Maastricht University

Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM

International and European researchers and their access to national health insurance coverage in the Netherlands

Legal and Impact analysis

Maastricht University/Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM

Prof. dr. H. Schneider
Dr. L. Kortese
P. Mertens, LL.M. MSc
S. Sivonen, LL.M.
S. Kramer, LL.M.

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Executive summary

Nuffic (the Dutch organisation for internationalisation in education) and SOFIE (*Sociaal Fiscaal Internationale Expertise*) have heard concerns from many universities and research institutes about the national health insurance coverage of European and international researchers and their family members in the Netherlands. Nuffic and SOFIE have found that it is not always clear why coverage is rejected for a particular person under the Health Insurance Act (*Zorgverzekeringswet; Zvw*) and Long-term Care Act (*Wet langdurige zorg; Wlz).* Particularly, the term "resident" (*ingezetene*), which is used to specify the scope of insured persons, is open to ambiguity. It has been noted that the assessment criteria for Wlz (Long-Term Care Act) used by the Sociale Verzekeringsbank (SVB) to determine whether one is insured lack clarity. In case the conditions for 'residency' are not met on the basis of this 'Wlz-test', the researcher may only obtain private health insurance which is reported to come with challenges, such as exclusions for certain medical conditions and the possibility of high premiums. The issue revolves around researchers who reside and/or work in the Netherlands in various contractual configurations in Dutch universities or research institutions. Due to the lack of clarity and uncertainty surrounding the health insurance coverage, Nuffic and SOFIE have reached out to ITEM to investigate the matter. This research (legal and impact analysis) examines the complexities of the Dutch health insurance system for international researchers and their family members. It highlights the legal, financial, and political considerations that are involved, and questions the desirability of the current set of laws and regulations.

The research found that the determination of public health insurance coverage is subject to a complex EU and national legal framework that often causes uncertainty for international researchers and their family members. Depending on the status of the researcher, different concepts govern whether one falls under the public insurance coverage. Those who have an employment relationship are generally insured in the state of work, while those who are "inactive" are insured in the state of their residence. Since many types of researchers and students in the Netherlands are not considered to be in an employment relationship, they may only be covered if they are considered resident (*ingezetene*) in the Netherlands. Taking a general look at the Wlz-coverage of different categories of researchers, it was found that the assessment of one's 'residency' becomes especially relevant to migrant researchers who receive a foreign grant or a scholarship. Consequently, it is also this category of researchers that face most often these issues of being refused to be covered under the national public health insurance in the Netherlands.

The Dutch concept of *residence* is greatly influenced by the concept maintained for tax purposes: it includes an evaluation of all relevant factors of the person, most importantly the duration of stay and form of housing (situation). On the EU-level, a similar concept is known as 'habitual residence', that assesses in which Member State the center of interests of the person lies, evaluating similar factors. Yet, an important difference regards the possibility of dual residency. Where the Dutch concept of residence, derived from the fiscal concept, allows dual residency (i.e. a strong bond with more than one state), the EU concept of 'habitual residence' excludes the dual concept of residence, indicating that EU citizens (or third-country nationals in situations of internal EU mobility) are subject to the social security system of one Member State only. Nevertheless, a tendency over the years is observable on the national level in demanding an exclusive, and stronger bond with the Netherlands. Another complication arises that different legal instruments and rights may be applicable in situations of external EU mobility of third-

country nationals: the social security arrangements of third-country nationals are more fragmented over various Directives, and bi- and multilateral agreements concluded between the Netherlands, EU, and third countries. Most often, however, international and European researchers and students enjoy the right to equal treatment with the nationals of the Netherlands. This means that especially when the equal treatment rights expand to the field of social security (and namely, public healthcare benefits) the Wlz-test should be conducted in a non-discriminatory manner.

The research also examines other relevant aspects to these issues, including political developments in the field of social security, immigration policy, and the aspects of legal certainty. Over the years, a limitative approach regarding the scope of social security can be observed. Here the tendency is, thus, for an exclusive and stronger bond with the Netherlands. In general, the Dutch entrenchment policies regarding social security over the years can be described as the entrance of immigration policy in the domain of social security and the increasing rejection of transnational alignment of migrants. This report also questions whether it is reasonable that these researchers do not enjoy full and effective rights of (mobile EU) workers. In this regard, the broader context of the *European Research Area*, as well as the scientific and innovative benefit that international researchers bring to Dutch universities, should be considered.

The research concludes that it is unsurprising that there are numerous uncertainties and ambiguities regarding the coverage of international and European researchers and their family members under the Dutch health insurance system. As this research demonstrates, this determination is governed by a complex web of legislation and case law that is constantly evolving. As a result, the report emphasizes the obligation and critical nature of providing information to mobile researchers and their family members about Dutch health insurance coverage and the Wlz-assessment. It seems opportune that social security organisations take a more prominent role in providing comprehensible, accessible, and accurate information pertaining to these topics. The changes in internal guidelines on the interpretation of residency should be more openly communicated, especially given the great impact on the health insurance status of researchers. Furthermore, both on national and European level a political debate would be needed on the desirability of the current set of laws and regulations. In the first place, whether the current protection of mobile citizens and researchers in particular is sufficient can be questioned. While the EU legal instruments have the specific aim of improving the social protection, this report shows that it insufficiently to do so in cases that are more atypical. The desirability of open norms as tool for allowing flexibility, but impeding legal certainty and possibly even equal treatment, should also be openly debated.

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1. Introduction & Outline

Access to healthcare is at the centre of citizens' well-being. Health care is thus an important aspect of the welfare state. From the perspective of equity (i.e. the equal opportunity to get health care among socio-economic groups) and solidarity this is especially true for e.g. students and early career researchers given their limited financial capacity to absorb financial shocks. Yet, Nuffic (the Dutch organisation for internationalisation in education) and SOFIE (*Sociaal Fiscaal Internationale Expertise*) have heard from several European and international researchers and their family members of whom it is not clear if they are covered by the Dutch health insurance system and to which extent. Cases presented by SOFIE and Nuffic, as well as educational and academic institutions, are summarized and included in Annex I. Examples include (unremunerated) researchers with scholarships from abroad, partners of researchers working in the Netherlands who are themselves employed in another country, and partners of students. More particularly, concerns are expressed regarding the coverage under the Health Insurance Act (*Zorgverzekeringswet; hereafter Zvw*) and Long-term Care Act (*Wet langdurige zorg; hereafter Wlz*). As will be elaborated in the report, much is linked to the concept of 'residency' to fall under the scope of the Dutch statutory social insurance and hence the legal health care framework.

As indicated by Nuffic and SOFIE, it is not always clear why coverage under the Dutch health system is rejected for a particular person. The 'residence' criterion under the Zvw and Wlz appears to produce unsatisfactory results, and the assessment criteria used by Sociale Verzekeringsbank (SVB) to determine whether a person is covered are experienced as confusing and including a hint of subjectivity. In case the conditions for 'residency' are not met on the basis of this 'Wlz-test', the researcher may only obtain private health insurance which is reported to come with challenges, such as exclusions for certain medical conditions and high premiums. The question comes down to the group of persons who reside and/or work in the Netherlands in the various contractual configurations with the Dutch research institutions. Given the uncertainty arising from the lack of clarity regarding the scope and coverage, Nuffic and SOFIE reached out to ITEM to have the issue investigated.

Therefore, it is necessary to perform a legal analysis of the Dutch health insurance system and clarify the legal concept of 'residence'. Given the reported cases, this analysis will look at the situation of the following categories of persons, both EU citizens and third-country nationals:

- Researchers and their family members
- Students and their family members

The aim of this research is to provide more clarity and transparency on the scope of the Dutch health insurance system and to provide a legal framework from both national and EU law on the relevant aspects. It will provide more information and advice on who is covered and under which conditions. To do so, first, a brief overview of the Dutch relevant systems will be given. This will act as background for the rest of the report and explain the relevant concepts, such as the design of the welfare state, health (care) and the different types of research relations with universities. In the following section, the Dutch legislative framework on health insurance will be elaborated. Particular attention is paid to the concept of 'residence' under national legislation and case law. Thirdly, the relevant EU legislative framework will be

described. A reflection will be made with the applicable EU law, the determination of applicable social security system and equal treatment under EU law, on both EU citizens and third-country nationals[1]. Then, section 5 explains how SVB evaluates 'residency' when determining whether a person is covered by the Dutch system. The focus is placed on the assessment criteria used by SVB and how this interpretation relates to the applicable EU and national law. Section 6 considers other relevant aspects to the issues presented, such as political developments in the Netherlands in the field of social security, and aspects of legal certainty and information provision. Finally, the report will revisit the reported obstacles and analyse them based on the findings of the legislation and case law, offering the opportunity to draw conclusions and recommendations.

[1] Any person who is not a citizen of the European Union within the meaning of Art. 20(1) TFEU.

2. Brief overview of relevant Dutch systems

2.1 Welfare State

The welfare state reflects on the state's activities in pooling risks and investing in social benefits through taxation and public services or indirectly through regulation. The welfare state supports living conditions, reduces inequality and addresses market failures, e.g. risks that cannot be insured on the private market.[2] Barr summarises the activities in broad terms as cash benefits and benefits in kind.[3] Cash benefits could be unemployment, sickness, family or income-tested benefits as well as pensions. Benefits can be subdivided into social insurance, which is generally granted on the basis of previous contributions and given a certain event, and non-contributory benefits, that can be universal or with an income test, being social assistance. Under benefits in kind can be thought of education and health care.

The design of a welfare state is very much rooted in the historical, cultural, social and economic background of a country. Nevertheless, amongst many others, Esping-Andersen and SCP have made attempts to make overarching typologies.[4] Where Esping-Andersen classifies the Dutch welfare state under the corporatist regime, characterised by a smaller role for the government and a strong link with industrial relations and income, later studies argue for a more hybrid typology. Indeed, aspects of the Nordic countries and the social-democratic tradition such as universal and redistributive benefits have entered the Dutch welfare state.

Universal benefits in the Netherlands form the statutory social insurances (*volksverzekeringen*). The statutory social insurances consist of four Acts: the General Old age Act (AOW), the General Survivors Act (ANW), the General Child benefit Act (AKW) and the Long-Term Care Act (Wlz).[5] The scope of insured persons is the same for each Act and thus each statutory insurance scheme. Every person who is a resident in the Netherlands is insured as well as persons employed in the Netherlands who pay income tax there. For the access to a benefit, it is not decisive if and how much is contributed to the national insurance schemes, underlining the universal and solidary character. The national insurance is funded via the pay-as-you-go system, where contributors pay for the beneficiaries in that same period. While the right to benefits under the statutory social insurance schemes is not linked or dependent of any level of contributions, every insured person is in principle liable to pay insurance premiums.[6] These are income-dependent, the combined premium tariff is 27,65%. There is an absolute maximum, capped at an income of €35.472.[7]

On top of the universal statutory social insurances, occupational and private welfare schemes are present, that are also regulated by the government. Over the years, liberal influences, individualisation, activation

[2] N. Barr, Economics of the Welfare State, *Oxford University Press,* fifth edition, 2012. M. Moran, Understanding the welfare state: in the case of health care, *British Journal of Politics and International Relations,* Vol. 2, No. 2, June 2000, pp. 135-160.
[3] Barr 2012, p. 8.
[4] G. Esping-Andersen, *The three worlds of welfare capitalism.* Cambridge: Polity Press, 1990. J. Wildeboer Schut, J. Vrooman, P. de Beer, *De maat van de verzorgingsstaat*, Den Haag: Sociaal en Cultureel Planbureau, 2000.
[5] Art. 2(a) Wet financiering sociale verzekeringen (Wfsv), Art. 1(a) Besluit uitbreiding en beperking kring verzekerden volksverzekeringen. The AKW is not included under Art. 2(a) Wfsv, but is under Art. 1(a). In contrast with the AOW, Anw and Wlz, the AKW is not funded through statutory social insurance premiums.
[6] Art. 6, para 1 Wet financiering sociale verzekeringen (Wfsv).
[7] Numbers are for 2022.

and privatisation have taken place, in order to come to the so-called participation society.[8] In this respect we would also like to refer to the report of the Dutch scientific council for governmental policy, WRR, *De verzorgingsstaat herwogen*, summarizing the Dutch welfare state in four functions: care, ensure, elevate and connect.[9]

2.2 Health system

"The philosophy underpinning the Dutch healthcare system is based on accessible, affordable, good quality care."[10]

The coverage of persons under a health system can be perceived as one of the fundamental aspects of social protection. It prevents that health care is inaccessible or unaffordable, especially for those who have limited financial capacity. Both from the point of view of efficiency as of equity, fundamental arguments can be made in favour of health systems as part of the welfare state.[11] Nevertheless, the provision of healthcare services in the Netherlands has a longer tradition of private initiatives. In line with the Bismarckian tradition, there is only a modest role for the government. Yet, especially the healthcare reform in 2006 brought fundamental changes and more government intervention.[12] For a more in-depth analysis of the historical background we would like to refer to the work of NIVEL[13] and, especially, the WRR[14].

The Dutch health care system founded in five Acts: the Health Insurance Act (*Zorgverzekeringswet; Zvw)*, the Long-Term Act (Wlz), the Social Support Act (*Wet maatschappelijke ondersteuning; Wmo)*, the Public Health Act (*Wet publieke gezondheid; Wpg)* and the Youth Act (*Jeugdwet*). Next to these foundations 'smaller' laws regulate the health sector. Of the five fundamental Acts, the Zvw and Wlz are most important and take account for the vast majority of the healthcare budget.

The Wlz regulates the care packages regarding serious and intensive care. The scope is focussed at the most vulnerable groups who need residential care.[15] To be eligible for the care, there is a 'needs assessment', that is done by the Care Assessment Agency. As it is grounded in the basis of solidarity, it is one of the statutory social insurance schemes and thus covering all residents of the Netherlands and persons employed in the Netherlands and liable to income tax. The Wlz is funded through statutory social insurance premiums, more precisely 9,65%.

Next to the Wlz, most day to day and regular care is regulated through the Zvw. This act has been introduced in 2006 and introduced regulated competition in health care, i.e. health insurers, insured

[8] L. Delsen, *Welfare state reform in the Netherlands: 2010-2015*, Working Paper NiCE16-02, Nijmegen 2016.
[9] WRR, *De verzorgingsstaat herwogen*, Amsterdam: Amsterdam University Press, 2006.
[10] Ministry of Health, Welfare and Sport (VWS), *Healthcare in the Netherlands*, November 2018, p. 3.
[11] Barr 2012, p. 231 and further.
[12] Kroneman M, Boerma W, van den Berg M, Groenewegen P, de Jong J, van Ginneken E. The Netherlands: health system review. *Health Systems in Transition*, 2016; 18(2):1–239.
[13] *Ibid.*
[14] R. Bertens, J. Palamar, *Het Nederlandse zorgbeleid in historisch perspectief,* WRR Working Papers 2021.
[15] As of 2015, after the transformation from the old Exceptional Medical Expenses Act (AWBZ) to the Wlz.

people and healthcare providers. It realised the desire to come with a compulsory private insurance, while stepping back from direct, strong government control. Characteristics of the Zvw are:

- Obligation for individuals to purchase at least a basic health insurance, while leaving the freedom of choice for insurer;
- The CAK[16] oversees this obligation and detects uninsured individuals;
- Obligation for health insurers to accept private individuals, regardless their personal circumstances;
- While health insurers are free to set their premium level, it is forbidden to vary the premium for different persons. This is allowed in the case of collective contracts;
- From the point of view of budgetary constraints but also "to increase cost awareness among the general public"[17], an 'own risk' is introduced. The costs for care up to a certain maximum of 'own risk' are for the individual to pay.[18] Some important care, such as GP, are exempted, as well as certain types of care or medication by the insurer;
- The government regulates the content of the basic health insurance package, based on advice of the National Healthcare Institute. This includes the bulk of essential medical care, medication and medical aids;
- Care outside the basic package can be provided as supplementary insurance on top of the basic package, that is fully private.

Seemingly rare from an international point of view[19], the Dutch system of Zvw can therefore addressed as a hybrid form of public social insurance and a private system: while the market is private, the mechanism is heavily regulated leaning to social insurance. It is one of the examples of welfare policy through regulation.

Next to the Zvw-premiums, the care under the Zvw is furthermore financed through income-dependent contributions paid by the employer. Budgetary deficits are made up by general tax revenues.

The Zvw is thus an important cornerstone of the Dutch health system, that is, thus, founded in four Acts. Regarding the scope of insured persons, the Zvw follows the scope of the Wlz.[20] Therefore, for social protection and being covered under public health insurance in particular, it is of great importance to fall under the scope of the statutory social insurance.[21] Otherwise, voluntary private health insurance remains possible, but, as the supplementary insurance, it is unregulated. As a result, private insurances can be more expensive and insurers can refuse individuals, for instance on the basis of their existing medical condition.

[16] https://www.hetcak.nl/
[17] VWS 2018, p. 11.
[18] For instance, for 2022 the 'own risk' (*eigen risico*) is 385 euros. See more at https://www.rijksoverheid.nl/onderwerpen/geestelijke-gezondheidszorg/vraag-en-antwoord/hoeveel-betaal-ik-in-2022-aan-eigen-risico-voor-een-behandeling-in-de-geestelijke-gezondheidszorg-ggz.
[19] Barr 2012.
[20] By referring to the Wlz in Article 2(1) of the Health insurance Act, https://wetten.overheid.nl/BWBR0018450/.
[21] Indeed, in the Explanatory Memorandum to the Zvw, it is mentioned that the scope is the same as the AWBZ (prior to Wlz), that is, again, the same to all statutory social insurances.

Finally, is worth mentioning that the right to healthcare allowance is also linked to insurance obligation, and thus to the group of insured persons, under the Zvw.[22]

2.3 Types of arrangements with universities

'There are many ways to Rome', as well as to a dissertation. As explained in the preceding section, the scope of national health insurance refers to the person's status as an employee or resident. As a result, it is essential to examine the various contractual relationships that researchers may have with a university in the Netherlands. This section briefly elaborates the different paths that can result in a dissertation and the contractual relation with a university relating to it.

Here are four overarching categories of PhD students as defined by the VSNU[23]:

1a. Employed PhD candidate *(werknemer-promovendus*)
This the more traditional PhD in the Netherlands, who is an employee of the university. The PhD has an employment contract – pursuant to labour law as of 1 January 2020 (entry into force of the *Wet Normalisering Rechtspositie Ambtenaren*) - with the contractual agreement regarding the dissertation. Provided indicators are an (contractual) agreement to come to a dissertation (access to graduate schools, research plan, supervisor etc.), wage payment by the university and contractual classification as PhD.

1b. Employee in a PhD track (*promoverende medewerker*)
This is an employee of the university, who have made arrangements with the employer to write a dissertation. The employer provides time and/or funding for the dissertation. Indicators are a contractual relation and the agreement to come to a dissertation, wage payment by the university and a contractual classification *not* as PhD. Thus, there is a slight difference with the employee PhD that the main task could be not the dissertation as such, but this is facilitated.

2. Scholarship PhD candidate (*beurspromovendi*)
This category includes doctoral students who do not have an employment contract with the university. Yet, they hold external funding for financing the PhD project. There is an agreement with the university regarding the dissertation and access to (research) facilities. Indicators are this agreement, no wage payment by the university (or only a supplement on top of the external fund) and external funding by a provider. Regarding the scholarship provider, two distinctions can be made:

a. Scholarship is awarded by the university itself: scholarship PhD candidate own university. This includes the experiment of 'promotion education' (*promotieonderwijs*), i.e. the PhD student (*promotiestudent*). Here, the university grants a scholarship to a doctoral student to conduct a, often self-developed, PhD research, but not employing the doctoral student as such. As distinction with employees often the scientific independence and freedom, as well as the space for personal development and no teaching obligations are brought forward.[24]

[22] Article 1(1)(c) and 2 Wet op de zorgtoeslag.
[23] VSNU, *Typen promovendi*,
https://www.universiteitenvannederland.nl/files/documenten/Feiten_en_Cijfers/Typering_promovendi_2019.pdf
[24] See for example: https://www.rug.nl/education/phd-programmes/phd-scholarship-programme/about/faqs-start

b. Scholarships can also be awarded externally, outside the university: so-called scholarship PhD candidate via another provider. This could be a foreign university, an association or organisation. The scholarship can be supplemented by the university, where the PhD research is performed.

