security is necessary if populations in countries with high unemployment and high unemployment protection should be requested to take on new risks.

Ilsøe¹⁹⁸ identify three drivers that will increase the likelihood that the transfer of a system from one country to a next will be successful namely: firstly repeated contact between the tutor country and learning country is important. Secondly, examples of domestic 'best practices' can be a driver of learning. Thirdly, similar economic political background to some extent can be a driver of learning. Studies on policy transfer have shown that, while countries with varying political-economical settings have a high motivation for mutual learning of best practices, it remains a challenge to transfer policies between such settings.

In the next paragraphs some elements of the political-economical setting of South Africa compared to the Netherlands will be discussed that may have an effect on the implementation of flexicurity:

6.1 Globalization

Both countries are facing the challenges caused by intensified international competition. Both countries have multi national corporations (MNC'S) that operate globally and have guest MNC's that are actively involved in the national economies. Globalization creates the need for a flexible, dynamic labour market and a well-educated, adaptable workforce.

¹⁹⁷ Ilsøe, A; The Danish Flexicurity Model - a Lesson for the US?; Working paper, May 2007; The Paul H. Nitze School of Advanced International Studies (SAIS) The Johns Hopkins University: P 24

¹⁹⁸ Ilsøe, A; The Danish Flexicurity Model - a Lesson for the US?; Working paper, May 2007; The Paul H. Nitze School of Advanced International Studies (SAIS) The Johns Hopkins University: P 24

6.2 Social Security

If the social economic circumstances in the two countries are compared, the main difference lies more within the social security elements than with the flexibility elements. In terms of redundancy legislation, the Dutch system is more strict than the South African system and relating to the flexibility of the reconciliation of work and family demands, the Dutch system is more flexible.

The South African Basic Conditions of Employment Act¹⁹⁹ recognizes maternity leave. Paternity leave and emergency care leave are unsatisfactorily combined into a catch-all leave provision known as "family responsibility leave". The legislated provision of three days of paid leave a year is to be used for the birth, death and illness of defined relatives, in the context of care demands in South Africa, it is considered by workers as being too short.²⁰⁰ This leave is available only to employees who work four days a week and who have worked for their employer for at least four months. In South Africa there is no legislation that enables employees flexibly through, for example, an arrangement to work from home or to job-share with another employee. The mentioned work-home arrangements are not illegal in South Africa and are frequently part of the personnel code of major companies but it is not actively promoted by the Government. The aforementioned options are given statutory recognition in the Netherlands by flexible working arrangements from their employers for care giving purposes.²⁰¹ 39% of Dutch workers that have a flexible work arrangement indicate that they feel a reduction in stress.²⁰² According to EU legislation part-time workers are covered by Article 141(2) of the Equal Pay Directive 75/117/EEC. This Directive forbids any discrimination of employers against employees on the grounds of the flexibility of their job relating to all aspects and conditions of remuneration.

¹⁹⁹ Basic Conditions of Employment Act (No. 75 of 1997)

²⁰⁰ <http://mg.co.za/article/2008-09-18-mom-at-work>

²⁰¹ <http://mg.co.za/article/2008-09-18-mom-at-work>

²⁰² <http://www.rijksoverheid.nl/onderwerpen/gezin-werk-en-opvoeden/nieuws/2010/11/08/flexibel-werken-maakt-gelukkig.html>

If the passive labour market policies of the two countries are examined it is found that the unemployment benefit has different coverage. In South Africa a contributor is eligible to receive one day's benefit for every six completed days of employment, up to a maximum of 238 days (34 weeks).²⁰³

Research indicated that the expansion of social security in South Africa, with systems such as welfare grants and subsidies for housing and basic services, may be a reason for the low labour force participation rate.²⁰⁴ This social security system must be funded by the working population and therefore there must be more jobs and a higher participation rate. To obtain both, a more flexible work force is needed.