3. Externally financed PhD candidate (*extern gefinancierde promovendus*)

Regarding this category, there is a slight difference with the scholarship PhD. Instead of a scholarship, the PhD research is funded in another way than a scholarship or the research can be conducted during work time.

4. External PhD candidate (*buitenpromovendus*)

In this last category, a person receives no time nor funding/wage from any party. The funding is by the person itself, from the family, and a private time investment. In this category can be included the persons who work on a dissertation in their own time, e.g. during retirement or next to a job. This also includes the employees of a university, who are not contractual categorised as PhD and do not have an arrangement regarding time or funding for performing the PhD research.

From the point of view of contractual relations and labour law, only the first category (1a and 1b) is in an employment relation with the university. The others are not, while, as mentioned, of course it remains possible that there is also another employment relation with the university outside the scope of the PhD. Given the personal circumstances of a doctoral researcher, the actual situation can result in the classification of an employment relation, even for the other type of doctoral researchers. The Civil Code stipulates that there is an employment relationship if (cumulative) (1) work is carried out, (2) there is authority (employer-employee) relationship and (3) a renumeration is paid.[25] There are cases in which it is ruled that e.g. a scholarship PhD student should be classified as an employment relationship.[26] Writing a dissertation can be seen as productive labour in favour of the university (both from financial as well as scientific point of view), which constitutes one of the elements for an employment relationship. It is nevertheless outside the scope of this report to elaborate on this further. Especially the assessment of the authority relationship might be difficult.

Also from the point of view of taxes and social security, there are important differences to mention. ITEM has earlier on worked on an analysis regarding the social security of a scholarship PhD candidate, who was not eligible for a childminding benefit (*kinderopvangtoeslag*).[27] Here the Childcare Act stipulates, to be eligible, that one is performing current work from which income from employment and housing within the meaning of the Income Tax Act 2001 (*Wet inkomstenbelasting 2001*) is derived, is receiving an unemployment benefit or other benefits, is enrolled at a school or institution listed in the Act (thus is a student). The Tax Authority is of opinion that there is no employment relationship, given the absence of an authority relationship. Nevertheless, external funds can be taxed as 'fictive employment'.[28] While this

[25] Art. 7:610 BW (Burgerlijk Wetboek).
[26] See e.g. HR 24-03-2006, ECLI:NL:HR:2006:AU7935.
[27] Read more here: https://itemcrossborderportal.maastrichtuniversity.nl/link/id/rmXQi4T5e324OZPQ
[28] Articles 3 and 4 Wage Tax Act 1964.

is relevant for tax consequences, it is not that much for the Wlz and Zvw as will be elaborated in the next section.

3. Dutch legislative framework

The coverage of persons under national health insurance is regulated in the Netherlands through the Long-Term Care Act (Wlz). Persons who are insured under this Act, also fall under the scope of the Health insurance Act (Zvw). The Wlz and Zvw together provide a full range of care services. The scope is the same for all national insurances, the so-called "*kring van verzekerden"* (group of insured persons). This is also explicitly mentioned in the explanatory memorandum when introducing the Wlz.[29] As mentioned earlier, the scope of insured persons is also relevant for the right to healthcare allowance. The scope of the insured persons more or less distinguishes two groups: residents and insured non-residents.[30] Furthermore, by Decree, groups are added and excluded from the scope of insured persons.[31] In principle not insured are the foreign nationals who do not reside lawfully in the Netherlands as referred to in the Aliens Act.[32]

3.1 Residents (ingezetene)

According to the Wlz, a person who is legally resident or subject to wage tax due to employment in the Netherlands, is insured under the Act.[33] The term 'resident'[34] is defined as a person who lives in the Netherlands,[35] which is established in accordance with relevant circumstances.[36] In the situation that a person is insured under the Wlz, that person is then also required to take out healthcare insurance in the Netherlands.[37] The SVB is the authority who is tasked with determining whether a person meets the conditions insurance under the Wlz.[38] To do so, the SVB publishes *Beleidsregels* ('Policy rules') that provide guidance on the explanation of the legal concepts and rules (see Section 5). The scope and determination is the same as under the former AWBZ. This results in a uniform determination for all national insurance schemes.[39]

For residence-based assessment, the person must be lawfully resident in the Netherlands (either a Dutch citizen or meeting condition of residency in the Aliens Act[40], that is to be evaluated individually), and have a personal bond of a permanent nature with the Netherlands. The concept of residence is greatly influenced by the concept of residence maintained for tax purposes. The legislator explicitly noted in the

[29] *Kamerstukken II* 2013/14, 33891, nr. 3, https://zoek.officielebekendmakingen.nl/kst-33891-3.html.
[30] Article 2 AOW, Wlz and AKW & Article 6 Anw.
[31] Besluit uitbreiding en beperking kring verzekerden volksverzekeringen 1999, https://wetten.overheid.nl/BWBR0010182/.
[32] Art. 2.1.1 (2) Wlz
[33] Article 2.1.1 (1) Wlz
[34] The terms 'resident' (*ingezetene*) and 'residence' (*woonplaats*) are often used in several legal fields. This concept has a central role in this report, but is also part of a legal debate in international private law. We note that the legal concepts and definitions do differ. For an analysis of the private law analysis of residence, see G.R. de Groot & K. Van der Ven, Titel 2 Woonplaats, in: S.F.M. Wortmann (red.), *Groene Serie Personen- en familierecht*, Deventer: Wolters Kluwer.
[35] Article 1.2.1. Wlz
[36] Article 1.2.2 (1) Wlz (resp. Article 3 AOW and AKW & Article 7 Anw)
[37] Article 2 (1) Zvw.
[38] Article 2.1.3 Wlz
[39] *Kamerstukken II* 2013/14, 33891, nr. 3
[40] Vreemdelingenwet VW. As mentioned in section 2.1, this provision aims to exclude foreign nationals not staying legally.

explanatory memorandum of the AKW that connection is sought with the fiscal definition.[41] It is clearly stated that regarding the definition, the case law in this respect is relevant.[42] The levy and collection of premiums for those insurances apply *mutatis mutandis* the fiscal rules.[43] The fiscal definition can nowadays be found in Article 4 of the *Algemene Wet Rijksbelastingen* (AWR), stipulating, again, "where one lives, shall be assessed in light of the circumstances".

Due to the fact that the concept of residence in the national insurance schemes, and thus the Wlz, is greatly aligned with the fiscal concept, it has been noted by the legislator in for instance the explanatory memorandum on the AOW and the AKW that not the *Centrale Raad van Beroep* (CRvB), but the *Hoge Raad* (HR) is the highest judge to decide on the explanation of the group of insured persons and the concept of residence.[44] Therefore, regarding the explanation of these concepts, an appeal on points of law may be lodged with the HR against the decision of the CRvB. This is done in order to avoid different rulings on and interpretations of these concepts, between what is established under tax law by the HR and under social law by the CRvB. It is the exclusive right of the judge to explain the concept of residence and it is not affected by interpretative rules of the SVB.[45]

This concept of residence is a long-lasting legal debate in tax law. The key question is whether there are durable relations with the Netherlands.[46] In the judgement of the HR in 2011, the case law on the concept of residence was summarised in a case regarding residence for the AKW.[47] Vonk rephrased the summary as "if a person has the centre of his social life in the Netherlands; this is the case if there is personal bond of a durable nature between him and the Netherlands; this bond must be established on the basis of the factual circumstances of the case, which reveals the legal, economic and social bond with the Netherlands".[48] The HR summarises that a personal bond of a permanent nature with the Netherlands does not require proving that this bond is stronger than the bond with another country. In this respect it is not necessary that the centre of a person's societal live is the Netherlands.[49] It is up to countries to deal with that via treaties.

Up to the judgement of the HR in 2011, the CRvB placed much emphasis on the legal, economic and social bond with the Netherlands. Yet, all relevant factors regarding the concept of residence have to be considered in an equal way. Not any aspect, for instance, economic factors, outweighs other aspects. Rather, the matter has to be considered *holistically*.[50] There is no hierarchy and classification must not lead to the omission of relevant facts.[51] Thus, the assessment of residency cannot be based on a strict

[41] *Kamerstukken II* 1957/58, 4953, nr. 3. As noted earlier, the concept of residency is the same for all national insurance schemes.
[42] Formerly regarding Article 3 of *Besluit op de Inkomstenbelasting 1941.* As also concluded in HR 21-01-2011, ECLI:NL:HR:2011:BP1466.
[43] C. Van der Spek, in: Cursus Belastingrecht, PH.0.0.4.
[44] *Kamerstukken II*, 1954-55, 4009, nr. 3, p. 65 & *Kamerstukken II*, 1957/58, 4953, nr. 3, p. 38.
[45] For example stated in CRvB 14-12-2012, ECLI:NL:CRVB:2012:BY6380.
[46] M. Hoogeveen, in: Cursus Belastingrecht, IB.2.1.1.A.
[47] HR 21-01-2011, ECLI:NL:HR:2011:BP1466 and HR 04-03-2011, ECLI:NL:HR:2011:BP6285.
[48] HR 21-01-2011, ECLI:NL:HR:2011:BP1466, met noot G. Vonk.
[49] HR 21-01-2011, ECLI:NL:HR:2011:BP1466, r.o. 3.5.3, referring to HR 22 December 1971, nr. 16650.
[50] For example in HR 21-01-2011, ECLI:NL:HR:2011:BP1466
[51] HR, 12-04-2013, ECLI:NL:HR:2013:BZ6824.

classification of indicators, where some missing indicators must be compensated by others.[52] Therefore, a personal bond of a permanent nature with the Netherlands has to be assessed on all relevant factors, not merely limited to the legal, economic and social factors. Furthermore, in the assessment all relevant facts have to be considered, not only in the Netherlands but also the personal circumstances and facts that are observable in another country.[53]

Other relevant aspects that have to be considered are nationality,[54] the intention of a person to stay in the Netherlands, bills, having a residence permit or being registered in the Register of inhabitants (*Bevolkingsregister*). As mentioned in the SVB Beleidsregels regarding '*Ingezetene*' (residents), the SVB in practice relies very much on the Register of inhabitants (*Basisregistratie personen; BRP*). Indeed, the BRP could be of importance, but cannot be decisive.[55] What *is* relevant, is that the factors should be objectively verifiable, such as the rather subjective factor of the intention to stay in the Netherlands.[56] The duration of the stay can become more and more significant in the assessment over time. After all, as the length of the presence in the Netherlands increases, it becomes more difficult to argue that no bonds with the Netherlands have been built up.[57]

In line with that, it is also possible that residency gradually arises. This can be the case when it is hard to assess whether there is a personal bond of a permanent nature right from the start when settling in the Netherlands. This can for example be especially true for asylum seekers, waiting for a permit.[58]

3.2 Insured non-residents

The second category that falls under the scope of the group of insured persons under the national insurance schemes, and thus the Wlz, are the insured non-residents. These are the persons who are not resident in the Netherlands, but are subject to wage tax through employment in the Netherlands or on the continental shelf.[59] Key factor in this provision is the employment relationship, i.e. the question whether wage tax is actually paid or due is of less importance.[60] It must be a genuine employment relationship.[61] Therefore, the persons who are in 'fictious employment' in the sense of fiscal law do not fall under the scope of the group of insured persons. The assessment of an employment relationship greatly follows the civil law interpretation of an employment contract. Here, three elements are important, where none of the elements have to be decisive: the obligation of the employee to perform (personal) work; the obligation of the employer to pay wages (in return); the element of authority.[62] This

[52] HR 21-01-2011, ECLI:NL:HR:2011:BP1466.
[53] HR, 12-04-2013, ECLI:NL:HR:2013:BZ6824.
[54] Nationality is a relevant aspect that is considered, but not decisive and does not stand alone.
[55] For example in CRvB 03-01-2019, ECLI:NL:CRVB:2019:103.
[56] CRvB 05-04-2013, ECLI:NL:CRVB:2013:BZ7752.
[57] S. Klosse & G. Vonk, 2020, *Hoofdzaken socialezekerheidsrecht*, Boom Juridisch: Den Haag.
[58] In this situation, the moment of granting the refugee status can be a 'turning point' for residency; CRvB, 23-02-1994, nr. KBW1993/46 & ECLI:NL:HR:1996:AA1836.
[59] Article 2.1.1 (1)(b) Wlz (and e.g. Article 6 (1)(b) AOW).
[60] M. Weerepas, in: Cursus Belastingrecht, PH.1.1.2.C.
[61] See for example CRvB 11-05-1988, ECLI:NL:CRVB:1988:AK8423.
[62] M. Weerepas, in: Cursus Belastingrecht, LB.1.3.0.b2.l.

assessment based on civil law is also used for tax law.[63] A reference can be made to the comments made in section 2.3.

The last category of insured non-residents are the persons that fall under the scope of the *Besluit uitbreiding en beperking kring verzekerden volksverzekeringen 1999* (Decree 1999).[64] Under this Decree, groups of persons are added to the group of insured persons, as well as excluded. Included are for example civil servants and their family members who are at a foreign diplomatic post, family members of sailing personnel or non-residents who have been working in the Netherlands and whose work is temporarily interrupted. Also included are the persons who were insured and are temporarily not living in the Netherlands because of study reasons or non-resident entrepreneurs who are active in the Netherlands and have income that is liable to income tax in the Netherlands. Directly insured are also the asylum seekers on the day that their residence permit has been granted.[65]

Excluded are the persons who, for example, live in the Netherlands but work abroad for at least three months, foreign civil servants in the Netherlands, students who have received a temporary residence permit for that reason, unless he works/worked in the Netherlands for six months or longer or is registered as job seeker, as well as the recently graduate that has a temporary residence permit under the condition to seek and perform work[66], or a person, who is employed by a foreign NGO in the Netherlands and who is still subject to a foreign social insurance scheme and requests for an exemption.

Finally, insured are also the persons to whom an international regulation applies, that determines that Dutch legislation is applicable. International regulations prevail over national law, the so-called 'strong effect'.[67]

After having examined national legislation, as well as case law, the following section will focus on some specific cases. This will illustrate how the factors of assessing coverage under the Wlz are weighed. Since the group of insured persons under the Wlz is similar to the other national insurance schemes, also that case law should be considered.

3.3 National case law

This section will mainly focus on the factors of coverage under the Wlz from the standpoint of national case law, especially when assessing the existence of "residency" which seems to be the bottleneck in many of the reported cases. In general terms, the principles from case law are already mentioned in the previous section. This section will illustrate some case law to a greater extent, also acting as examples for

[63] For example in HR 25-03-2011, ECLI:NL:HR:2011:BP3887.
[64] https://wetten.overheid.nl/BWBR0010182/.
[65] Art. 9a Decree 1999.
[66] Art. 20 Decree 1999.
[67] Art. 2.1.2 Wlz.

various cases. As a starting point in various judgements[68], the Courts have stated that the assessment of residency must take amount of **all relevant circumstances** of the case, where it matters whether these circumstances are of such nature that a personal bond of a permanent nature (*persoonlijke band van duurzame aard*) exists between the person concerned and the Netherlands.[69] As earlier noted, as stated in various judgements, although a bond between the Netherlands and the insured person is required in order to establish residency, this bond does not have to be stronger than a bond with any other country; 'residency' does not require that the centre of the insured person's social life is located in the Netherlands.[70]

Important judgments of the HR were made in 2011, to which in many judgments is referred thereafter[71]. In the judgement of 21 January 2011, the HR ruled on the case of a person with the Azerbaijani nationality. The applicant came to the Netherlands in January 2000 and received an asylum permit as of February 2000 (temporary) and February 2003 (permanent). Over the years, the applicant has his family in the Netherlands, children going to school in the Netherlands, performed voluntary work, went to school and disconnected himself from Azerbaijan. The applicant requested for child benefit, AKW, but got rejected. Also the CRvB ruled that applicant is not a resident in 2005, as there are no economic bonds due to missing paid labour. The HR ruled exactly the opposite (par. 3.5.3):

"Pursuant to Article 2 of the AKW, persons residing in the Netherlands are considered to be residents for the purposes of the application of that law. Where someone lives is assessed according to the circumstances pursuant to Article 3(1) of the AKW. All the relevant circumstances of the case must be taken into account. According to established case law, it matters whether these circumstances are of such a nature that a permanent personal link exists between the person concerned and the Netherlands (see for example HR 20 December 1995, no. 30452, BNB 1996/161). This permanent link does not have to be stronger than the link with any other country, so that it is not necessary for the centre of a person's social life to be in the Netherlands in order to have a place of residence here (see HR 22 December 1971, no. 16650, BNB 1973/120).

It follows from the parliamentary history of the concept of domicile for tax purposes, as set out in the Annex to the Opinion of the Advocate General in the Supreme Court judgment of 2 June 2006, No. 41392, LJN AV1227, BNB 2006/337, that the legislator did not wish to attach any special significance to certain (categories of) circumstances, such as, for example, a person's social or economic ties with a country. On the basis of what has been established in section 3.5.2, this parliamentary history is also normative for the interpretation of the concept of residence in the AKW. In the light of this, it must be assumed that the presence of a place of residence in the Netherlands does not require that the person concerned has economic ties with the Netherlands, for example by performing paid work."

[68] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2011:BP1466 and https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2011:BP6285, ECLI:NL:HR:2011:BP1466, ECLI:NL:HR:2011:BP6285, ECLI:NL:RBDHA:2020:7034.
[69] ECLI:NL:HR:2011:BP6285.
[70] ECLI:NL:RBDHA:2018:12684.
[71] Such as most recently, for instance, in CRvB 01-12-2021, ECLI:NL:CRVB:2021:3037.

In the judgement of 4 March 2011, the HR draw a similar conclusion. Here, the judgement, in casu regarding a Vietnamese national, was very similar to the previous case. The CRvB argued that the social bonds with the Netherlands are not strong enough to compensate the missing legal and economic bonds. The HR repeated its judgement above, making clear that classification of factors and compensating missing factors through other factors is not correct.

Amongst others, in CRvB, 04-05-2012, nr 10/2725[72], the Court again rephrased the ruling of the HR above. In this case, the applicant had a Moroccan nationality and lived in the Netherlands for several years. Furthermore, he had a permanent residence permit, he was registered in the BRP, he was living in a had a rental house, and his five children in the Netherlands. On the other hand, the applicant had family in Morocco, as well as a child and partner there. He also paid the rent for their home. The SVB prescribed in its policy rules that it is not possible to have dual residence for social security purposes. Nevertheless, the CRvB ruled "that the Supreme Court sees no room for a different interpretation of the concept of residence when implementing the social insurance laws than under tax legislation. Therefore, the Council cannot follow the Svb in its opinion that a different interpretation of this concept should be chosen within social security, whereby dual residence is excluded."[73] Given the long stay in the Netherlands, the presence of a permanent housing, the presence of his children and grandchildren in the Netherlands and the intention to stay in the Netherlands, the Court ruled that he should be considered as resident. The fact that he also says in Morocco with his family for longer periods of time cannot detract from the personal ties with the Netherlands.

The case of the CRvB in October 2006[74] is interesting when it comes to demarcating residency, when a person is moving relatively often and circumstances change over time. The plaintiff moved to Paris, France, end of 1959 to study French part-time, after having received advice from his teacher to have a long holiday in France to learn French. The aim was to come back to the Netherlands, but resulted in a 2-year bachelor study in Paris as of 1961. In July 1963 the plaintiff started a doctoral study in the Netherlands, which ceased at March 1964. The plaintiff moved to Burkina Faso with his partner in September 1964 and worked there for seven years as volunteer. In his defence, the plaintiff argued that the intention was to come back to the Netherlands after two years. CRvB ruled that regarding the first period of 1960 to 1961 the plaintiff was still resident of the Netherlands, as the aim was to gather French experience and come back. The CRvB did argue that as of the academic year 1961-1962 the plaintiff became resident of France, as he chose to commit himself to a study for four years in Paris and no relevant contra-indications were brought forward. Regarding the period in Burkina Faso, the Court found that the intention for returning after two years is not enough to prove that the centre of the societal life was in the Netherlands.

In CRvB, 08-01-2021, nr. 19/2407[75], a plaintiff with a Dutch nationality went to Portugal, with her three children, in November 2013 for a study and received study financing and a child benefit (AKW) from the Netherlands. The SVB was of opinion that the plaintiff could not be considered as Dutch resident anymore

[72] ECLI:NL:CRVB:2012:BW5323.
[73] *Ibid,* § 4.12.
[74] CRvB, 27-10-2006, nr. 05/1203, ECLI:NL:CRVB:2006:AZ2599
[75] ECLI:NL:CRVB:2021:117

as of the first quarter of 2018, referring to its policy rules under which residence lapses after a stay abroad of three years or longer. The plaintiff argued that there is a bond with the Netherlands, as she received study financing from the Netherlands and had the intention to come back to the Netherlands after her study. The CRvB ruled that the plaintiff was a migrant EU-citizen, and thus Regulation 883/2004 applied. Therefore, not the Dutch concept of residency but the concept of Regulation 883/2004 and Regulation 987/2009 should be applied.[76] While the plaintiff's only income was from the Netherlands (AKW and study financing) and she remained home seeker in the Netherlands during her stay in Portugal, she had a rental house in Portugal, her children went to school there and had no possessions or insurances in the Netherlands. Although the source of income is relevant in the EU concept of residence, it cannot be decisive. After a stay of more than four years in Portugal, and few objective facts and circumstances, other than the source of income, the CRvB ruled that as of 2018 plaintiff was indeed resident of Portugal. This was not contrary to other sources of EU law, such as Article 48 TFEU, as it is settled case law that moving within the EU is neutral for social security. The case showed and confirmed that the length of stay can be relevant factor that has to be considered.

Also in CRvB, 06-05-2021, nr. 13/3864[77], it was ruled that the concept of residence should be assessed following EU law and conceptualisation, instead of the Dutch concept, in case of cross-border settings, such as a migrating EU citizen. While the assessment was made by the SVB on the basis of the Dutch concept of residence, the CRvB ruled the EU concept applied here. In casu, the plaintiff with the Dutch nationality moved to Spain with her three children in March 2015. In January 2017, the plaintiff returned to the Netherlands with the youngest child. After returning to the Netherlands, the plaintiff lived with her mother and friends thereafter. She was registered in BRP as of March 2017, received a benefit as of April, the other two children came in June to the Netherlands and she had an house as of December. The question was concentrated on whether the plaintiff's habitual centre of interests were in the Netherlands in the second and third quarter of 2017. Based on the EU concept of residence, the Court considered that over the months there was a gradual shift towards more and more leads that showed that the stay was mere permanent than temporary. When the plaintiff's two children arrived in the Netherlands, can be considered as a turning point after which the plaintiff was considered as resident. According to the Court, this date should be objectively verifiable.

In a judgement from *Rechtbank Den Haag*, a minor daughter of the plaintiff was denied coverage under the Wlz as she was missing a personal bond of a permanent nature with the Netherlands.[78] The plaintiff returned to the Netherlands from Morocco with her daughter, after which she applied for the Wlz-coverage leading to the contested decision: the minor was not considered to be resident in the Netherlands. The plaintiff disagreed with the outcome of the investigation, arguing that her daughter is a resident: she is a Dutch national, who goes to school in the Netherlands. While in the waiting line of a housing association, the family was living in the apartment of the plaintiff's son: they had the intention to settle in the Netherlands. Nevertheless, it was not sufficient alone that the person had the intention to settle in the Netherlands. Whether there is a permanent bond, the Court stated it is important to consider

[76] See section 4.1.1.
[77] ECLI:NL:CRVB:2021:1048
[78] ECLI:NL:RBDHA:2020:7034.

whether the person has permanent housing ties the Netherlands. The Court assessed that the absence from the Netherlands in the time the minor was living in Morocco severed the personal ties with the Netherlands, and that she has been living in the Netherlands for a relatively short time and without an independent living space. It was irrelevant hat they were on a waiting list, as in the view of the Court it is only relevant to look at the actual living situation. Therefore, the fact that the minor went to school in Netherlands and had Dutch nationality, were not sufficient alone to consider her resident in the Netherlands. The Court stated that the burden of proof of demonstrating the existence of permanent personal link with the Netherlands lays with the applicants. Interestingly, the nationality of the person concerned was not as important as the other factors, such as permanently available living space.[79]

The existence of permanent housing was also deemed decisive in a case from the *Centrale Raad van Beroep*, where the SVB rejected an application of child benefit[80]. The person concerned had a residence permit and was living in asylum seekers centre in the Netherlands, while waiting for independent accommodation. The applicant intended to stay permanently, as he followed an integration course and his son attended school in the Netherlands. The Court referred to the criteria as mentioned in the previous case, agreeing with the refusal of the benefit based on the absence of residence[81], as the person had lived in the Netherlands for only a short time and did not have an independent housing. The applicant referred to the principle of proportionality, but the Court stated that the refusal was mandatory in nature, where there is no room for the SVB to weigh interests. Furthermore, the intention of the person to stay in the Netherlands was irrelevant in this case, according to the Court.[82]

Yet, the intention can be relevant, if it is objectively verifiable. In CRvB, 05-04-2013, nr. 12/3196[83], it was ruled that the moment from which residency is acquired should be determined on the basis of all relevant circumstances. Indeed, the intention on its own is not enough, but can be relevant when determining as of when one is resident. Both the moments when the (subsequently objectivised) intention arose and when the objectively verifiable ties were established are important in this respect. The mere fact that the objectively verifiable ties are created later than the intention (objectified on the basis thereof) has no significance as such.

3.4 Conclusions from national legislation and case law

To conclude the findings from above sections on national legislation and case law, it was seen that in the Netherlands, the same definition of insured person is applied for both health insurance but also other national social insurances. In general, those who work or reside in the Netherlands fall under the scope of both Zvw and Wlz. A person is considered a 'resident' in the Netherlands if there is a personal bond of a

[79] *Ibid,* §4.5.
[80] Under the General Child Benefit Act (AKW). As stated above, all four national insurance schemes, including the Wlz, apply the same scope of insured persons.
[81] Art. 2 AWK, Art. 3(1) AWK.
[82] ECLI:NL:CRVB:2017:877
[83] ECLI:NL:CRVB:2013:BZ7752

permanent nature between him and the Netherlands. Whether such a link exists must be judged on the basis of all the relevant facts and circumstances of the case.[84]

These judgments of the HR in 2011 regarding residency summarised and made clear that:

- The concept of residence in social security law is similar to the fiscal concept;
- In the assessment of residence, all relevant factors and circumstances should be taken into consideration. This is not limited to factors that qualify as economic, legal or social bond;
- Residency is present if the circumstances show that a person has a personal bond of permanent nature with the Netherlands;
- The durable bond with the Netherlands does not have to be stronger than with the bond with another country. In fact, a person can have double residency[85], meaning having also a strong bond with another country;
- It is not required for the concept of residence that the centre of a person's social life is in the Netherlands;
- It is not required for the concept of residence that a person has economic bonds with the Netherlands, for example through paid labour;
- A factor / bond can be so strong that it can result in residency by itself, it is also possible that there is no real strong factor but the overall picture (complex of factors) results in residency.

As it can be seen from the cases, all though all circumstances ought to be relevant in the assessment of residency, the existence of independent housing and duration of stay are deemed as one of the most important criteria in these cases. Intention to settle in the Netherlands is deemed rather unimportant, but can act as indicator if objectively verifiable. Less importance is also placed on the nationality of the person. However, having the EU citizenship, or being an EU national, or having a permit of permanent nature, can contribute as indicator in favour for a longer duration of the stay in the Netherlands.

Residency can be clear from the start, or become clear after objectively verifiable indicators that follow. It can also be accrued over time, as it becomes more likely that strong ties exist with the Netherlands when other (contra-)indicators are missing. The duration of the stay of a person in the Netherlands can is therefore also a relevant indicator that should be taken into consideration, especially when other indicators are missing. As will be discussed, the SVB presumes a turning point after three years.

While the SVB is the competent authority to assess the scope of insured persons under the statutory insurance schemes and is also responsible to keep track of it, it is the exclusive task of the Court to give explanation on the law, thus also the concept of residence. Nevertheless, the SVB can issue interpretative policy rules, without binding effect to the Court.[86]

[84] ECLI:NL:HR:2011:BP1466 and ECLI:NL:HR:2011:BP6285.

[85] See in this regard also G.R. de Groot & K. Van de Ven, 2 Dubbele woonplaats? bij: Burgerlijk Wetboek Boek 1, Artikel 10 [Woonplaats natuurlijk persoon en rechtspersoon], in: S.F.M. Wortmann (red.), *Groene Serie Personen- en familierecht*, Deventer: Wolters Kluwer

[86] E.g. ECLI:NL:CRVB:2006:AZ2599

Returning to the types of researchers and students as mentioned in Section 2.3, the following can be concluded:

- Foreign students who have received a temporary residence permit for that reason are in principle not insured based on the Decree 1999;
- An employed PhD-candidate and an employee in a PhD track are insured in the Netherlands based on the paid employment relationship in the Netherlands. This, of course, also applies to an external PhD-candidate or a student with paid employment in the Netherlands. The legal basis for the insurance position can change to residency, if this also is or becomes evident;
- For the other types of researchers, the question of residency is relevant and determines whether one is insured in the Netherlands or not.

Finally, it is concluded that international law prevails over the national concept of residence and legislation. Thus, if European or international law stipulate that Dutch social security is applicable, the Dutch requirement of residency is of less importance. Therefore, the next section will continue on the EU legislative framework.

4. EU legislative framework

This section will examine the applicable EU legal framework. Focus will be placed on the Coordination Regulations of social security systems, which also provide criteria for assessing one's 'habitual residence'. However, as further explain in the section below, while these instruments may be relevant for EU citizens and some third-country nationals (TCN), not every TCN falls under the scope and rights provided by these Regulations. Therefore, as this report analyses the public health insurance coverage of both EU and third-country national researchers, a distinction has to be made. First, this section will examine the legal framework applicable to EU citizens and specific categories of third-country nationals. Second part of this section is focussed on the applicable EU legal framework on third-country nationals. Finally, concluding remarks on the situation of the researchers' Wlz-coverage will be made from the standpoint of EU law.

4.1 EU legislation applicable to EU citizens and certain categories of TCN's

For EU citizens and certain third-country nationals (such as the family members of EU citizens or those moving within the EU, i.e. internal EU mobility), it will be relevant to look at the Regulations on coordination of social security systems. This section will also examine the interrelation between the Regulations and rights of residence and equal treatment set in Directive 2004/38. Furthermore, a brief look will be taken at the impact of other applicable provisions of EU law.

4.1.1 Regulations on coordination of social security systems

Regulation (EC) 883/2004[87] and Implementing Regulation (EC) 987/2009[88] lay down rules on the coordination of social security systems of the Member States.

According to Article 2 of Regulation 883/2004, the Regulation applies to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member State, family members[89] and survivors.[90] This means that in general, third-country nationals are not covered by the scope of the Regulation, except specific categories of persons (e.g. family member of an EU citizen). However, Regulation 1231/2010[91] extends the personal scope to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, provided that they are legally resident (a concept distinguished from 'habitual residence', as outlined

[87] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, p.1).
[88] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, p. 1-42).
[89] Definition of "family members" can be found from Article 1(i) Regulation 883/2004.
[90] Article 2 Regulation 883/2004.
[91] Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ L 344, p. 1-3).

below)[92] in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State. In simplifier terms this implies that a third-country national moving from another EU Member State to the Netherlands is covered within the scope of that Regulation (intra-EU mobility), while those moving to the Netherlands from outside the EU (external EU mobility) fall outside the scope. Persons falling to the scope of Regulation 883/2004 enjoy the right to equal treatment, meaning, when the Regulation applies to an EU- or third-country national researcher, they have the same rights and obligations in respect to social security under the legislation of any Member State as the nationals thereof.[93]

As to the material scope, the Regulation applies to different branches of social security, for instance to unemployment benefits, invalidity benefits and sickness benefits.[94] Sickness benefits can be divided to those provided in cash or in kind. Benefits in cash are intended to compensate income losses in the case of sickness, whereas sickness benefits in kind are intended to supply, make available, pay directly or reimburse the cost of medical care and products, and services ancillary to that care, also including long-term care.[95] The Healthcare Insurance Act and the Long-term Care Act consist of healthcare in the sense of benefits provided in kind (see Section 2.2).[96] Also in the Explanatory Memorandum of the Healthcare Insurance Act, it is mentioned that it falls under the scope of Regulation 883/2004.[97]

Based on the principle of exclusivity, persons subject to the Regulation are covered only by legislation of one Member State.[98] The competent Member State is determined by the rules on applicable legislation (also known as 'conflict rules'). As a main rule, the legislation of the State of employment is applicable (*lex loci laboris*).[99] By contrast, economically inactive citizens are subject to the legislation of the State of residence (*lex loci domicilii*).[100] In the context of this report, 'economically inactive' refers to those who are not workers[101] or self-employed, thus students and researchers who are not in an (genuine) employment relationship.

Applying these conflict rules to the type of PhD-researchers presented in Section 2.3 means that *werknemer pomovendus* and *promoverende medewerker* are subject to the legislation of the Member State of their work, thus the Netherlands, while the other types of PhDs, that are *not* considered to be in

[92] In case *Holiday on Ice*, the Court has clarified the difference between the concept of 'residence' under Article 1(j) Regulation 883/2004 and 'legally resident' under Article 1 Regulation 1231/2010. The Court stated that the concepts are not used for the same purposes in both regulations - while the aforementioned refers to habitual residence in order to establish to which Member State the citizen is closely connected and to whose legislation they are therefore subject, 'legal residence' has a different meaning and imposes a prior condition of right of residence before the extension of personal scope to nationals of third countries under Regulation 883/2004 can be made. See Case C-477/17 *Holiday on Ice,* ECLI:EU:C:2019:60, §38.
[93] Article 4 Regulation 883/2004.
[94] Article 3 Regulation 883/2004.
[95] Article 1(va)(i) Regulation 883/2004.
[96] See also *Molenaar* on the distinction between 'benefits in kind' and 'benefits in cash', Case C-160/96 *Molenaar*, ECLI:EU:C:1998:84, §31-36.
[97] *Kamerstukken II*, 29763, nr. 3, p. 57.
[98] Article 11(1) Regulation 883/2004.
[99] Article 11(3)(a) Regulation 883/2004.
[100] Article 11(3)(e) Regulation 833/2004.
[101] Article 1(a) Regulation 833/2004. The Regulation defines activities as an employed person as "any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists."

an employment relationship, are subject to the legislation of the Member State in which they reside (in case they do not perform any other work). Same applies for students. For this reason, it is essential to consider how one's residence is established for social security purposes. The following subsection will look more in depth how an assessment of 'residence' is made under the Regulations.

Assessment of 'residence' under the Regulations on social security coordination

Regulation 883/2004 defines residence as "the place where a person habitually resides",[102] that is distinguished from temporary residence, i.e. stay in a Member State.[103] Due to the principle of exclusivity, there can be only one place of habitual residence under EU law.[104] The Regulation also applies so-called negative conflict of law, avoiding a situation where a person would not be subject to any Member State's social security legislation.[105] In other words, a person subject to the Regulations has always one place of habitual residence.

The concept of 'habitual residence' has an autonomous meaning under EU law. According to the Court of Justice, that place is determined based on the *factual situation* of a person's centre of interests. Habitual residence as a concept is also to be distinguished from the *right to reside*. Referring to *Swaddling*[106] in *European Commission v United Kingdom of Great Britain and Northern Ireland*[107], the Court stated that:

> *"that term designates the place where the* ***habitual centre of interests*** *of the person concerned is to be found. In order to determine that centre of interests, account should be taken in particular of the worker's family situation, the reasons which have led him to move, the length and continuity of his residence, whether he is in stable employment and his intention as it appears from all the relevant circumstances.*
>
> *More specifically, that place is to be determined in the light of the* ***factual circumstances and the situation of the persons concerned regardless of their legal status in the host Member State and of whether they have a right to reside*** *in its territory on the basis, for example, of Directive 2004/38. Therefore, Regulation No 883/2004 confers on the concept of 'residence'* ***a specific meaning which is independent of the meaning attributed to it in other measures of EU law or in national law*** *and is not subject to any legal pre-conditions."*[108]

This list of factors is now codified in Article 11 of the Implementing Regulation 987/2009.[109] When two institutions of two Member State have a different view to the respect of where the person resides under

[102] Article 1(j) Regulation 833/2004.
[103] Article 1(k) Regulation 833/2004.
[104] See also *Wencel*, where the Court confirmed that for the purpose of determination of legislation applicable, there can be only one place of habitual residence – otherwise, the related provisions would be deprived of any practical effectiveness. C-589/10 *Wencel,* ECLI:EU:C:2013:303, §48.
[105] See also Case C-535/19 *A*, ECLI:EU:C:2021:595, §46.
[106] Case C-90/97 *Swaddling*, ECLI:EU:C:1999:96.
[107] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2016:436.
[108] *Ibid*, §30-31.
[109] C-589/10 *Wencel,* ECLI:EU:C:2013:303, §50.

the Regulation, the institutions shall establish a common agreement evaluating the centre of interests of the persons, taking into account the following relevant facts:

- the duration and continuity of presence on the territory of the Member States concerned
- the person's situation, including:
    - the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;
    - his family status and family ties;
    - the exercise of any non-remunerated activity;
    - in the case of students, the source of their income;
    - his housing situation, in particular how permanent it is;
    - the Member State in which the person is deemed to reside for taxation purposes.[110]

It has to be noted that the above-mentioned criteria are not exhaustive and there is no hierarchy between them. The criteria only apply where appropriate: each individual case must be assessed according to its relevant facts and circumstances.[111] Therefore, neither a simple fact that a person has remained in a Member State continuously over a long period means that he is 'habitually resident' in that Member State: determination of the place of (habitual) residence of a person for social security purposes must be based on a whole range of factors.[112] If, on the basis of these criteria the institutions do not come to agreement, the person's intention based on the facts and circumstances, and the reasons that led the person to move, are also considered decisive in the assessment.[113] It has to be noted, that the mere intention or will of a person to have residence in a certain place is not sufficient, but the intention must be supported by factual evidence.[114]

The EU Commission has clarified that as the Regulations do not provide harmonisation of the social security systems, the Member State may provide in their national legislation additional conditions on the access to social security benefits as far as these criteria are compatible with the EU legislation, and in particular with the general principles of equal treatment and non-discrimination of migrants. This also implies that national legislation might require residence in line with their national definition of residence.[115] However, in its Practical Guide the Commission has clarified that while frequently the national institutions assume that the place of residence is identical with the place where a person is registered to have an address, it may provide indication in the assessment, but is not a decisive factor.[116]

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[110] Article 11(1)(a)-(b) Implementing Regulation 987/2009.
[111] EU Commission, Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland. Accessed via https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en, p. 44.
[112] Case C-255/13 *I v Health Service Executive*, ECLI:EU:C:2014:1291, §48.
[113] Article 11(2) Implementing Regulation 987/2009.
[114] EU Commission, Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland. Accessed via https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en, p. 44.
[115] *Ibid*, p. 42.
[116] *Ibid*, p. 44. See also Case C-394/13 *B* where the Court held that "Article 11 [of Regulation 883/2004] must be interpreted as precluding a Member State from being regarded as the competent State for the purpose of granting a family benefit to a person on the sole ground that the person concerned is registered as being permanently resident in its territory, where neither that person nor the members of his family work or habitually reside in that Member State." Case C-394/13 *B,* ECLI:EU:C:2014:2199, §36.