In the Netherlands the unemployment benefit will be payable for the claimant for as many months as the number of years in employment (with a maximum of 38 months). The length of the claimant's entitlement to this benefit depends on his/her employment history²⁰⁵, and varies from three months to three years and two months.²⁰⁶ A Claimant must have worked in the period directly before he/she became unemployed, for a minimum of 26 of the last 36 weeks to be entitled to the unemployment benefit in terms of the Unemployment Insurance Act (WW).²⁰⁷ This Dutch act ensures that employees are protected against the financial consequences of unemployment.

Successful flexicurity requires a modern social security system, which provides sufficient income support and facilitate labor market flexibility. The Social Security system must provide income security that will motivate workers to be more flexible. These systems include provisions that assist workers to combine work with private and family responsibilities.²⁰⁸ & ²⁰⁹ As indicated the Netherlands has a more modern/advanced social security system than South Africa and the issue must be

²⁰³ Unemployment Insurance Act as amended by Unemployment Insurance Amendment Act, No 32 of 2003

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²⁰⁴ A fresh look at unemployment: A conversation among experts (June 2011) available at <http://www.cde.org.za>

²⁰⁵ <http://www.easyexpat.com/en/amsterdam/work/unemployment-benefits.htm>

²⁰⁶ <http://www.dutchembassyuk.org/government/index.php?i=79>

²⁰⁷ <http://www.ontslag-krijgen.nl/wv-uitkering.html>

²⁰⁸ www.unep.org/labour_environment/PDFs/Greenjobs/UNEPGreenJobs-E-Bookp275-293-Part3section1.pdf

²⁰⁹ http://ec.europa.eu/employment_social/equal/news/200711-flexicurity_en.cfm

evaluated in order to determine whether the discrepancy between the systems will hamper the implementation of flexicurity in South Africa. South Africa has a more advanced basic social security system than most other developing countries. The government also endeavors to improve the system over time for example, by introducing a national pension system and reforming the health care system. The flexicurity principles are applicable to South Africa because workers are insured against unemployment although it is not as comprehensive as in the Netherlands and it is also considered that the South African Government plans to eventually improve the social benefits.

6.3 Active Labour Market Policies

In South Africa the Skills Development Levy is a mandatory contribution of 1% of the payroll and is paid by the employer.²¹⁰ The money received from the Skills Development Levy is used towards skills training in order to address the shortage of skilled workers in the country.²¹¹ The South African Department of Labour launched the Training of the Unemployed project in 2010 and the objective is to train and re-skill South African workers who were retrenched as a result of the global economic recession.²¹² This is only a pilot project and the Department is considering to roll it out to the rest of the country. It is clear from the high unemployment figures and the skills shortages, that training of the unemployed does not receive enough attention. South Africa has recently unveiled its New Growth Path. This strategy puts the creation of decent work at the centre of the country's economic policies.²¹³ The New Growth Path must provide "bold, imaginative and effective" strategies to create millions of new job opportunities.²¹⁴ The proposed Employment Services Bill²¹⁵ also proposes Public Employment Services. The

²¹⁰ Benjamin, P; Borat H and van der Westhuizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 15

²¹¹ <http://www.southafrica.info/business/economy/policies/labourbodies.htm>

²¹² <http://www.growsouthafrica.org/News/TempNew/AllInbnpNews/ArticleDetails/tabid/420/ItemID/1246/View/Details/Default.aspx>

²¹³ http://www.ilo.org/jobspact/news/lang--en/WCMS_154349/index.htm

²¹⁴ http://www.moneyweb.co.za/mw/action/media/downloadFile?media_fileid=9594

²¹⁵ Employment Services Bill , South African Government Gazette, 17 December 2010, no. 33873: P87

South African Government has set aside 9 billion Rand, to be used over the next three years for a Jobs Fund, to co-finance innovative public- and private-sector employment projects.²¹⁶

According to De Koning²¹⁷ the active labour market policy of the Netherlands is changing continuously. A major change was when the Government changed their role in the re-integration of the unemployed in the labour market from active involvement to financier. The reason for this change was an attempt to create a market for private re-integration services.²¹⁸ According to De Koning, the results of the private employment Services were not very encouraging and the reason for that is that the agencies compete to render the services as cheaply as possible to get contracts from the Government. Recently the public sector has again increased their involvement in the re-integration process.