Regarding place of residence, Recital 16 of Regulation 883/2004 specifically states: "Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account."

Now that the concept of 'habitual residence' under EU law has been examined, the following section will turn focus to the interrelation of the Coordination Regulations and the rights of residence and equal treatment as provided under Directive 2004/38.

4.1.2 Citizens' Rights Directive 2004/38

Directive 2004/38[117] provides rights of residence and equal treatment to Union citizens and their family members[118]. At this point it should be once more noted that the concept of residence under the Coordination Regulations is distinct from the right of residence. The issues as reported by SOFIE do not necessarily concern that the researchers and family members would be denied right of residence, but rather that they are not considered as 'habitually resident' in the Netherlands and fall outside its social security coverage. Habitual residence is therefore to be considered a distinct concept from legal residence (the right to reside). However, the evaluation of habitual residence may take into account the legal residence of the person[119], therefore it is relevant to briefly outline the rights to residence and equal treatment under the Directive.

Article 24 of the Directive provides right to equal treatment to citizens residing on the basis of the Directive in the territory of the host Member State. The right is extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.[120] For stay of less than three months, however, equal treatment may be limited. The limitations apply to social assistance and study maintenance aids.[121]

During the first three months of stay in the host Member State, the Directive provides a right to short stay on minimum conditions.[122] Permanent right of residence may be obtained after 5 years of residence.[123] Between these time periods, i.e., for a stay longer than three months but less than five years, additional conditions must be met by the citizen, depending on their status of work. Workers, i.e. those who perform services for and under the direction of another, in return for which they receive remuneration,[124] must

[117] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, p. 77-123).
[118] Family member is defined as the spouse, a registered partnership, direct descendants under the age of 21 and dependant direct relatives in the ascending line: see Article 2(2) Directive 2004/38.
[119] As elaborated in the EU Commission, see footnote 90.
[120] Article 24(1) Directive 2004/38.
[121] Article 24(2) Directive 2004/38.
[122] Article 6 Directive 2004/38: Valid passport or identity card.
[123] Article 16 Directive 2004/38.
[124] Case 66/85 *Lawrie-Blum*, ECLI:EU:C:1986:284.

register and obtain a certificate.[125] On the other hand, inactive citizens and their family members may be required to hold a comprehensive sickness insurance and sufficient resources in order to avoid a situation where the citizen becomes a burden on the social assistance system of the host Member State.[126] With this provision, Member State may avoid costly 'social tourism' by restricting residence rights of those who are neither working or contributing to their social welfare system. Indeed, a Member State may refuse to provide a social benefit on the grounds that the individual is an "unreasonable burden" and consequently lacks the right to reside in that Member State. Thus, it may be required that economically inactive citizens, and their family members[127], staying for longer than three months in the Netherlands but who have not yet acquired permanent residence, have a comprehensive sickness insurance and sufficient resources (and, consequently, the right to reside) before access to social security, including Wlz-coverage, is granted. This interplay between social security benefits and residence rights has also been discussed in the case law of the Court of Justice, for instance in *UK v Commission.*[128]

In *UK v Commission*, the Court ruled on a case that combined the residence criteria under Directive 2004/38 and rules on habitual residence under Regulation 883/2004. In this case, the UK required legal residence from economically inactive EU residents as part of their 'habitual residence' assessment before granting access to certain child benefits. The European Commission brought infringement actions against this requirement, finding it directly discriminatory. Moreover, the Commission noted that Regulation 883/2004 on coordination of social security systems does not include a requirement of right of residence in its wording, but only refers to the condition of *habitual residence.*[129] Ruling in the favour of the UK, the Court found that Regulation 882/2004 merely points out the applicable law and does not govern the criteria on the *substantive right* to a social security benefit.[130] The Court was of the opinion that UK was justified to require a right of residence from economically inactive citizens before a social security benefit could be granted, as far as the requirement of lawful residence was continued to be checked in a proportionate manner.[131]

Several more judgements in the context of economically inactive citizens' residency rights have been issued by the Court, although they have focused on social assistance rather than social security benefits. In *Brey* the Court clarified how an assessment of a person's 'unreasonable burden' is made. The case involved a German couple living in Austria who were denied a pension supplement benefit since they did not hold a legal residence for a period exceeding three months, on the grounds that they had insufficient resources. The Court found that in case residence right is not granted given the insufficient resources of

[125] Article 7(1)a Directive 2004/38.
[126] Articles 7(1)(b)-(c) Directive 2004/38.
[127] The Court has clarified that although the provision contains some ambiguity, it is required that both the EU citizen as well as the members of his family who reside with him have a comprehensive sickness insurance cover. See, for instance, Case C-247/20 *VI*, ECLI:EU:C:2022:177, §63.
[128] Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2016:436.
[129] *Ibid,* §31 and §35.
[130] *Ibid*, §67.
[131] *Ibid*, §85-86.

the citizen, a case-by-case analysis of the citizen's unreasonable burden on the host member State must be made on the basis of personal circumstances and in accordance with the proportionality principle.[132]

In *Dano*, *Alimanovic* and *García-Nieto* the Court continued with the subject of residence rights of economically inactive EU citizens, taking a restrictive approach. *Dano* concerned an unemployed Romanian national, who requested minimum social assistance during her stay in Germany. In this case, the Court stated that equal treatment under Article 24 of the Directive cannot be invoked by those who do not have a right to reside under Article 7, i.e. those who are not workers or those who do not hold sufficient resources. In *Alimanovic* and *García-Nieto*, the Court further clarified how an assessment of 'unreasonable burden' is made. Rather than focusing on individual applications for social assistance, the assessment must make an overall evaluation of all the individual claims together and their burden imposed as a whole on the social assistance system of the host Member State.[133]

The above case law mostly focused on the requirement of 'sufficient resources' as a condition for lawful residence as an economically inactive citizen. However, next to sufficient resources, these citizens must also hold a comprehensive sickness insurance. In a recent case *A,* the Court clarified this requirement under Directive 2004/38 and its interrelation with Regulation 883/2004.

A concerned an Italian national, who decided to move to Latvia. He was no longer entitled to healthcare provided by the Italian system, and once he applied registration in the healthcare system of Latvia, his application was rejected. As an economically inactive citizen, he could only claim medical care against payment. A argued the treatment was discriminatory, as opposed to foreign nationals, economically inactive Latvian citizens could access the state-funded healthcare systems. The national Courts argued that the difference in treatment could be justified with the aim of protecting public finances of the State. Furthermore, after A would acquire permanent residence, he could access the health system financed by the Latvian State. Finally, A appealed to the highest Court in Latvia, who referred preliminary questions to the Court of Justice. One of these questions regarded whether in such situations the refusal to affiliate an inactive EU citizen to the national health system would be compatible with the general principles of non-discrimination, citizenship and freedom of movement, and with Regulation 883/2004, and namely its binding effect.

The Court held that although the Regulation does not lay down any substantive conditions for determining a right to benefits, the conflict rules laid down by Regulation 883/2004 are mandatory and the Member States therefore have no power to determine to what extent their own legislation or that of another is applicable. Consequently, the conditions establishing the right of a person to be affiliated to a social security scheme, or more specifically to the public sickness insurance scheme, cannot have the effect of excluding from the scope of the legislation at issue persons to whom, pursuant to Regulation 883/2004,

[132] Case C-140/12 *Brey,* ECLI:EU:C:2013:565.
[133] Case C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, Case C-299/14 *García-Nieto*, ECLI:EU:C:2016:114.

that legislation is applicable.[134] This prevents a situation where A would be left without social security coverage because there is no legislation which is applicable to him.[135]

The Court did, however, take into account the residence conditions set forth in Directive 2004/38, namely the requirement of sufficient resources and comprehensive health insurance. The Court noted that these conditions laid under the Directive would be rendered redundant if the host Member State would be required to grant economically inactive citizens affiliation to their public sickness insurance system free of charge. Combining the objectives of Regulation 883/2004 and Directive 2004/38, the Court concluded that a Member State is obliged to affiliate EU citizens to their healthcare system on the basis of the Regulation, but they are not obliged to do this free of charge. Therefore, a proportional contribution may be required from the citizen. More specifically, the Court stated that: *"Such conditions may include the conclusion or maintaining by that citizen of comprehensive private sickness insurance, enabling the reimbursement to that Member State of the health expenses it has incurred for that citizen's benefit, or the payment, by that citizen, of a contribution to that Member State's public sickness insurance system."*[136]

Contribution in this context can mean taking a private health insurance or paying contributions to the health insurance system of that Member State. For both types of contribution, the principle of proportionality must be respected; the contribution may not be extremely burdensome for the citizen. This means that if the Netherlands is designated as competent Member State under Regulation 883/2004, the economically inactive researcher may not be automatically refused from the affiliation to the Dutch public health insurance scheme – however, it may be required that the citizen has a private insurance (Zvw) or pays a contribution to the public healthcare system (Wlz).[137]

Recently, on 10 March 2022, the Court of Justice ruled on another case clarifying the requirement of comprehensive sickness insurance coverage laid down in Directive 2004/38.[138] A child of EU nationality and his family with Pakistani nationality, living and working in Northern Ireland, were denied child benefits since, according to the authorities, they were not considered to hold comprehensive sickness insurance. The Court held, that once a permanent right of residence is acquired, the family is no longer required to maintain a comprehensive sickness insurance in order to retain their right to reside and subsequent right to benefits. More significantly, the Court clarified that the requirement of comprehensive sickness insurance, as outlined in case *A*, is also met when the citizen is affiliated with the public sickness insurance system of the host Member State free of charge.[139] In light of the circumstances of the case, namely that the family had worked and paid taxes on their income in the host Member State, the Court held that affiliating them to the public health insurance system free of charge could not be regarded an unreasonable burden on the public finances of that State.[140] Thus, the requirement of 'comprehensive sickness insurance coverage' in the meaning of Directive 2004/38 may be fulfilled by obtaining a private

[134] Case C-535/19 *A*, ECLI:EU:C:2021:595, §48-49.
[135] *Ibid*, §46.
[136] *Ibid*, §59.
[137] Dr. L.S.J. Kortese, 'Economisch niet-actieve EU-burgers en de zorgverzekeringseis onder de Burgerschapsrichtlijn', NtER 2021-7-8, p. 145-151.
[138] C-247/20 *VI*, ECLI:EU:C:2022:177.
[139] *Ibid,* §68-69.
[140] *Ibid,* §70.

health insurance, but it also can be met through affiliation in a public sickness insurance system, such as the NHS in this instance. This also implies that incoming researchers in the Netherlands can meet this requirement via private health insurance, as well as when they fall under Wlz-coverage and the state-controlled health insurance system (Zvw).

4.1.3 Other applicable provisions of EU law

Next to provisions on equal treatment set in the Coordination Regulations and Directive 2011/24, non-discrimination is also enshrined in the founding agreements of the EU, i.e. in the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). In this context, not only the right to equal treatment, but also to free movement and the concept of EU citizenship, are significant. It is worthwhile to mention that also other sources of law may provide rights for researchers, such as the Charter of Fundamental Rights of the European Union, as well as European Convention on Human Rights and subsequently developed case law.[141] However, for the feasibility of this research, this section is limited to a certain selection of EU legislation, namely the provisions of the Treaties.

Overall, the Treaties form part of EU primary law (being the fundament of the EU), meaning that secondary legislation (the Coordination Regulations and the Directive) must be applied consistently with these provisions. These provisions may also become relevant for EU citizens, in case, for instance, they could not rely on the rights provided by the Directive or the Regulation.[142]

Article 45 TFEU prohibits obstacles on free movement of workers, as well as discrimination, unless it is justified on the basis of public order, public safety, or public health. Workers, thus researchers in employment relationship, may rely on this provision. This provision also forms the basis for Regulation 492/2011[143], specifying the right of workers to move in another Member State without unjustified discrimination. On the other hand, Article 18 TFEU (on prohibition of discrimination) in connection with Articles 20 and 21 TFEU (on EU citizenship) may be invoked by all EU citizens, including those not in employment.[144]

Regarding equal treatment, direct discrimination on grounds of nationality is always prohibited, unless it can be justified on a statutory ground.[145] Indirect discrimination (where an apparently neutral provision in fact leads to a disadvantage for the protected category) is prohibited unless the provision serves a

[141] See, for instance, Part I: Human Rights and Social Security in Research Handbook on European Social Security Law; Pennings, F., Ed.; Research Handbooks in European Law; Edward Elgar Publishing: Cheltenham, UK, 2015.
[142] For instance, in situations where a cross-border element is absent, and the Directive would not be applicable to them. See also *Martínez Sala,* who could not rely on a Regulation but could invoke equal treatment in respect to social security benefits on the basis of Arts. 20, 21 and 18 TFEU: Case C-85/96 *Martínez Sala*, ECLI:EU:C:1998:217.
[143] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141 27.5.2011, p. 1.
[144] Note the priority order of the provisions: if Article 45 TFEU applies, Article 21 TFEU is not applicable. See Case C-287/05 *Hendrix*, ECLI:EU:C:2007:494, Case C-3/08 *Leyman*, ECLI:EU:C:2009:595.
[145] For instance, public policy, public security or public health as found in Article 45 TFEU. For instance, administrative difficulties are not acceptable grounds to justify discrimination.

legitimate objective and the means as to achieve this aim are suitable and necessary.[146] An example of such indirectly discriminatory provision is if an access to a benefit is only granted for persons resident in the State concerned. In general, such a residence criterion is more easily fulfilled by the nationals of that State than those who do not have that nationality.[147]

In this respect it is important to note that the Treaty articles do not only prohibit discrimination, but any obstacles on free movement making the exercise of the fundamental freedoms guaranteed by the Treaties unjustifiably less attractive.[148] For instance, in *Government of the French Community and Walloon Government v Flemish Government*, the Court found that a Flemish care insurance, which is only available to people living in a Dutch-speaking region of Belgium, may discourage migrant workers from taking up employment in that region if their residence in other regions of Belgium would result in the loss of their rights to care insurance.[149]

From this perspective, it could be argued that the Wlz-criterion on residence puts migrant researchers at a disadvantage, compared to domestic researchers. Although the national legislation applies without distinction to Dutch nationals and other citizens of the Union, applying 'residence' criterion as such may prevent and discourage other national from exercising their right to move in the Netherlands, if the strict interpretation of the national authorities results in the individual not being considered a resident there despite their relocation. This could constitute a restriction on their right to freely move and reside within the Union, where for instance, Articles 18, 20 and 21 TFEU could be invoked.

[146] The judgements in *Bidar, Förster, Prinz and Seeberger* shed light on which kind of justifications may be accepted in this context (although the judgements concern study assistance, rather than social security benefits). In *Bidar* and *Förster* it was held that Member States are permitted to ensure that a certain degree of integration exists between the citizen and the host Member State before a right to a social benefit will be granted.[146] In *Bidar*, the Court stated that the Member States are justified to offer maintenance assistance only to students demonstrating a degree of integration, in order to avoid migrant (economically inactive) students becoming an unreasonable financial burden to the host Member State. The Court applied a stricter interpretation in *Förster*, where it was held that the Netherlands was justified in requiring five years of uninterrupted residence in the Netherlands before a student maintenance assistance could be granted, in order to ensure that the students with nationality of other Member State are integrated into their society. Regarding outbound mobility, i.e. a situation where a student going to another Member State, the Court has applied a more lenient approach. *Prinz* and *Seeberger* regarded residence requirement as a condition to export grants. At the time, Germany required at least three years of residence in their country before study financing for studies in another EU Member State would be granted. The Court of Justice found this as an unjustifiable restriction of free movement of EU citizens under Articles 20 and 21 TFEU. More specifically, the Court stated that a sole condition of uninterrupted residence is too general and exclusive and cannot be regarded as proportionate. The degree of integration into the society of host Member State must take account other relevant factors, such as family, employment, social and economic factors. The impact of the link of integration of economically inactive citizens was also noted by the Advocate General in *A*, see Case C-535/19 *A*, ECLI:EU:C:2021:595, §113-127. See Cases C-209/03 *Bidar*, ECLI:EU:C:2005:169, Case C-158/07 *Förster*, ECLI:EU:C:2008:630, Joined Cases C-523/11 and C-585/11 *Prinz/Seeberger*, ECLI:EU:C:2013:524, §38.

[147] F. Pennings, *The non-discrimination and assimilation provisions of Regulation 883/2004*, European social security law. 2010, p. 114.

[148] F. Pennings, *European social security law*: Chapter 10: Non-discrimination and free movement provisions of the treaty. Intersentia Publishing Ltd., 2010. P. 168.

[149] Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government*, ECLI:EU:C:2008:178.

4.2 EU legal framework applicable to third-country nationals

As stated in the preceding sections, the EU legal framework on coordination of social security systems mainly applies to EU citizens and only certain categories of third-country nationals. Therefore, it will be relevant to examine various Directives laying down the residence and equal treatment rights for third-country nationals. A brief look will also be taken on other relevant legal instruments, such as bilateral agreements concluded with third countries.

4.2.1 EU Directives applicable to third-country nationals: the principles of equal treatment and non-discrimination

The following Directives provide for the right of residence and mobility for third-country nationals and their family members, which are relevant in the context of this report:

- Council Directive 2003/86/EC on the right to family reunification
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents ('Long-term Residents Directive')
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ('the Blue Card Directive')
- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State ('The Single Permit Directive')
- Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing ('The Researchers' Directive')

Each Directive provides conditions under which residence right in a Member State may be granted. In general, it is required that the third-country national holds a valid travel document (e.g. a passport). Furthermore, most of the Directives require that the TCN holds sufficient resources and, depending on how the implementation of the Directive into the national law, has applied for or has a valid health insurance.

Next to residence rights, it is essential to look at the Directives as they provide for the principle of equal treatment and non-discrimination on grounds of nationality. Except for the Directive on family reunification, the other Directives mentioned here specifically refer to equal treatment in terms of social security rights. The Directives apply the same definition of 'social security' as in the Coordination Regulations.[150] The only exception is Long-term Residents Directive, which refers to social security as

[150] Social security as defined in Art. 3 Regulation 883/2004.

defined by national law. Furthermore, depending on each Directive, equal treatment may be subject to derogations as outlined in Table 1.

Directive 2003/109/EC is applicable to third-country nationals who have acquired long-term residence status. These persons may invoke equality of treatment regarding social security.[151] Similar provisions can be found from the Blue Card Directive, that provides equal treatment for highly qualified third-country workers.[152] Third-country workers and their family members legally residing a Member State may rely equal treatment provisions under the Single Permit Directive.[153]

Directive 2016/801 applies specifically to third-country national researchers[154] and their family members[155]. The Directive refers to equal treatment and social security, stating that equal treatment in respect to branches of social security under Article 3 of Regulation 883/2004 (therefore, including public health insurance) is granted to researchers and students.[156] However, the Directive is merely limited to applying the principle of equal treatment in the field of social security.[157] In the event of mobility between Member States, Regulation 1231/2010 applies. The Directive should not confer more rights than those already provided for in existing Union law in the field of social security for third-country nationals who have cross-border interests between Member States.[158]

The following table will provide an overview of the relevant provisions on equal treatment and their derogations.

[151] Article 11(1)(d) Directive 2003/109/EC. See also Case C-462/20 *ASGI and Others*, ECLI:EU:C:2021:894.
[152] Article 14 Directive 2009/50/EC.
[153] Article 12 Directive 2011/98/EU, see also Cases C-449/16 *Martinez Silva*, ECLI:EU:C:2017:485, and C-302/19 *Istituto Nazionale della Previdenza Sociale*, ECLI:EU:C:2020:957.
[154] More specifically to third-country national researchers, students, trainees, volunteers and au pairs. Article 3(2) defines researches as "a third-country national who holds a doctoral degree or an appropriate higher education qualification which gives that third-country national access to doctoral programmes, who is selected by a research organisation and admitted to the territory of a Member State for carrying out a research activity for which such qualification is normally required." Recital 12 clarifies that Member States are encouraged to treat doctoral candidates as researchers for the purposes of this Directive.
[155] Pursuant to Article 3(24) Directive 2016/801, the family of the researcher consist of members as defined in Directive 2003/86/EC. These are the researcher's spouse and minor children (Article 4(1) Directive 2003/86/EC). The Member States may also consider the first-degree relatives in the direct ascending line, dependent adult children, partner of long-term relationship, registered partnership, and the children of the unmarried partner as family members (Article 4(2)-(3) Directive 2003/86/EC).
[156] Article 22, Recital 55 Directive 2016/801.
[157] Recital 55 Directive 2016/801.
[158] Recital 57 Directive 2016/801.

Table 1: Overview of the provisions on equal treatment under the relevant Directives

	Right to equal treatment in respect to social security as defined in Regulation 883/2004	Derogations
EU Citizenship Directive 2004/38	Article 24: Union citizens and their family members enjoy equal treatment with the nationals of the Member State of residence	Article 24(2): ET can be limited for citizens who have not acquired a permanent right of residence (residence for less than five years) Case C-535/19 *A:* contribution to the public sickness insurance system may be required from inactive citizens
Single Permit Directive 2011/98/EU	Article 12(1)(e), Recital 20: **TCN workers** or **those who are allowed to work and hold a residence permit** (Article 3(b)-(c)). Including **family members of TCN worker** who are admitted in accordance with the Directive on family reunification (2003/86) and the Directives on students and researchers (now: Recast 2016/801)	Article 12(2)b: Member States may restrict ET on social security but not for those TCN who are in employment or who have been employed or a minimum period of six months and who are registered as unemployed Limits on sickness benefits
Long-term Residents Directive 2003/109/EC	Article 11(d): Social security, social assistance and social protection **as defined by national law**	Article 11(2): MS may restrict on (d) to cases where the registered/usual place of residence of the TCN or family member lies within the territory of the MS concerned Article 11(4): MS may limit ET in respect to social assistance and social protection to core benefits[159]
Highly qualified employment (Blue Card) Directive 2009/50/EC	Article 14(1)(e), Recital 18: ET as regards to provisions in national law regarding branches of social security as defined in the Regulation (now: 883/2004) ET on social security apply to TCN provided that the person is legally residing as holder of a valid EU Blue Card & fulfils conditions set under national law for being eligible for the social security benefit concerned	Article 14(4): Only on social security when the EU Blue Card holder moves to a second MS and no positive decision on the issuing of the Card has not yet been taken Sickness benefits may be limited
Researchers recast Directive 2016/801	Article 22(1), Recital 54: **Researchers** entitled to equal treatment as set in Single Permit Directive (Article 12(1) and (4)) Article 22(3), Recital 54: **Students** entitled to ET as provided in Single Permit Directive (Article 12(1) and (4)), subject to restrictions as set out in that Directive (Article 12(2)) Recital 55: ET as granted to researchers and students in respect to branches of social security listed in Art. 3 Regulation 883/2004.	Article 12(2): ET subject to restrictions as provided in Article 12(2) of Single Permit Directive, thus to those who are not in employment or have not been employed for a minimum period of six months.

[159] A non-exhaustive list of 'core benefits' is found in Recital 13 Directive 2003/109/EC, including assistance in case of illness, pregnancy and long-term care.

As Directives are legal acts that only set out goals that national governments must achieve in their legislation, it is also necessary for them to be implemented in the national law. As the table demonstrates, the Directive provides possibilities for Member States to derogate from certain equal treatment provisions. Therefore, it is also relevant to examine how the Directives have been implemented in the Netherlands. Seeing that the focus of this report lies on researchers and students, a short look will be taken how the equal treatment provisions under the Researchers Recast Directive has been implemented in the Dutch legislation.

The Directive is implemented in the Netherlands in *Vreemdelingenwet 2000* and *Vreemdelingenbesluit 2000* by Regulations of 9 April 2018 and 11 December 2018[160], and by Decision 9 April 2018[161].

In general, students who are only temporarily studying in the Netherlands are not covered by the Wlz (and not with other social insurances, such as AOW, ANW and AKW). However, following the adoption of the Recast Researchers Directive, the provision has been amended providing that students who have worked at least 6 months in the past and are now registered as jobseekers, must be treated equally for social security purposes; they are generally covered under the *volksverzekering* and the Wlz.[162]

As the equal treatment provisions under the Researchers Recast Directive refer to the Single Permit Directive, it is also essential to see how those provisions are implemented.

Article 12(1) provides equal treatment rights in relation to social security as defined by Regulation 883/2004. No specific provisions have been implemented in the national legislation following the Directive. In the Implementing Act, it is stated that:

"In the field of social security, the Netherlands has for many years complied with the international equal treatment obligations to which it is bound, as included, for example, in Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 20 of the Charter of Fundamental Rights of the EU. Partly in view of the constant developments in case law in the field of equal treatment in social security, the Netherlands continues to comply with this obligation. It is standard practice that all third-country nationals residing lawfully in the Netherlands are equally entitled to social security protection as Dutch nationals."[163]

[160] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 19 april 2018, 2018-0000072475, tot wijziging van de Regeling uitvoering Wet arbeid vreemdelingen 2014 in verband met de implementatie van richtlijn (EU) 2016/801 van het Europees Parlement en de Raad van 11 mei 2016 betreffende de voorwaarden voor toegang en verblijf van derdelanders met het oog op onderzoek, studie, stages, vrijwilligerswerk, scholierenuitwisseling, educatieve projecten of au-pairactiviteiten (herschikking) (PbEU 2016, L132), and Regeling van de Staatssecretaris van Justitie en Veiligheid van 26 april 2018, nummer 2255930, houdende wijziging van het Voorschrift Vreemdelingen 2000 (155e wijziging).

[161] Besluit van 9 april tot wijziging van de het Vreemdelingenbesluit 2000 en enige andere besluiten in verband met de implementatie van richtlijn (EU) 2016/801 van het Europees Parlement en de Raad van 11 mei 2016 betreffende de voorwaarden voor toegang en verblijf van derdelanders met het oog op onderzoek, studie, stages, vrijwilligerswerk, scholierenuitwisseling, educatieve projecten of au pairactiviteiten (herschikking) (PbEU 2016, L 132).

[162] Amendment to Article 20 *Besluit uitbreiding en beperking kring verzekerden volksverzekeringen 1999*.

[163] Free translation from Dutch to English, see original text in Wijziging van de Wet arbeid vreemdelingen en de Vreemdelingenwet 2000 in verband met de implementatie van Richtlijn 2011/98/EU van het Europees Parlement en de Raad van 13 december 2011 betreffende één enkele aanvraagprocedure voor een gecombineerde vergunning voor onderdanen van derde landen om te verblijven en te werken op het grondgebied van een lidstaat, alsmede inzake een gemeenschappelijk pakket rechten voor werknemers uit derde landen die legaal in een lidstaat verblijven (PbEU 2011, L 343).

Regarding possible derogations on equal treatment as provided by the Single Permit Directive, the Netherlands has implemented Article 12(2)(a)(iii), i.e. excluding study and maintenance grants from the scope of equal treatment. Therefore, the equal treatment rights of researchers in relation to social security, and the Wlz, and not restricted in the implementing legislation.

4.2.2 Agreements on social security between third-countries

Next to the legal instruments examined above, third-country nationals may be subject to agreements on social security concluded either bilaterally between the Netherlands and a third country[164], or between the EU and a third country.[165] The aforementioned Directives also specifically state that they apply without prejudice to more favourable provisions laid in bilateral and multilateral agreements.[166]

While analysing each of these agreements in detail would exceed the scope of this research, it is necessary to acknowledge their existence. For more insights to these agreements and their effects on the third-country nationals' social security rights, we would refer to the publication 'The external dimension of EU social security coordination: Towards a common EU approach.'[167]

4.3 Conclusions on EU legislation

This section examined the applicable EU legal framework for EU citizens, third-country nationals, and their family members.

Researchers and their family members who are subject to Regulation 883/2004 (thus, EU citizens and third-country nationals to whom the personal scope is extended) are subject to the social security legislation of the Member State in which they work (in this case, the Netherlands). On the other hand, those who are not in an employment relationship are covered by the social security system of the Member State in which they reside. This distinction between the conflict rules of workers and those economically inactive may lead to difficulties as reported by SOFIE and Nuffic. Because many of the categories of doctoral researchers in the Netherlands are not considered to be in an employment relationship, the determination of whether they are entitled to social security coverage in the Netherlands is based on assessment of their *habitual residence.* This is comparable to the concept of *ingezetenschap* used under Dutch law, as examined under section 3.1.

[164] See https://www.svb.nl/nl/wlz/verdragslanden-algemeen.
[165] "The EU agreements with third countries that include a reference to social security coordination are: the EEA Agreement, the EU-Swiss Agreement, the EU-Turkey Agreement, the Agreement on Cooperation and Customs Union with San Marino, the Euro-Mediterranean Association Agreements, the Stabilisation Association Agreements with Balkan countries, the Partnership and Cooperation Agreement", see P. Melin, *The External Dimension of EU Social Security Coordination: Towards a Common EU Approach*, Brill | Nijhoff. Studies in EU External Relations No. 15. 2019, p. 59.
[166] Article 4 Directive 2016/801, Article 4 Directive 2009/50, Article 13 Directive 2011/98.
[167] P. Melin, *The External Dimension of EU Social Security Coordination: Towards a Common EU Approach*, Brill | Nijhoff. Studies in EU External Relations No. 15. 2019.

In the judgment of *A*, the Court of Justice has recently held that if a person is not subject to any other social security legislation and the Regulation specifies certain Member State as the competent State, that State cannot automatically refuse to affiliate a citizen to their public sickness insurance.[168] With this argumentation, the Court ensures that a citizen is not left without social security coverage when they exercise their movement rights. If a citizen would not have a sufficient (and accessible) healthcare coverage in the host Member State, this may discourage them to use their rights in relocating to another State. The Court did, however, state that affiliation may be conditional on a proportional payment - although the Court did not define what constitutes *proportional* in this context. Further questions remain regarding how this ruling should be applied to different healthcare systems. The case involved Latvia, which has a universal health care system that is largely funded by government taxes. However, as previously discussed, the Netherlands has a (regulated) private health insurance market. It could be argued that in the case of these systems, citizens would already contribute to the system by means of premiums. This is also suggested by the Advocate General in his Opinion.[169] This conclusion could be relevant for the Zvw, the health care insurance, as there are individual premiums paid for the health insurance. Different conclusions could be reached in case of Wlz-care, that is in principle funded via (solidaric) statutory social insurance premiums, topped up via government taxation. If inactive citizens do not contribute to the system through their work, requiring a contribution seems proportional for the Wlz-coverage.

Another recent judgment examined in this report, *VI*, supports this argumentation.[170] Following the Court's findings, incoming researchers in the Netherlands may fulfil the requirement laid under 2004/38 of 'comprehensive sickness insurance coverage' and retain their right of residence not only when acquiring private insurance, but also via public insurance coverage. In this context, it may be assessed whether that person constitutes an 'unreasonable burden' on the public finances of the host Member States. In *VI,* although the family did not contribute directly to the public health insurance system, as the healthcare system, the NHS, was free of charge, the Court found no issue as the family had worked and paid tax contributions to that State. Similar argumentation could be followed in case of researchers who are in employment relationship and contribute to the Dutch system via taxation. However, notable difference exists in that in the Netherlands, the public health insurance system is not universal and free of charge. Due to the fact that citizens pay premiums and an annual "own risk" contribution for their healthcare coverage, it is questionable whether granting researchers or students without an employment relationship access to public health insurance would place an unreasonable burden on the public finances of the Netherlands. The decision on whether the individual circumstances would lead to unreasonable burden to the host Member State must be always made in accordance with the principle of proportionality. As previously stated, in EU law, a person's status as a worker or non-worker, or in other words, economically active or inactive, is critical when it comes to free movement rights or even when

[168] Case C-535/19 *A*, ECLI:EU:C:2021:595.

[169] "In the light of those considerations, I consider that when an economically inactive Union citizen, with a genuine link of integration in the host Member State and with sufficient resources, makes a financial contribution to the social security system of that Member State on an equal basis with nationals either by means of premiums, when the system is based on an insurance mechanism, or through taxation, in the case of a national health system like that in force in Latvia in 2016", Opinion of Advocate General Saugmandsgaard øe on Case C-535/19 *A*, ECLI:EU:C:2021:114, §122.

[170] C-247/20 *VI,* ECLI:EU:C:2022:177.

determining which social security system, the individual is subject to. A person could indeed avoid the assessment of their habitual residence if they would be considered to be in an employment relationship. As stated earlier, in EU law, the term 'worker' consists of criteria laid in case law of the Court of Justice, namely requiring that, for a certain period of time, a person provides services of some economic value for and under the direction of another person, in return for which they receive remuneration.[171] The concept has been widely interpreted, including part-time work[172], in-kind remuneration[173], and job seekers[174]. One could ask whether the researchers, who are not formally in employment relationship, should also be considered workers.

The Court of Justice has also addressed the issue in *Raccanelli*. The case was about a doctoral scheme applied in Germany, under which German nationals were recognised as having an employment relationship with the Institute, while another scheme was applied to foreign nationals. Under the second scheme, the researchers were not given an employee status, but they received financing via research grants. One of these researchers, Raccanelli, an Italian national, claimed that this treatment was discriminatory treatment, especially since doctoral researchers under both schemes carried out same duties. In their judgment, the Court recalled the definition of a worker, and noted that the concept has a specific Community meaning and must not be interpreted narrowly.[175] Unfortunately, the Court did not answer whether in these situations the criteria of 'worker' were met. Neither did the Court conclude whether in these circumstances foreign doctoral students were treated discriminatory but left it for the national court to assess.[176]

The issues as reported by SOFIE often concern researchers who are in a similar situation as Raccanelli – those who are not considered to be in an employment relationship. Their position as non-workers lead to consequences, namely that they may not enjoy full rights of mobile workers. This is not only seen in the difficulties of social security (healthcare) coverage, but also in the conditions imposed on residence – before permanent residence is acquired, the researcher must hold sufficient resources and a comprehensive sickness insurance. Despite of these researchers' position as economically inactive citizens, arguably they should not be equated with all other types of economically inactive citizens, such as social tourists in *Dano.* The researchers certainly are *active* with their research activities, contributing to science and innovation in the Netherlands, as also noted in Section 2.3, also to the financial and scientific benefit of the Dutch universities. ***Should these researchers be granted the full rights of mobile 'workers' under EU law?*** Although this aspect could be an avenue for further research, it should not go

[171] Case 66/85 *Lawrie-Blum*, ECLI:EU:C:1986:284.
[172] Case 139/85 *Kempf*, ECLI:EU:C:1986:223.
[173] Case 196/87 *Steymann*, ECLI:EU:C:1988:475.
[174] Case C-292/89 *Antonissen*, ECLI:EU:C:1991:80.
[175] Case C-94/07 Raccanelli, ECLI:EU:C:2008:425, §33. Again, a worker is someone who performs real and actual work, the employment relationship is characterised by the fact that for a certain period of time a person performs services for remuneration for another person and under his authority.
[176] *Ibid,* §37.

unnoticed in the context of these reports, and in the wider context of economic and social welfare of the European Research Area.[177]

With regard to social security rights of third-country nationals, it can be concluded that on the EU level there is no common approach to social security coordination with third countries, which may lead to fragmentation and legal uncertainty for third-country nationals of their rights to social security. The equal treatment provisions enshrined in the examined EU legislation mainly provide EU-citizens, third-country nationals and their family members the right to non-discriminatory treatment. This means that national legislation, including the scope of Wlz-coverage, is to be applied in a non-discriminatory manner to migrant researchers, students and their family members. At this point it is important to recall the useful effect doctrine of EU law, according to which national legislation of the Member States may not jeopardise the achievement of the objectives pursued by EU law and deprive them of their effectiveness.[178] One could argue that equal treatment rights should be effective, so if in practice numerous researchers do not have access to social security coverage in the Netherlands (while they should have in view of their equal treatment compared to their fellow (domestic) researchers), there seems to be a systemic problem. This is especially case for those third-country national researchers who can only rely on the equal treatment provision set in the examined Directives.

As a result of the distinctions between the rights of EU citizens and those of nationals of third countries, as well as the rights of active and inactive citizens, the EU legislative framework is quite complex. An additional distinction is made between external and intra-EU mobility. The Coordination Regulations seek to protect social security rights in instances of intra-EU mobility. It does not, however, cover cases of external EU-mobility, such as when a researcher moves directly from a third country to the Netherlands. This researcher may only rely on the migration Directives, which, with regard to social security, contain only an equal treatment provision. The varying scopes of these legal instruments, which do not appear to be adequately coordinated with one another, may add to the ambiguity. The following table summarises these findings in relation to the EU legislative framework and different categories of researchers arriving to the Netherlands.

[177] Find out more about the European Research Area (ERA): https://ec.europa.eu/info/research-and-innovation/strategy/strategy-2020-2024/our-digital-future/era_en. The European Charter for Researchers recommends that all researchers to be regarded as professionals and treated accordingly, https://euraxess.ec.europa.eu/jobs/charter/european-charter. These obstacles are also familiar at other Member States in the EU. See European Commission, FMW: Online Journal on Free Movement of Workers within the European Union, June 2013 no 6. See also D. Pieters, P. Schoukens, 'Improving the Social Security of Internationally Mobile Researchers' Procedia - Social and Behavioral Sciences, Volume 13, 2011, pp. 50-60.
[178] See for instance Case C-508/10 *European Commission* v *Kingdom of the Netherlands*, ECLI:EU:C:2012:243, §65.

Table 2: Simplification of EU law applicable to different categories of researchers[179]

Type of researcher	Conditions on right of residence	Covered under 883/2004	Insured in NL on the basis of	Problematic
Active EU citizen • Researcher in employment relationship	EU citizenship	Yes	Employment relationship	No
Inactive EU citizen • Students • Researcher on scholarship/ other financing	Directive 2004/38: After three months, sufficient resources & comprehensive sickness insurance	Yes	Residency C-535/19 *A:* if Regulation 883/2004 dedicates NL as the competent Member State, affiliation to public sickness insurance scheme may not be refused	Occasionally
TCN (intra-EU mobility) • Moving from another MS to NL • Working in one or more MS in addition to NL (C-477/17 *Holiday on Ice*)	TCN Directives: Valid travel document & Sufficient resources & has applied/has health insurance	Yes, personal scope extended by Regulation 1231/2010	Residency (C-535/19 *A:* if Regulation 883/2004 dedicates NL as the competent Member State, affiliation to public health insurance scheme may not be refused) or employment relationship	Occasionally
Inactive TCN (external EU-mobility) • Students • Researcher on scholarship/ other financing	TCN Directives: Valid travel document & Sufficient resources & has applied/has health insurance	Not directly, equal treatment under Directives in respect to social security (within the meaning of Regulation 883/2004)	Residency	Yes
Active TCN (external EU-mobility) • Researcher in employment relationship	TCN Directives: Valid travel document & Sufficient resources & has applied/has health insurance	Not directly, equal treatment under Directives in respect to social security (within the meaning of Regulation 883/2004)	Employment relationship	No

[179] Final conclusions can only be made on a case-by-case analysis, e.g. long-term TCN residents are subject to different rules. Depending on the applicable Directive, derogations on equal treatment differ: see complete overview of 'TCN Directives' in Table 1.