An active labour market policy is a fundamental part of the flexicurity principles. The South African government has an active labour market policy. The basis of the South African labour market strategy is correct because it focuses on the employability of workers through enhancing their skills. The government supports the matching of the specific demands of employers for labour, with the need of employment of the workers. Although the Government has an active labour market policy, it is clearly inefficient if the unacceptable high unemployment rate is considered. That the government accepts that an active labour market policy is necessary whether their specific strategy is effective or not, is an indication that the flexicurity principles are reconcilable with the fundamental strategies of the government.

6.4 An appropriate legal framework

²¹⁶ http://groups.google.com/group/ycls-a-eom-forum/browse_thread/thread/38c06648d0a37b83/7124031586f6fbd5?pli=1

²¹⁷ Koning, J; Reforms in Dutch active labour policy during the last 20 years : an evaluation; SEOR Working Paper, No 2009/2: Pi

²¹⁸ De Koning, J; Reforms in Dutch active labour policy during the last 20 years : an evaluation; SEOR Working Paper, No 2009/2: Pi

For flexicurity to be successful, a country must have a legal system that allows for a rapid adjustment of labour supply when the labour demands changes. According to De Gobb²¹⁹, this is normally found in an industrialized economy where employment contracts are characterized by formal and by waged employment. In developing countries, particularly in low income ones, it applies only to a small part of the economy, namely to those workers who are formally employed.²²⁰ High unemployment in South Africa is linked to an underperforming formal sector and to the failure of the unemployed to enter informal labour markets. South Africa has a rather small informal economy, if the high level of unemployment is considered. Pearson, et al²²¹ states that surveys indicate that informal employment is only 10.3% of the labour force.

The latest changes in the composition of the employment sector in South Africa can be found in figure 1.²²² According to figure 1 the formal sector grew to 67% in 2011.

FIGURE 1

Employment by Type		
Occupation Employment	Employment Mar 2011	Percentage change vs. Feb 2010*
Unofficial sector	6,132,367	2.04
Official sector	12,970,794	7.28
Typical (permanent, full-time)	9,148,597	9.55
Atypical (temporary, part-time)	3,822,197	3.70
Total	19,103,161	5.57

²¹⁹ De Gobb, NS, Flexicurity in developing countries: Perceptions and determining factors; Employment Policy Department, ILO, Geneva : P 7

²²⁰ De Gobb, NS, Flexicurity in developing countries: Perceptions and determining factors; Employment Policy Department, ILO, Geneva : P 7

²²¹ Pearson, R and Sweetman C; Gender and the economic Crises; Practical Action Publishing Ltd; Oxfam GB, 2011: P 116

²²² Adcorp Employment Index, March 2011, Release date: Monday, 11 April 2011

The dominating role that the formal economy plays in South Africa will support the implementation of flexicurity strategies. That a-typical employment is 20% of the formal work force and that it grew with 3.7% from February 2010 is an indication of the flexible nature of the work force.

It is clear that the current legal framework of South Africa supports the domination of the formal sector and the flexible nature of the labour market. South Africa has a modern and a progressive Labour Relations Act and it provides effective conflict resolution procedures. The proposed labour legislation amendments that were previously discussed may disrupt the current *status quo* where the security of workers will receive prominence against the flexible labour market.

6.5 Social dialogue

As indicated earlier in this document, social dialogue is an important element in the functioning of the labour market and specifically the implementation of flexicurity measures. Gobbs indicates that social dialogue is normally quite effective in industrialized countries and often weak and ineffective in developing economies.²²³ In the Netherlands social dialogue played an important role in the implementation of flexicurity measures. An important aspect was the trust that the social partners had that flexicurity will have positive results. In South Africa the Social partners are a fundamental part of the labour legislation dispensation. The role of business, employers, trade union federations and the Government in NEDLAC was previously mentioned.