5. The SVB policy rules and the Wlz-test

The SVB is appointed by law to examine ex officio and on request whether a person falls under the scope of the insured persons.[180] To do so, the SVB has issued policy rules ('*beleidregels'*), that are used in the assessment. The policy rules describe the interpretation and guidelines of the SVB regarding national legislation and case law, as well as EU and international law (mostly Regulation 883/2004). In the policy rules references are made to several rulings by the HR, CRvB and CJEU.[181] Next to the policy rules that are publicly available, there are work instructions for implementation of legislation. These are called *Paradocs* and is an internal document (thus, not available to the public)[182]. Therefore, the policy rules that will be described below are also accompanied with internal guidelines that might give more concrete instructions on how residency has to be assessed by the SVB. Indeed, there are process instructions regarding the assessment of the residence country, that provide more insight on the determination of facts by the SVB.[183]

Regarding the concept of residency, the following policy rules are of relevance: SB1021 (*kring van verzekerden – algemeen)*, SB1022 (*ingezetene/wonen*), SB1273 (*band met Nederland*), SB1274 (*duurzame woning)*, SB1023 (*invloed van nationaliteit en vreemdelingenrecht*), SB1027 (*einde verplichte verzekering na vertrek uit Nederland*). The SVB acknowledges that the national legal situation is much influenced by international law: particularly Regulation 883/2004 and bilateral treaties. In case these apply, these prevail over national legislation, as also described in SB2128 (*voorrang van de conflictregels boven nationale verzekeringsvoorwaarden*). The SVB also issued policy rules on the basis of international law, that are covered in a dedicated paragraph within the policy rules (*SVB Beleidsregels – Internationaal*). This mostly concerns Regulation 883/2004 and the explanation of some principles as the territorial, material and personal scope, as well as the policy regarding, e.g., the conflict rules and atypical labour relations.

Nevertheless, regarding the concept of 'residency', the policy of the SVB seems mostly developed on the basis of national case law: a person is considered to be resident in the Netherlands if there is a lasting personal bond between him and the Netherlands.

According to the SVB policy rules, the SVB relies mostly on the Personal Records Database (BRP) in their assessment of 'residents' in the Netherlands. In case the person explicitly requests an investigation or if SVB has indications of situations deviating from the BRP indication, they may conduct further research of the person's insurance position.[184]

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[180] Art. 2.1.3 Wlz.

[181] In her PhD dissertation, Marjolein van Everdingen also assesses the policy of the SVB, among others, regarding residency. She concludes that the SVB and its law-interpreting policy rules are consistent with the jurisprudence of the HR and CRvB.

[182] As a result of the *toeslagenaffaire*, the Ministry of Social Affairs and Employment (Minister van Sociale Zaken en Werkgelegenheid) has carried out an inventory on the use of nationality as a factor of assessment in the field of social security. The inventarisation on the use of nationality in the Wlz-system shows that SVB uses multiple internal guidelines (*paradocs)* when concluding Wlz-assessments in international situations. Find the full document under Appendix 1 – *Inventarisatie nationaliteit SVB*: https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z12861&did=2021D27625

[183] M. van Everdingen, De dubbele woonplaats in het socialezekerheidsrecht, *BoomJuridisch:* Den Haag 2022, p. 316. In her dissertation, she also mentions *Procesatlas*, that is an internal document describing the procedures and processes.

[184] SVB Beleidsregels, 'Ingezetene/wonen' https://puc.overheid.nl/svb/doc/PUC_1022_20/10/.

The existence of a lasting personal bond indicating residence is assessed based on the relevant facts and circumstances of the individual. The final decision will be based on all the relevant factors (such as living and working environment, family ties, financial situation, and registration in the BRP) and not solely based on one factor.[185] In this respect, the intention of a person to stay in the Netherlands will only be considered by the SVB, if this can be objectively verified. The intention needs to be assessed on the basis of the behaviour and become clear from facts and circumstances. However, the intention on its own is never enough to presume residency.

Yet, from the policy rules it appears that some circumstances have particular attention of the SVB. It concerns working as an employee or a self-employed in the Netherlands, being able to dispose a permanent home, the status under residence law and the duration of the stay in the Netherlands or elsewhere.[186] In case the facts and circumstances do not give a decisive answer to the question where a person is resident, the policy rules regarding the loss of residency are applied in analogy, and relies on the duration of the stay. In SB1027 (*Einde verplichte verzekering na vertrek uit Nederland*), the SVB distinguishes three situations[187]:

- A person leaves the Netherlands with the intention to settle permanently in another country. The permanent character should become clear from all relevant circumstances. In that case residency stops when the person leaves the Netherlands;
- A person has the intention to stay for less than a year outside the Netherlands. In this case, the person remains resident of the Netherlands. The permanent stay has to become clear from all relevant facts and circumstances;
- A person has the intention to stay for longer than a year outside the Netherlands, but it has no permanent character. In this case, the SVB states that the longer the person is outside the Netherlands, the less strong the link with the Netherlands is likely to become. In cases where an examination of the actual circumstances does not lead to the conclusion that there is a permanent residence abroad, the SVB will (still) regard the person concerned as resident for the first year after their actual departure from the Netherlands. After this year, the SVB will regard residency as having ended unless the person concerned demonstrates that the factual circumstances justify the (provisional) maintenance of residency. If three years have passed since the date of departure from the Netherlands, the SVB will automatically regard residence as having ended. The period of residence outside the Netherlands has then lasted so long that the person concerned is no longer considered to have a permanent personal link with the Netherlands. The SVB will only make an exception to this rule in very exceptional cases. If it is upfront clear that the stay will be at least three years, residency ends immediately after leaving the Netherlands.

This, thus, also applies regarding the acquisition of residency in the Netherlands, i.e. the SVB will regard a person to be resident in the Netherlands automatically after a stay of three years in the Netherlands. Again, if it is upfront clear that the stay in the Netherlands will be at least three years, the SVB will presume residency immediately. Nevertheless, it remains always possible that contraindications show differently.

[185] SVB Beleidsregels, 'Ingezetene/wonen' https://puc.overheid.nl/svb/doc/PUC_1022_20/10/.
[186] M. van Everdingen, De dubbele woonplaats in het socialezekerheidsrecht, *BoomJuridisch:* Den Haag 2022, p. 267-268.
[187] SVB Beleidsregels, 'Einde verplichte verzekering na vertrek uit Nederland' https://puc.overheid.nl/svb/doc/PUC_1027_20/9/

Persons can also themselves bring forward facts and circumstances that act as rebuttal to the presumption of evidence.

Regarding the possibility of having dual residence, the SVB notes that this will apply in only very rare cases. Referring to the case *Wencel* (discussed in Section 4.1.1), the SVB considers it not possible to have dual residence in case EU law should be applied.

As seen from case law, the existence of permanent housing is particularly important in the assessment of residence. According to the SVB policy rules, housing is considered permanent if the house is permanently available to the person and can be used by him at all times, even if he does not make use of it for some time but intends to return to it. For the analysis of this aspect, it is irrelevant whether the person own or rents the house. A holiday home or other housing intended for short stays is nevertheless not considered permanent housing.[188]

If the person is concerned employed or self-employed in the Netherlands, there is usually a strong bond between the person and the Netherlands. Other relevant factors in assessing the existence of a permanent bond are, for example:

- the place where the family life of the person concerned takes place;
- the children going to school in the Netherlands;
- following education aimed at integration or participation in the labour market;
- political, cultural and / or other activities (for example, being affiliated with a political party, a sports association, a church, mosque or temple);
- the presence of a family member living in the Netherlands who has been living and / or working in the Netherlands for some time;
- indications that indicate that the person concerned will leave the Netherlands and settle elsewhere in the foreseeable future or in the future.[189]

The existence of a permanent bond can also be deducted from the resident status within the meaning of the Aliens Act. As the residence permit increases the certainty of continued residence in the Netherlands, this in turn increases the bond between the foreign national and the Netherlands. Therefore, the SVB considers important in their analysis whether the person has a residence permit for a certain period or for an indefinite period. In case the person has a permit for indefinite period, the SVB generally assumes residency. A permit for a fixed period is viewed in the light of other relevant circumstances. If no residence permit has been (yet) obtained, in principle, continued residence cannot be established. However, in those situations a period of residence of three years may be an indication for one to be considered resident.[190]

[188] SVB Beleidsregels, 'Duurzame woning' https://puc.overheid.nl/svb/doc/PUC_1274_20/3/
[189] SVB Beleidsregels, 'Band met Nederland' https://puc.overheid.nl/svb/doc/PUC_1273_20/4/
[190] SVB Beleidsregels, 'Invloed van nationaliteit en vreemdelingenrecht' https://puc.overheid.nl/svb/doc/PUC_1023_20/9/.

In the case of Dutch nationals and EU citizens who have a right to reside under EU law, if other facts or circumstances do not provide a definite answer on residency, the SVB pays particular attention to the nationality of the person concerned.[191]

Regarding PhD-researchers, the SVB explicitly clarifies that a regular or grant-sponsored PhD student is subject to Wlz scheme if the following cumulative criteria are met:

- their research is carried out on the basis of a supervision agreement, and
- their attendance is compulsory, and they are scheduled for teaching, and
- they have to ask for the university's permission if they plan to start working somewhere else, and
- they receive instruction from their PhD supervisor, and
- the intellectual property rights of their thesis will be owned by the university, and
- they receive remuneration directly from the Dutch university.

In fact, these criteria test the question whether there is a genuine employment relationship. In case the researchers receive a European or international grant or scholarship, the SVB states that they are only insured under the Wlz if they are regarded as a resident in the Netherlands.[192]

In 2019, 26.583 requests for a Wlz-test have been received and handled by SVB. For 2018 the amount of requests was 22.656.[193] For other years, no information on the amount of requests is openly published and available. Nevertheless, the amount of requests seems to be increasing structurally. Based on an interview that ITEM conducted with SVB, around 10% of these requests are coming from PhD researchers.[194] The requests are usually solved in 30 days, although especially in international cases the assessment procedure may take longer. Based on *Algemene Wet bestuursrecht*[195], the statutory period for providing a decision on Wlz-coverage is 8 weeks, but an extension of another 8 weeks is possible. Extending for a longer period is only done when strongly motivated and with the consent of the applicant.[196] The process is not automatised, but each application is evaluated individually.[197]

5.1 Conclusions on the SVB's approach in relation to national and EU law

The above section summarised the SVB's approach on assessing the scope of insured persons under the Wlz (and consequently, under the Zwv). In this context, it has to be once more recalled that it is the exclusive task of the judge to interpret the legal concept of residency. This does not mean that the SVB may not draw up policy rules interpreting the law, but these rules do not bind the Court. Therefore, the policy rules are not of decisive importance when assessing whether a person is regarded as a resident. It

[191] SVB Beleidsregels, 'Invloed van nationaliteit en vreemdelingenrecht' https://puc.overheid.nl/svb/doc/PUC_1023_20/9/.
[192] SVB 'If you work in the Netherlands', selection "I am doing research" at https://www.svb.nl/en/the-wlz-scheme/when-are-you-insured-under-the-wlz-scheme/if-you-work-in-the-netherlands.
[193] SUWI Jaarverslag 2019, p. 16.
[194] I.e., 3217 applications on estimation.
[195] https://wetten.overheid.nl/BWBR0005537/
[196] See also SB3197 Beslistermijnen aanvraagprocedure, https://puc.overheid.nl/svb/doc/PUC_3197_20/9/
[197] Interview with the SVB, conducted 5 April 2022.

must always be assessed whether the SVB has systematically applied its policy rules in this matter, insofar as they refer to a favourable interpretation of the law.[198]

As seen from the explanation of SVB, again, the assessment of one's 'residency' becomes especially relevant to migrant researchers who receive a foreign grant or a scholarship. Although the criteria used by SVB to determine 'residency' are similar to those mentioned in national and EU legislation on habitual residence, we agree with the findings of Van Everdingen in her PhD-research that from the policy rules it can be derived that some indicators do weigh heavier in the assessment. This policy could be at odds with the vast amount of case law that highlight the holistic assessment of all facts and circumstances that should be weighted equally.[199] As the assessment is done by individuals, guided by internal guidelines, the question is also unclear whether the criteria are, effectively, weighted and applied equally among third-country nationals, EU citizens, and Dutch nationals. Furthermore, the issue of transparency in the assessment remains. The legal framework regarding residency as the SVB policy rules are rather open and do not provide guidelines that make individuals able to oversee their residency status. The information provision of the SVB is concentrated to the online policy rules and specific information regarding researchers on the website.[200] The latter is unfortunately limited to the assessment of the employee-status, as concluded in the previous section and not elaborating on the complex assessment of the residency status. Further information provision is provided through several forms, such as the form to request a Wlz assessment. More specific information will be provided and requested if it becomes clear that the request concerns a PhD researcher; in that case, a specific form will be provided as well. Nevertheless, these forms do not necessarily inform the researcher about their residence status upfront. These aspects of uncertainty and lack of legal clarity will be addressed briefly in the following section.

[198] ECLI:NL:CRVB:2012:BW5741, ECLI:NL:CRVB:2012:BW6264

[199] M. van Everdingen, De dubbele woonplaats in het socialezekerheidsrecht, *BoomJuridisch:* Den Haag 2022, p. 299.

[200] SVB 'If you work in the Netherlands', selection "I am doing research" at https://www.svb.nl/en/the-wlz-scheme/when-are-you-insured-under-the-wlz-scheme/if-you-work-in-the-netherlands.

6. Other relevant aspects to consider

6.1 Political developments

Relevant to mention are the political developments that have taken place in the field of social security, especially regarding the exclusion and inclusion of migrants. Vonk and Van Walsum observe two tendencies of governments: to allow arguments on immigration policy to enter the domain of social security and the increasing rejection of transnational alignment of migrants.[201] The Netherlands appears to be an example of this, where a person is deemed to have unique ties with Netherlands.

Over the years there has been the reversal of the liberal attitude towards social security and the openness for the outside world. Around the turn of the century, the access to the system for newcomers has been made more difficult (exclusion), as well as the functioning of the system has been restricted to Dutch territory (withdrawal).[202] With the introduction of the *Koppelingswet* (Linkage Act) in 1998, foreign nationals not staying legally, shall be excluded from the Dutch statutory social insurance system.[203] The aim is to link social security with migration policy and to exclude migrants without right of residence. Therefore, the entitlement to benefits is linked to immigration status, with the introduction of the legal residence test.

Regarding the residence test, another trend has become apparent, that is the rejection of transnational alignment of migrants. From citizens it is expected that they have a strong and unique bond with the Netherlands and do not have loyalty with other countries at the same time.[204] In that respect it was established policy that persons cannot have a double residence but should be predominantly connected with the Netherlands. It was the rulings of the HR in 2011, as discussed in Section 3.3, that have put an end to the policy line from a legal point of view. Nevertheless, from discussions with SVB it became clear that internal instructions effectively still do not allow to have double residency. A balance will always be made, looking at where the centre of interests lies.[205]

Also the second chamber has been insisting on limiting the granting of benefits, in order to prevent fraud and undesirable and high entitlements after only a short period of stay in the Netherlands.[206] In the Parliamentary letter on the implementation of the motion, the residency test is mentioned as 'measure at the gate' to limit the granting of social benefits for incoming migrants.[207]

In this regard, the legal responsibilities regarding enforcement and administration are also worth mentioning. As of 15 March 2011 the Act on Detection and Insurance of Uninsured Persons under the Health Insurance Act (*Wet Opsporing en verzekering onverzekerden Zorgverzekeringswet;* OVOZ) entered into force. The aim is to detect uninsured persons who should be insured under the Zvw. The CAK is the responsible authority to enforce the insurance, sent letters and fine if necessary. Yet, the SVB is the

[201] G.J. Vonk & S. van Walsum, Access Denied. Towards a new approach to social protection for formally excluded migrants, *European Journal of Social Security*, Volume 15 (2013, No.2, p. 132.
[202] S. Klosse & G.J. Vonk, Hoofdzaken Socialezekerheidsrecht, Den Haag: Boom Juridisch 2020.
[203] Although it can be questioned in some cases: Ibid.
[204] Klosse & Vonk 2020, p. 99.
[205] Interview with the SVB, conducted on 5 April 2022.
[206] See for example the resolution of Omtzigt/Schut-Welkzijn (33 928, nr. 15).
[207] Kamerstukken II, 2014-2015, 33928, nr. 19.

responsible authority to assess the mandatory insurance, thus cooperating and sharing data with the CAK. The OVOZ Act made that the SVB is also responsible for administering the data regarding the insurance position for health insurance (than: AWBZ), for which in the period 2009-2011 an administration has been built.[208]

Indeed, now the SVB is responsible for an adequate administration of insured persons and to process information to do so.[209] The administration is done in the *Basisadministratie verzekerden*[210], that, automatically, makes use of several sources. Here the BRP is an important source for the correct recording of insurance events in the BAV and the insurance periods derived therefrom.[211] The data in the BAV are supported by exchange of information and data with other chain partners such as the Belastingdienst, UWV, CAK and CIZ.[212] As of 2021 a programme has been started in order to improve the quality of the BAV, in order to come to a statutory basic registration of Insured Persons (*wettelijke basisregistratie Verzekerden*), which shows whether someone is currently insured for the national insurance schemes AOW, Anw, AKW, Wlz, and also offers an overview of all insured periods of that person in the past, in 2025.[213] Internationally, through the EESSI project information is exchanged with participating social security institutions across the EU.[214]

Simultaneously, the BRP, that thus performs a central role in the BAV, is undergoing several improvement processes. In 2014, the Ministerial Committee on Fraud requested departments to propose solutions for combating various forms of fraud. The Ministry of the Interior and Kingdom Relations (BZK) proposed a data-driven risk-oriented approach. This approach entails investigating addresses where people, consciously or unconsciously, incorrectly register themselves because they gain a (financial) advantage from doing so. By correcting the incorrect registration of the address data, fraud is also combated. At the end of 2014, the commission released funding for the development of this approach, which has become known as the National Address Quality Approach (*Landelijke Aanpak Adreskwaliteit*; LAA).[215] Also the SVB was collaborating in the LAA by sharing data.[216] The selection of addresses is done automatically through an algorithm. However, the decision and change in the BRP itself is made after further (human) investigation. The indicators for the algorithm used as risk factors are recently openly published.[217] There

[208] SVB SUWI Jaarverslag 2009; Kamerstukken II, 2009-2010, 32150, nr. 3.
[209] Art. 34 & 35 Wet structuur uitvoeringsorganisatie werk en inkomen
[210] https://www.svb.nl/nl/privacy/register/basisadministratie-volksverzekeringen
[211] SVB Jaarplan 2021, p. 44.
[212] IV-Strategie SVB 2021-2025, p. 29.
[213] *Ibid,* p. 31.
[214] https://ec.europa.eu/social/main.jsp?catId=1544&langId=en
[215] Ministerie van Binnenlandse Zaken en Koninksrijksrelaties, *Evaluatie Landelijke Aanpak Adreskwaliteit*, 2020.
[216] SVB Jaarplan 2021, p. 44.
[217] Attachment 1 *Profielsamenvattingen projectfase LAA* with Kamerstukken II 2021/22, 35772, nr. 6 (nota naar aanleiding van het verslag).

is currently a legislative amendment in parliamentary process in order to legally enshrine this.[218] It is worthwhile that there is attention for possible discrimination in this controlling procedure.[219]

In this regard, as response on the WW-fraud by labour migrants (in autumn 2018, it became known that Polish migrant workers were increasingly defrauding the unemployment insurance system), UWV and SVB are requested to annually issue a notification letter on fraud around June, as of 2019.[220] The signals are self-generated, internally or externally generated. In the letter of 2021, for example the incorrect registration in the BRP and the consequences for the BAV is mentioned.[221]

In this regard the latest policy development has also to be mentioned, being the TOVER project: *ten onrechte verzekerd*. As of 1 July 2019 the implementing Act became into force.[222] The Act aims to enable health insurers to determine the insurance obligation under the *Zorgverzekeringswet*. As the Explanatory Memorandum elaborates, the Act has been introduced after signals of the *Nederlandse Zorgautoriteit* that health insurers are not in the position to assess whether one falls under the insurance obligation.[223] For 2017, the estimation was that 79.000 persons were insured, while they do not fall under the scope of a mandatory insurance. In that case, having an insurance is in breach with the Zvw. The following categorisation was made:

Category	December 2015	April 2017
Living abroad	35.000	30.000
Departed unknown whereabouts	20.000	9.000
Foreign students	5.000	3.000
Employed outside the Netherlands	5.000	3.000
Uncertain residence permits	5.000	15.000
Recently employed, but left	10.000	7.000
Foreign law applicable	2.500	2.000
Other (e.g. foreign international organisation, different premium deductions, no residence permit, determined not insured)	10.000	10.000
Total	**92.500**	**79.000**

[218] Wijziging van de Wet basisregistratie personen in verband met de invoering van een centrale voorziening ter ondersteuning van de colleges van burgemeester en wethouders bij het onderzoek of een persoon als ingezetene in de basisregistratie personen op een adres in de gemeente dient te worden ingeschreven alsmede naar de juistheid van de gegevens betreffende het adres van een ingezetene in de basisregistratie personen, Kamerstuk 35772. Find more about the process here: https://www.rvig.nl/brp/landelijke-aanpak-adreskwaliteit-laa

[219] See for example the Parliamentary letter 2022D13762, https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2022D13762&did=2022D13762

[220] https://www.nieuwsszw.nl/maatregelen-ww-fraude-op-de-rails/

[221] https://www.rijksoverheid.nl/documenten/publicaties/2021/07/06/svb-signaleringsbrief-fraudefenomenen

[222] Wet van 27 maart 2019 tot wijziging van de Zorgverzekeringswet, de Wet langdurige zorg en enige andere wetten in verband met het controleren van de verzekeringsplicht voor de zorgverzekering en het regelen van de verwerking van gepseudonimiseerde persoonsgegevens door Onze Minister voor Medische Zorg, het Zorginstituut Nederland en het RIVM, Stb. 2019, 140.

[223] Kamerstukken II, 2019-2019, 35 044, nr. 3.

The health insurer is to a great extent dependent of the information that a person is providing, therefore the assessment whether there is a mandatory insurance can be problematic. As proposed solution, the Act stipulates that the SVB and health insurers have made a Guideline on the application of reasonable doubt to the obligation to insure under the Health Insurance Act, that describes how the insurance obligation can be assessed, what procedures and actions should be undertaken when there are doubts and when the SVB should be involved. In this case, the health insurers can hand over batches with clients that needs to be compared or assessed. The Guideline, thus, prescribes how this process looks like and should be followed, but is not publicly available itself.

Again, the SVB is the responsible authority to make the assessment regarding the group of insured persons. In this respect, the Act also introduces the task for the SVB to periodically perform a file comparison between the BAV and the Reference file of persons insured under the Health Insurance Act (*Referentiebestand verzekerden Zorgverzekeringswet*) of the health insurers.[224] After assessing possible disparities, the health insurance can attach consequences to this. The file comparison will, expectantly, be made every three months. Although the careful implementation should limit the possibility that someone is deregistered by mistake, it cannot be ruled out. The person concerned may still submit information that shows differently, however, after which it will be restored retroactively.

6.2 Automatization

Reflecting on the previous section, the relevance of databases, information exchange, automation and data-driven control are visible. Indeed, the processes of the SVB are increasingly automated and rely on several streams of data.[225] In the dissertation of Van Eck, the automated chain decisions of implementing organisations were subject to research from the perspective of legal protection.[226] One of the two case studies was the AKW for social security. For a legal analysis of automated chain decisions by executive organisations, especially from the point of legal protection and good administration, we would like to refer to this dissertation. In the dissertation it was amongst others concluded that implementing authorities for example are relying on the information in databases, both internally and externally (through information exchange). Also the SVB has an infrastructure of data-sharing between relevant authorities and databases within the framework of BAV. Also, the BRP takes a central role and starting point in the assessment of residency. Nevertheless, databases cannot capture the full scope of a law or all circumstances that are relevant for a decision. As acknowledged, also other circumstances that are not captured in the BPR are relevant in the assessment of residency. By gathering information also directly by the individual the problem seems not to be that relevant for the SVB regarding the Wlz test. Also the assessment itself appears to made by human involvement, and not by automated chain decisions. Yet, it should be taken into consideration in the further development of trajectories as TOVER. Data-driven

[224] The files/databases that will be used are appointed by the Minister in Regeling van de Minister voor Medische Zorg van 19 augustus 2019, kenmerk 1519788-189754-Z, houdende wijziging van de Regeling zorgverzekering voor het aanwijzen van de bestanden waarmee ten onrechte verzekerden worden opgespoord

[225] Klosse & Vonk 2020.

[226] M. van Eck, Geautomatiseerde ketenbesluiten & rechtsbescherming: Een onderzoek naar de praktijkvan geautomatiseerde ketenbesluiten over een financieel belang in relatie tot rechtsbescherming. Dissertation: Tilburg, 2018.

enforcement appears to be a key policy that will be worked on, as written down in the *SZW Handhavingskoers 2018-2020* and Annual plan of the SVB in 2021.[227] An important take-away in this regard is the prevention of unwanted (indirect) effects, such as discriminatory practices by using non-transparent algorithms, task descriptions and decision rules. This for example took place in the former LAA programme[228], which can also have consequences for partners in a later phase of the information supply chain.

A very relevant conclusion is regarding the non-transparency of the decision rules. Although policy rules of the SVB are published online, it is not possible for an individual to foresee their insurance status upfront and how the SVB will assess their situation and how it will come to certain conclusions regarding the weighing of indicators and contraindications. This can be regarding what automated processes are used in the assessment, e.g. regarding gathering information, selection of data and its evaluation and use. Van Eck therefore concludes and recommends more openness of (accessible) information and decision rules. Decision rules can be automated through algorithms but could also be working instructions that prescribe how decisions will be made and based on. Indeed, working instructions and guidelines can effectively ensure that the process can behave as an automated decision. Since these documents are internal and not shared, we cannot assess this aspect.

That also raises the question of the next section, regarding the legal certainty.

6.3 Legal certainty and access to sufficient information

As explained in the previous sections, the term 'residency' is a rather open norm under both EU law ('habitual residency') and national law. After all, it must be assessed based on all relevant facts and circumstances as repeatedly mentioned in the report. Legal scholars have been discussing open norms in laws and regulations for some time, for example searching for classifications and degrees, but most importantly its desirability.[229] As biggest advantage is mentioned the flexibility, as it allows individual customisation. Yet, as disadvantage is often mentioned the loss of legal certainty. An open norm makes it hard or even impossible for a person to estimate a legal effect, or in the case of the report the insurance position, as they do not provide sufficient information itself. Van Everdingen summarises three points of concern caused by this lack of clarity: it is not clear how far the search for (and consideration) *all* facts and circumstances should go (when is enough?); it is not clear how facts should be classified; and last, there is the risk of inadequate reasoning where it is not clear what facts are considered and how they are gathered. Even more concerning is the risk of legal inequality, followed by the lack of clarity and the individual assessment hereof – cases and assessments cannot be compared.[230] With open norms, the objective discretion is given to the implementing body, the SVB. The SVB on its part has published policy

[227] SVB Jaarplan 2021.
[228] See for example the Parliamentary letter 2022D13762, https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2022D13762&did=2022D13762
[229] See Chapter 3 of M. van Everdingen, De dubbele woonplaats in het socialezekerheidsrecht, *BoomJuridisch:* Den Haag 2022 for a recent literature review.
[230] J.M. Barendrecht, *Recht als model van rechtvaardigheid. Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming* (diss. Tilburg), Deventer: Kluwer 1992, p. 77.

rules publicly, yet repeating the rather vague open norm and reserving the, possible more concrete, guidelines internal. By doing so, the legislator most importantly but also the SVB impede the transparency of the assessment procedure and the assessment itself.[231]

Given the uncertainty arising from the lack of clarity regarding the scope and coverage of the regulatory frameworks in place on national and EU level, attention should be drawn to the following. The increase of the bewildering number of rules and regulations, as it currently stands, hampers it for mobile researchers to unravel which rules in certain events, e.g. crossing-borders, apply, endangering the foreseeability of legislation. As has become evident in the sections above, mobile researchers are confronted with several fields of legislation, on different levels, each having their own modalities, and shortcomings. Furthermore, the clarity of legislation is affected as rules appear to be poorly aligned with each other, are too detailed, and are amended continuously. These phenomena have increasingly jeopardised the legal certainty of laws and regulations.

Furthermore, the meaning of the principle of legal certainty lies in the possibility to foresee, to a reasonable degree, the legal effects of a particular act at the time when that act is performed. This is also clearly reflected in the description of the requirements of accessibility, clarity and predictability, identified by the European Court of Human Rights (hereinafter: ECtHR) in her settled case-law.[232] What is more, as regards EU legislation, the CJEU has consistently held that the clarity of legislation is a requirement of legal certainty, aimed at informing the person subject to the law accurately of his rights and obligations and to render the application of rules foreseeable.[233] The persons concerned should know without ambiguity what his rights and obligations entail, and be enabled to take steps accordingly. This is also explicitly confirmed by the ECHR, within the boundaries of reasonableness. For instance, the legal provision's wording must be sufficiently precise to enable the citizen to organize his conduct, i.e. the citizens must be able to foresee, possibly with appropriate advice, within a degree that is reasonable in the circumstances, what the consequences of a given action may be.[234]

As regards the requirement of clear legislation, several hurdles in the legal domain arise, both in the case law of the CJEU, as well as the ECtHR's case law. Firstly, as mentioned above, the ambiguity of legislation caused by the plurality of sources of law. With respect to the present research, this relates to the multitude of sources of law on a national and European level. This implies that also the origin, or source, of the legal arrangement must be clear, so that the person subject to the arrangement is not kept in suspense about his right to invoke, for instance, EU law on the compatibility of a certain domestic provision with the CJEU's case-law. In this regard, the fact that the person in question may invoke a

[231] In this respect we also refer to the principle of *legal certainty* as one of the general principles of law, also codified in the European Charter of Fundamental Rights. See M. De Mol, De directe werking van de grondrechten van de Europese Unie. [Doctoral Thesis, Maastricht University]. Wolf Legal Publishers: 2014. https://doi.org/10.26481/dis.20141002mm

[232] *Silver and others* ; *Commission v French Republic* ; *Gerda Kloppenburg v Finanzamt Leer* ; *Kingdom of Denmark v Commission* ; *Commission vs Netherlands* ; 'Pensioen Adequacy Report 2018: Current and Future Income Adequacy in Old Age in the EU' and ibid.

[233] See also *Chorherr* 13308/87 (ECHR) para 22 and *Vereinigung Demokratischer`Soldaten Österreichs and Berthold Gubi* 15153/89 (ECHR) para 26.

[234] *Silver and others* 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECHR) para 61; C-30/89 *Commission v French Republic* ECLI:EU:C:1990:114 (CJEU) para 82; C-70/83 *Gerda Kloppenburg v Finanzamt Leer* ECLI:EU:C:1984:71 (CJEU) para 130; C-348/85 *Kingdom of Denmark v Commission* ECLI:EU:C:1987:552 (CJEU) para 133; C-326/85 *Commission vs Netherlands* ECLI:EU:C:1987:547 (CJEU) para 156;

(directly) applicable provision of EU law before a national Court is solely a minimum guarantee, for instance not ensuring the (correct) implementation of a European directive into domestic legislation. **Moreover, ambiguity of legislation is caused by the broad discretion left to the executive authorities, i.e. for the present research; the national authorities, for instance the Dutch SVB issuing its policy rules (*SVB Beleidsregels*).** The ECtHR holds that the attribution of discretion ('Freies Ermessen') to the executive power is not consistent with the requirement of clarity.[235] Nevertheless, the applicable legislation must stipulate sufficiently accurately, the basic principles and requirements within which it may use its discretion.[236] The legislation should provide the citizens with enough indications with respect to the circumstances, and the preconditions, under which the executive authorities may use their executive power.[237] As regards European legislation, the CJEU considers that legislation implementing a directive, leaving its implementation to the executive authorities, must clearly indicate the margin of her discretion within the boundaries as set out in the directive.[238] In any event, sufficient control measures must be embedded in the applicable legislation, in order to provide the person subject to the legislation enough legal protection against arbitrary government actions.[239]

In this context, also the principle of good administration must be emphasised. As also provided by Article 76 of Regulation 883/2004, competent authorities must, in accordance with the principle of good administration, respond to all queries within a reasonable period of time and shall also provide the persons concerned with any information necessary for them to exercise their rights. In case of SVB, this entails that their decisions on Wlz-coverage must be made timely, and the applicants have rights to be well-informed regarding their rights and the assessment procedure. In the light of the foregoing – in particular the principle of legal certainty - it seems opportune that the SVB takes a central role in providing accessible and accurate information pertaining to the Wlz test, to the individuals concerned.

[235] *Gillow* 9063/80 (ECHR); *Gerda Kloppenburg v Finanzamt Leer*
[236] *Chappell* 10461/83 (ECHR).
[237] See *Commission v French Republic* ; *Leander* 9248/81 (ECHR) and *Kruslin.*
[238] C-306/91 *Commission vs. Italy* ECLI:EU:C:1993:161 (CJEU).
[239] *Commission vs Netherlands* and *Kruslin.*

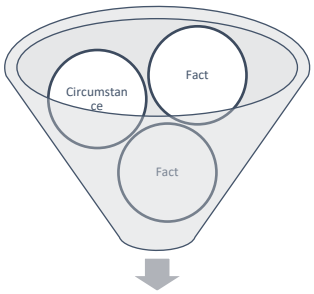
7. Conclusions and recommendations

The aim of this research was to provide more clarity and transparency on the scope of the Dutch health insurance system and to provide a legal framework from both national and EU law on the relevant aspects. The report aimed to provide more information and advice on who is covered under the national health insurance and under which conditions, analysing the legal framework in respect of various categories of researchers: EU and third-country national researchers, students, and their family members.

At first, the research provided insight to the social welfare and health insurance system in the Netherlands. It was found that the scope of national health insurance (*Zorgverzekeringswet; Zvw*) applies the same scope of that of long-term care insurance (*Wet langdurige zorg; Wlz*). Although the researchers, as reported by SOFIE and Nuffic, seek to be insured for regular healthcare services, the question ultimately comes down to whether the individual can be considered an 'insured person' as defined under the Long-term Care Act (Wlz).

The research finds a distinction in the determination of insurance for workers and residents on the basis of Dutch and EU law. In general, workers are insured in the State of their employment, whereas those who are not employed are insured in the State of their residence. More specifically, the concept of residence has a special meaning in the context of social security, also known as *habitual residence* (under EU law) or *ingezetenschap* (under Dutch law). As a result, these concepts are not identical to the place of one's residence per address nor do they refer to the right to reside, but the concepts rather focus on identifying and establishing to which State the person has close ties to. In the Netherlands, it is the SVB that carries out this assessment.

Both the EU and the national concept of residence look to all facts and circumstances that are relevant to determine the place of residency, in which in both concepts all facts and circumstances should be weighted equally. Yet, an important difference regards the possibility of dual residency. Where the Dutch concept of residence, derived from the fiscal concept, allows dual residency, the EU concept of 'habitual residence' excludes dual residence. This has important implications in the assessment of the facts and circumstances. For the Dutch concept, a person is considered resident of the Netherlands when the facts and circumstances considered show a pattern that reveals a personal bond of permanent nature with the Netherlands. It can be best illustrated by the comment of prof. Vonk in his case note on the ruling of the HR in 2011: "All elements of bonding must be thrown into a hat like shreds, shaken and scattered on the table to see if the pattern on which they have descended reveals a sufficient bond with the Netherlands."[240] Thus, a strong bond is also possible with another country as long as the bond with the Netherlands is also strong enough.



Residency: circumstances show a personal bond of permanent nature with NL

[240] HR 21-01-2011, ECLI:NL:HR:2011:BP1466, met noot G. Vonk.

The EU concept of 'habitual residence' excludes dual residency. In case there is a strong bond with multiple countries, a balance have to be made. Here, it has to be assessed which bond is the strongest. Van Everdingen illustrates this as a two-armed balance, where the assessment under Dutch law is more a single scale.[241] Therefore, it is important to know and consider which laws and regulations apply, for example due to intra-EU mobility.

These findings lead to the following conclusions in respect to the aforementioned categories of persons:

Researchers and students in an employment relationship

Section 2.3 explored the various contractual relationships between the researchers and Dutch universities. Only the first two type of categories, the employed PhD candidate (*werknemer-promovendus*) and employee in a PhD track (*promoverende medewerker*) conclude an employment contract with the University. However, it is possible that although the researcher/student is not in employment with the University, they enjoy the status of worker through other employment relationships (e.g. a side job). In some specific circumstances, also other type of PhD researchers may obtain insurance coverage as an employee, if their situation can be classified as an employment relation (meeting cumulative conditions relating to their work, remuneration and authority relationship). Overall, it can be concluded that these researchers and students employed in the Netherlands are clearly covered under the Wlz. Consequently, if an employment relationship exists, the researcher/student (whether EU or third-country national) is obligated to take health insurance in the Netherlands. This is also reasonable from the political perspective described throughout the report: the researchers contribute to the Dutch social welfare system through their employment, and their insurance position is well justified.

Researchers and students not in employment relationship

The research found that many types of researchers are not considered to be in an employment relationship. This especially holds with regard to international PhD researchers who fund their activities via a scholarship. The research raised critical points in this respect throughout the report. The differentiation of the types of researchers and their employment relation often led to difficulties obtaining the Wlz (and national health insurance) coverage. Because of these circumstances, these researchers and students may only be covered under the Wlz if they are considered resident in the Netherlands. This residence test weighs various factors and circumstances, aiming to establish the existence of a personal bond of a permanent nature with the Netherlands. One could think of factors such as nationality, the intention of the person to stay in the Netherlands, their registration in the Register of inhabitants (BRP), duration of stay, source of income, housing circumstances, and family life. What is important, is that all relevant factors regarding the concept of residence have to be considered in an equal way. Not any aspect, for instance, economic factors, outweighs other aspects. Rather, the matter has to be considered *holistically.*

[241] M. van Everdingen, De dubbele woonplaats in het socialezekerheidsrecht, *BoomJuridisch:* Den Haag 2022, p. 287.

The concept of residence is greatly influenced by the concept of residence maintained for tax purposes. It is for this reason, that the Hoge Raad (HR) is the highest judge to decide on the explanation of the group of insured persons and the concept of residence. Although the SVB is tasked by determining the insured persons, it is the exclusive right of the judge to explain the concept of residence and it is not affected by interpretative rules of the SVB. For instance, the HR has explicitly held that whether such a permanent bond is established, it is not necessary for the Netherlands to be the centre of a person's social life. Therefore, it is possible that one is considered as 'resident' in the Netherlands, although they have ties to other countries.