It is predicted that if flexicurity is implemented in South Africa the workers will probably not be required to take more risks because the country has a rather flexible workforce. With the current issues with TES in mind, flexicurity can only improve the security situation of workers. The promises of the government that TES and temporary posts will be abolished, did create certain expectations, but in a country with such a high

²²³ De Gobb, NS, Flexicurity in developing countries: Perceptions and determining factors; Employment Policy Department, ILO, Geneva : P 7

unemployment rate the creation of more decent jobs for more people would likely be supported by the majority of the community. It must also be kept in mind that the demand to ban TES and temporary contracts is a COSATU agenda and, as it was earlier discussed, it is in some respect a self-serving goal of the trade union confederation.

In terms of trust it is important to consider that South Africa is a member of the ILO and the ILO accepts the principles of flexicurity. That the Dutch system does not deviate from the Decent Work agenda of the ILO, creates the assumption that labour in South Africa will trust the flexicurity strategy as implemented in the Netherlands. The ratification of ILO Convention No. 181 by South Africa, will also enhance the trust that flexicurity will improve quality of working live.

This section is finalized with the remark that the predictability of the success of the transferability of the flexicurity principles from the Netherlands to South Africa is excellent, because the principles of the strategy are already present in the South African labour dispensation in a uncoordinated way. The Government endeavors to address the issues with the TES Sector by the banning of TES and temporary contracts, while a golden opportunity exists to combine the uncoordinated elements of the active labour market policy that will balance flexicurity and security.

7. CONCLUTIONS AND RECOMMENDATIONS

This thesis focused on the problematic situation of the TES sector in South Africa within the framework of an unacceptable high unemployment rate. The South African government on the one hand endeavors to actively promote job creation, but on the other hand publishes labour law amendments and new legislation that will, for all practical purposes, end TES. It was indicated that for any economy in the global arena to be competitive that will stimulate job creation, the labour market must be flexible. It was indicated in this thesis that to limit the flexibility of workers will hamper job creation

and will be in contrary to the South African Governments' job creation objectives. The cardinal importance of the decent work agenda of the ILO was also emphasized in this document. The principle that job growth must not be at the detriment of decent work, is an integral theme of this thesis. The question can be asked: how can a flexible labour force, that promotes job creation, be balanced with decent work. This document proposes that the Dutch flexicurity strategies can be implemented with success in South Africa to ensure a labour market policy that supports a work force that is flexible but also has a high level of security. The successes of the Dutch system were discussed and the problematic aspects of the implementation in the country were mentioned. This document attempts to draw a framework that can be utilized by role players in South Africa to tailor-make a flexicurity strategy that will address the specific needs of South Africa. That the flexicurity strategy is transferable from the Netherlands to South Africa, was motivated in terms of the following elements: globalization, social security, an active labour market policy, an appropriate legal framework and social dialogue.

In the framework of flexicurity, the impact of the TES sector world wide, was also investigated with specific emphasis on the role that the sector plays relating to the principles of flexicurity. The proposed South African labour law amendments and new legislation was also evaluated in the ambit of flexicurity and job creation. In this thesis it was argued that limiting temporary posts and outlawing the TES sector will not improve job creation and decent work in South Africa, but will actually accomplish the opposite. These amendments will force people to the informal sector and casual work. The finding of this thesis is that the TES sector can contribute in job creation and more secure and decent work, if the sector is properly regulated by flexicurity principles. The TES sector must be mended and not ended in South Africa.

If the research questions are again considered, the following become evident:

Research question 1: Whether the strategy of flexicurity have a positive effect on job security and decent work:

The experience from the Netherlands and the rest of the EU is that flexicurity is effective in balancing the needs of employers for a flexible workforce, with the need of security of the workers. 81% of companies reported that agency work is an effective strategy to manage economic flexiations. In order for countries to be competitive in the global market, there is a need that labour legislation must be flexible. 80% of the new jobs after the economic crisis would not have existed without the role of PrEAs. If countries are not competitive enough to attract direct foreign investment, economic growth will not enable job creation. This thesis indicated that the focus must not be on the security of an individual job, but rather on the employability of the worker. The first aspect of decent work is that a worker must have a job that is sustainable and secondly that the rights of the worker must be ensured in the workplace. Agency work is a stepping stone for the jobless into the world of work. This thesis indicated that flexicurity has the capability to promote better and more jobs.

Research question 2: Can the temporary employment sector promote decent work?:

This thesis indicated that there are problematic aspects in the TES sector. Even in the Netherlands the transition is not always so smooth from a temporary position to a permanent position. In South Africa, employers use TES to avoid adherence to the rights of their employees. This thesis indicated that if the TES sector is properly regulated and if the players in the field are professional, the sector will play an important role in the promotion of decent work. The capability of the sector to create work and to train workers to be employable plays a very important role here.

Research question 3: Will the proposed amendments of South African Labour Law improve decent work, job creation and the flexibility of the labour market of South Africa? :

The proposed amendments will have a very negative effect on job creation. As indicated a flexible labour market is a must for a country to be competitive internationally. To ban temporary contracts will not improve decent work, but will force workers into the informal

market. In the informal market it is very difficult to enforce decent working standards and rights. The role of PrEAs in job creation, training and developing must not be underestimated and the removal of the sector will definitely leave a gap.

Research question 4. Are the principles of flexicurity transferable from the Netherlands to South Africa? :

As discussed, it was found that the principles of flexicurity are transferable relating to globalization, social security, active labour market policies, an appropriate legal framework, and social dialogue. South Africa is one of the few developing countries where flexicurity principles can be successfully implemented. In other countries attention must first be given to increase the formal labour market. As was indicated previously, South Africa actually already follows a couple of flexicurity principles in an uncoordinated manner. South Africa now has the golden opportunity to build on the success of the EU by implementing flexicurity principles.

7.1 Recommendations of the thesis:

- To introduce flexicurity strategies in South Africa in the TES Sector,
- That the Social Security benefits of temporary workers in South Africa must progressively improve relating to the length of service. This will limit the risk of employers to employ new employees.
- To identify sectors where TES work is not beneficial to flexicurity principles and address the issues there or prohibit TES work in that sectors if the corrective measures are not successful. This approach could allow for prohibition or restriction of agency work in specific sectors or types of work on grounds such as the need to avoid exploitation or the protection of health and safety
- Specify the grounds that justify the conclusion of a fixed-term contract. This could include employment as a substitute employee, employment on a project for a

fixed-term and probation. Germany provides a useful example – legislation specifically identifies a number of grounds which qualify as justification for the use of fixed-term contracts, and cases in which companies are exempt from the requirements on objective grounds.²²⁴

- Limit the number of times that a fixed-term contract can be renewed. Employment beyond that period would be deemed to be indefinite. The Dutch system of a maximum number of successive fixed term contracts and a maximum on the total length of consecutive contracts of respectively 3 contracts and 3 years, can be used as an example,
- the ILO Convention C181 must be ratified by South Africa that will provide guidelines on the scope and operations of private employment agencies,
- The development of a code of conduct for the TES sector that regulates matters such as dismissals, skills development and benefits²²⁵,
- That the TES sector must abide to bargaining council and collective agreements where applicable,
- That a fidelity fund, specific to the sector, must be developed and that all role-players in the TES sector must contribute to the fund,
- The establishment of a public/private partnership to regulate the TES sector. Such a public-private partnership, or co-regulatory body, must comprise representatives of government, business and labour. The model currently in use in the Netherlands could be considered as a possible example (According to Benjamin, et al each industry contributes a levy based on a sum equivalent to the

²²⁴ Benjamin, P; Bhorat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 31

²²⁵ Benjamin, P; Bhorat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 41

proportion of TES workers in its total workforce, which funds a business-labour regulatory body which focuses on TES employees).²²⁶

- Promulgate legislation to prohibit employers to discriminate between employees on the basis of a possible difference in working hours. TES employees should receive the same level of protection against unfair dismissal and unfair labour practices as other employees. An employee who is placed in work for a client on an ongoing basis should have the same degree of protection as other employees of that client.
- That the lifelong learning of TES workers must be part of the flexicurity strategies
- That the flexicurity principles in the TES sector must include: PrEAs transforming their role from labour suppliers to human capital managers.

²²⁶ Benjamin, P; Borat H and van der West Huizen C, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010; Prepared for the Department of Labour and the Presidency ; 9 September 2010 : P 42

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