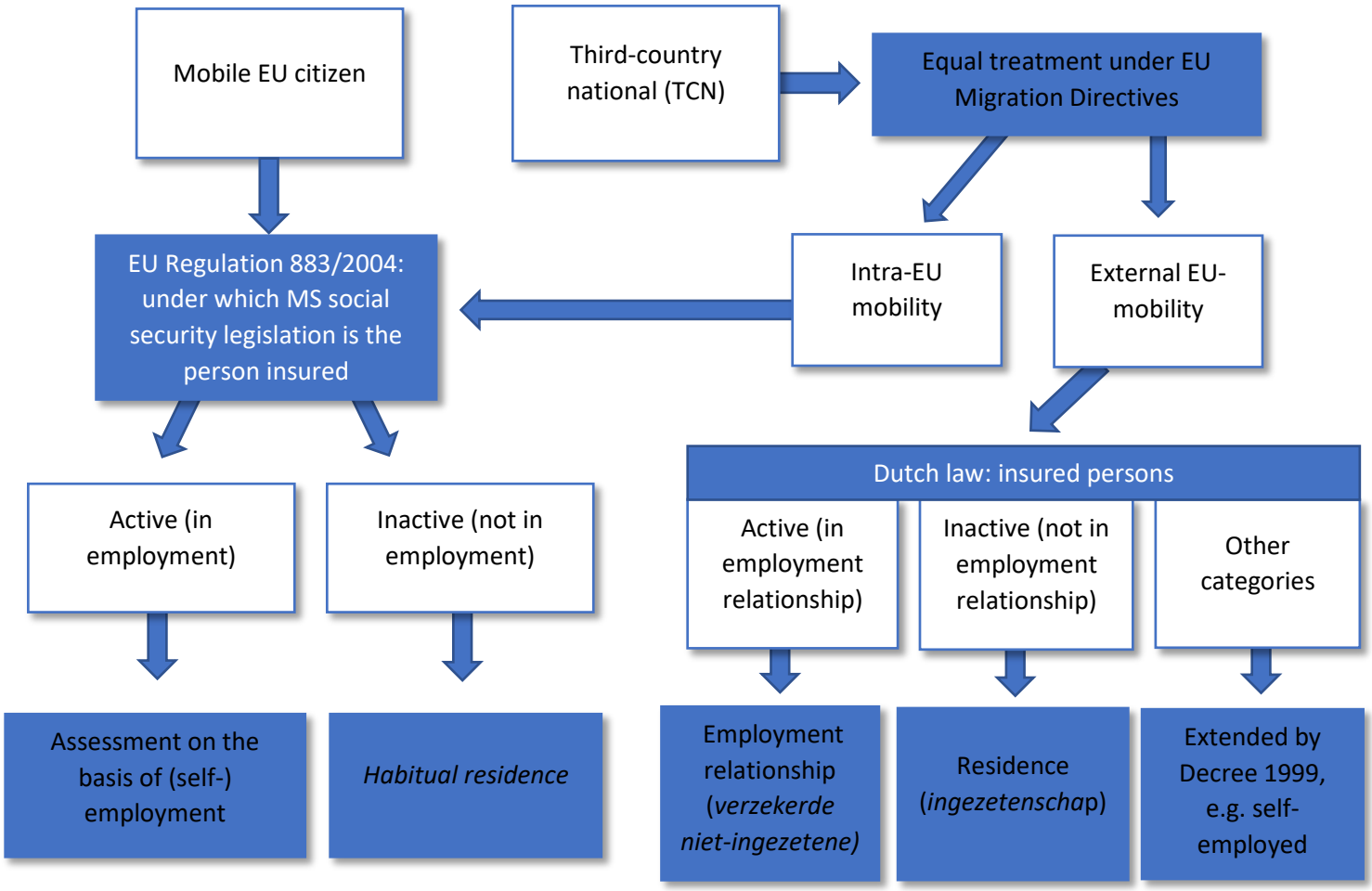
On the difference of insurance position under this category between EU nationals and third-country nationals, it can be concluded that EU law offers more protection to those who fall under the scope of EU legislation: either via EU citizenship or intra-EU mobility. The social security arrangements of third-country nationals are more fragmented over various Directives, and bi- and multilateral agreements concluded between the Netherlands, EU and third countries. Most often, however, international and European researchers and students enjoy the right to equal treatment with the nationals of the Netherlands. This means that especially when the equal treatment rights expand to the field of social security (and namely, healthcare benefits) the Wlz-test should be conducted in a non-discriminatory manner.

Finally, a distinction should be made between researchers and students moving from another EU Member State to the Netherlands and those moving from outside the EU. Regarding intra-EU mobility, the EU Regulation regarding social security coordination applies, stipulating that one can be resident in only one Member State. Thus, a final balance on the resident state must be made. This is also true for TCN who are moving within the EU. It is different for those moving from outside the EU, as than the Dutch concept allows dual residency. Nevertheless, depending on the country, there might be a bilateral treaty preventing dual residency.

Family members of researchers and students

In an EU law context, usually the researchers' and students' family members derive rights (such as residence and equal treatment rights) from them. However, it must be noted that the Wlz-test is to be conducted individually. This means, that a similar assessment is made in regard to various factors and circumstances of the family member, as to the researcher or student itself. Of course, one of the factors that can indicate a close link with Netherlands is that the family life, thus the researcher or the student, has relocated in the Netherlands.

Table 3: Simplification of the assessment of applicable social security legislation for different categories of persons



Taking a general look to the Wlz-coverage of different categories of persons, the research finds that the assessment of one's 'residency' becomes especially relevant to migrant researchers who receive a foreign grant or a scholarship. While the criteria used by SVB to determine 'residency' are similar to those found in national and EU legislation on habitual residence, one issue may be identified regarding the possibility of dual residence. While under EU law this is indeed not possible, Dutch law explicitly allows the possibility of being resident of two states for social security purposes. Nevertheless, a tendency over the years is observable in demanding an exclusive, and stronger bond with the Netherlands.[242]

Another issue is that of the transparency of the assessment, and whether the criteria are equally weighted and applied to third-country nationals, EU citizens, and Dutch nationals. Indeed, the report also examined other relevant aspects to these issues: political developments in the field of social security, immigration policy, and the aspects of legal certainty. Automatization processes in for example the TOVER, OVOZ and LAA may give way for unintentional discrimination between certain persons. A recent internal study to

[242] As the internal documents of the SVB were not open to us, we cannot assess this in practice of the SVB.

the use of the indicator 'nationality', for example within the SVB, has not found unusual or undesirable practices.[243] Especially the TOVER project, started by the government, is an example of the limitative approach regarding social security and the scope thereof. These developments can well be placed against the great abhorrence of fraud, such as the so-called unemployment fraud by Polish labour migrants in 2018.

Over the years a limitative approach regarding the scope of social security can be observed. Here the tendency is, thus, for an exclusive and stronger bond with the Netherlands. In general, the Dutch entrenchment policies regarding social security over the years can be described as the entrance of immigration policy in the domain of social security and the increasing rejection of transnational alignment of migrants. As Vonk and Walsum conclude, it does not work in the same way for all immigrants. While from a national point of view no distinction is made between national origins of the immigrants, the access to social security is dependent of the existence of a treaty or international law.[244] It is thus very detrimental to migrants from countries with which the Netherlands has not entered into any social security obligations.

Several arguments are made throughout the report regarding the limited financial impact of covering these researchers, as insured individuals in the Netherlands are required to pay premiums and own risk contributions to the healthcare insurer. From a legal standpoint, the question is whether that person is an unreasonable burden to the public finances of the hosting Member State. Nonetheless, to find the core of the issue, it is also necessary to consider the situation not only from legal or financial standpoint, but also from a political one. It is possible that local authorities are hesitant to cover a larger population since doing so could set an undesirable precedent and send an undesirable message. In reality, the main question is not necessarily whether the Dutch social protection system could financially cover these individuals, but rather whether the government has any inclination to include them under their social welfare system. From the European perspective, it can be concluded that if European and international researchers do not have access to national health insurance coverage, this may deter them from migrating to the Netherlands. It should also be recalled that in the framework of EU law, any obstacles to the exercise of free movement rights are, in principle, prohibited. Furthermore, it is a fundamental principle of the Coordination Regulations that no one is left without social security insurance coverage. The Court of Justice has held in its judgements that if the Regulations so provide, a State may not refuse to affiliate a citizen to their public sickness insurance scheme. This is especially relevant for those EU researchers, who are considered inactive (i.e. not in an employment relationship with the University) and must demonstrate a sufficient bond with the Netherlands in order to be insured. This report also questions whether it is reasonable that these researchers do not enjoy full and effective rights of mobile EU workers. In this regard, the broader context of the European Research Area's economic and social welfare, as well as the scientific and innovative benefit that international researchers bring to Dutch universities, should be considered.

[243] Appendix 1 – *Inventarisatie nationaliteit SVB*:
https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z12861&did=2021D27625
[244] G.J. Vonk & S. van Walsum, Access Denied. Towards a new approach to social protection for formally excluded migrants, *European Journal of Social Security*, Volume 15 (2013, No.2, p. 132.

The research concludes that it is unsurprising that there are numerous uncertainties and ambiguities regarding the coverage of researchers and their family members under the Dutch health insurance system. As this research demonstrates, this determination is governed by a complex web of legislation and case law that is constantly evolving. As a result, the report emphasizes the obligation and critical nature of providing information to mobile citizens and their family members about Dutch health insurance coverage and the Wlz-test. It seems opportune that social security organisations take a more prominent role in providing comprehensible, accessible, and accurate information pertaining to these topics. The changes in internal guidelines on the interpretation of residency should be more openly communicated, especially given the great impact on the health insurance status of researchers. The provision of clear and accessible information is also especially important in relation to the processes of TOVER, OVOZ and LAA, in order to make sure that on the one hand the quality of the databases will be improved by well-informed clients (*prevent* instead of *cure*) and on the other hand to prevent that clients, unexpectantly, are not insured in the Netherlands, sometimes even retroactively. Furthermore, both on national and European level a political debate would be needed on the desirability of the current set of laws and regulations. In the first place, the protection of mobile citizens and researchers in particular can be questioned. While the Researchers' Directive and Coordination Regulation have the specific aim of improving the social protection, this report shows that it insufficiently do so in cases that are more atypical. The desirability of open norms as tool for allowing flexibility, but impeding legal certainty and possibly even equal treatment, should also be openly debated. The report elaborated on the open norm 'residency' and showed the vulnerabilities when it comes to (highly) mobile researchers.

Recommendations

Based on these findings, ITEM makes the following recommendations:

1. **Reconsidering the status of PhD researchers as employees**

Both EU and national law have specific rules regarding employees. Employees enjoy certain rules in Regulation 883/2004 and under national law are included in the group of insured persons. Yet, the labour market is changing, as well as the labour typologies. Here we can refer to the platform workers, or atypical workers in general. This is also true for researchers, as the funding sources are becoming more diverse and often even 'privatised' to external funders. This raises the question whether it is needed to place the emphasis on the concept of 'employee' or 'workers' that is often defined by national law some decades ago.

The fact that some researchers are not considered employees leads not only problems in relation to healthcare insurance coverage, but has also implications to other benefits, e.g. child care. Nevertheless, researchers do conduct productive work and contribute to the national (knowledge) economy. Here we can again refer to the ruling of the HR in the Netherlands that PhD-research can be seen as productive labour in favour of the university. When the differences between the different PhD-typologies are not that significant *de facto*, the difference should also not be that significant *de jure*. A recommendation here to do so could be to reconsider the status of PhD researchers as employees. A more fundamental revision

could be to change the focus in the different laws and regulations from employees to workers in the broadest sense.

2. Strengthening information provision on the Wlz assessment

The report highlighted the need for more transparency and clarity of the Wlz assessment. As it has been seen, the assessment has been developed through extensive case law and it is quite complex. It is also the obligation of the SVB to provide this information. Although information already exists on the website, more collaboration with the SVB and the departments of university could be advised. In this regard, a dedicated person within the SVB has an important role in communicating and helping universities in providing information to the incoming researchers and their family members. Furthermore, a 'help desk' within the SVB could be developed for these purposes. Of course, this would mean an expansion of the tasks and activities of the SVB and thus some financial investments regarding the budget allocated by the government.

In 2022, Nuffic (supported by SOFIE and ITEM) has created a guidelines document in order to provide more information to European and international researchers about the Wlz-test and how different factors are assessed. Similar initiative is found on the EURAXESS website, which includes an infographic prepared in collaboration with SVB to advice on who is insured under the Dutch social security system.[245] Although these are good initiatives, it should not be only the responsibility of other institutions or organisations to provide such information, but the obligation of the government and consequently the SVB. This is especially true given the open norm that the legislator has introduced. In this respect, one could argue that the government is also responsible for more clear and active information provision as the legislation itself is insufficiently designed to do so. This also would follow the current trend of simplifying laws and regulations, improving the understanding for citizens.

Information provision will help to inform the incoming researchers upfront, improving their feeling of legal certainty and enabling them to make well-informed decisions. Furthermore, it can prevent enforcement measures such as the TOVER and OVOZ ex-ante. The budgetary implications for more investment in active information provision could be mitigated in this way.

3. Healthcare insurance packages

Of course, international and European researchers may seek coverage for their healthcare costs from private insurers. However, due to privatisation, the packages may be expensive and may also exclude pre-existing medical conditions. One option would be to collaborate with health insurers to develop a more attractive insurance package. According to the information that ITEM has received, these insurance packages are currently under development by AON. One insurance company already offers this type of package (Insure to Study)[246].

[245] https://www.euraxess.nl/netherlands/information-researchers/health-insurance.
[246] See more here: https://www.insuretostudy.com/en/basic-health-insurance-hollandzorg/.

4. Changing the scope of the national health insurance (Zorgverzekeringswet)

As mentioned in multiple occasions, the scope of the insured persons under the national health insurance refers to the scope under other national insurance schemes. As the reports received from SOFIE and Nuffic indicate, the researchers do not necessarily aim to obtain coverage for long-term care, but rather seek more (accessible and affordable) protection regarding regular and immediate health care. One possible solution would be to apply a different scope to the national health insurance (Zvw) itself and be less restrictive regarding the group of insured persons here. This would avoid a situation where the person is given overarching rights and costly social protection under all the national insurance schemes. The budgetary implications would be smaller, as the health insurance still requires the payment of (monthly) premiums. However, this amendment would require strong political will and can be perceived as not a feasible (short-term) solution.

5. Introduce stricter rules and less open norms

As discussed in Section 6, there is a tension between open norms and transparency and legal certainty. In the first section, the importance of health insurance is already stressed. From multiple reasons and aspects, sufficient and adequate protection is desirable. Yet, the access to the Wlz and the regulated health care insurance under the Zvw is the same, as well as for all national social insurance schemes: the group of insured persons. These are employees and residents, leaving out the additions and exclusions by Decree. More troublesome is the open norm of residency in more atypical situations, characterised by elements of high mobility. Researchers fall under this group, given their different research relations, PhD types and increasing trends of mobility[247]. Therefore, cases where the residency criteria have to be assessed are diverse as well as the 'facts and circumstances' that have to be gathered. While an open norm might give flexibility and room for customisation, it also makes the assessment hard for the implementing authority, the SVB. More importantly, it can be questioned whether it is desirable that an open norm will cause legal uncertainty and non-transparency in important fields as health care. Especially, as the cases do not infrequently concern vulnerable cases, such as PhD researchers with only a small remuneration.

To improve the legal certainty and simplify legislation, Van Everdingen recommends replacing the open norm 'residency' for a stricter norm.[248] For example, this could be done by identifying a select number of clearly formulated criteria for determining the country of residence. This follows the recommendation earlier done by the Committee Cross-border workers in Europe, that recommended introducing in the legislation certain decisive criteria, as tiebreakers, that are important in the assessment.[249] To ensure that

[247] Such as promoted through the European Research Area and the European Universities Initiative.
[248] M. van Everdingen, De dubbele woonplaats in het socialezekerheidsrecht, *BoomJuridisch:* Den Haag 2022, p. 323.
[249] Commissie grenswerkers, *Grenswerkers in Europa. Een onderzoek naar fiscale, sociaalverzekerings-*

these select number of criteria do not cause negative side-effects by excluding cases that should not be excluded, a hardship clause can be introduced or include the intention of a person in the assessment as correction factor.[250]

Strengthening information provision (as addressed under recommendation 2) and reducing the use of open norms enhances the level of transparency of the Wlz-assessment. This increased level of transparency potentially evokes a higher level of trust in authorities and their perceived legitimacy..[251] Authorities' orientation towards clients and their interaction style creates a climate which fosters either resistance or client's trust in organisations and perceived legitimacy. Transparency takes a central role in this regard. Interaction processes building on understandable regulations, client's support, dialogue, transparency of procedures, trustworthiness of institutions, and respectful, polite and dignified treatment of clients characterise such a 'service and client' approach, rather than a 'cops and robbers' approach. Hence, the interventions of information provision and reducing open norms seem likely to have potential effects that go beyond the legal consequences but may have beneficial effects on people's trust, perceived legitimacy, and eventually compliance.

6. Consider the issue in a wider EU context

Although the focus of this report lies in researchers, students and their family members in the Netherlands, it should also be noted that the identified issues may not be unique in this particular State, but similar issues may also be faced in other Member States of the EU. It is not only the national legislation in the Netherlands that causes these obstacles, but the lack of coordination or unclarity of the social security rights of researchers, especially when their appointment is not considered as employment. The importance of the access of researchers to social security rights, and particularly the access to public health insurance coverage, should be emphasised within the context of the European Research Area. In addition, it would be desirable for the Administrative Commission to revise their 2014 Practical Guide on the application of 'habitual residence tests'[252], and to include a clarification of the situation of researchers.

en pensioenaspecten van grensoverschrijdend werken (Geschriften van de Vereniging Voor Belastingwetenschap, nr. 257), Rotterdam: Vereniging voor Belastingwetenschap 2017, p. 89.

[250] Van Everdingen 2022, p. 324.

[251] R.M. Kramer, 'Trust and distrust in organizations: Emerging perspectives, enduring questions', *Annual Review of Psychology,* 1999*,* 50 (1), pp. 569-598 and R.M. Kramer and T.R. Tyler, *Trust in organizations. Frontiers of theory and research*, Thousand Oaks, CA: Sage.

[252] The practical guide is available at: https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en

ANNEX I. Obstacles as presented by Nuffic and SOFIE

Nuffic and SOFIE have received several reports from European and international researchers and their family members who are not covered by the Wlz, and consequently, by the public health insurance. Given the uncertainty arising from the lack of clarity regarding the Wlz coverage, Nuffic and SOFIE reached out to ITEM to have the issue investigated.

Although Nuffic and SOFIE point out that these problems have been encountered by both EU citizens and third-country national researchers, most of the cases referred to ITEM focus on PhD researchers with a third-country nationality. Some examples include:

- Chinese PhD researchers, financed via a scholarship, who have a contract for 4 years: SVB rejected their Wlz-coverage since in their view PhD activities do not qualify as (salaried) employment, and on the basis of their circumstances, they are not regarded as resident in the Netherlands.
- A Turkish PhD researcher, financed via a scholarship and his family member from Armenia, were initially rejected as they were not considered resident in the Netherlands (the case is still-ongoing)
- A Lebanese PhD researcher, under similar circumstances, was also rejected.
- A Vietnamese PhD researcher on the other hand was not rejected, possibly because he has a Dutch partner
- Iranian PhD researcher with a 4-year contract who originally had a private health insurance, but had difficulties to obtain a public health care insurance as she could not submit an employment contract attached to the Wlz-application
- Indonesian PhD researcher who also obtained a private health insurance. She was covered under the Wlz only one year after the start of her PhD contract.

Based on these reported cases, it is stated that PhD researchers do not fall under the Wlz since they are, contrary to a classical employment, in a 'fictitious' employment relationship. Under this type of employment, wage tax and social security contributions are withheld, but no contributions to pension premiums are made. As a result, these individuals may not be covered by the Wlz on the basis of their employment, but only if they are considered residents in the Netherlands. However, as reported, often from the SVB's view, there is lack of supportive arguments that would entail residence – for instance there is no indication that these PhD researchers have an intention to stay in the Netherlands after their contract ends. Furthermore, they are also lacking other supportive factors, such as family ties, permanent housing (often they live in student houses), and/or integration to Netherlands (for example by taking a Dutch language course).

One University reports that the situation differs in regard to EU-PhD researchers, who do fall under the Wlz on the basis of employment. Therefore, according to this University, it is only the non-EU PhD researchers who must demonstrate residence to fall under the Wlz.

Nevertheless, later on it was reported that non-EU PhD researchers on scholarship, who have stayed in the Netherlands for more than one year, are automatically considered as residents and insured under the Wlz from the date of their arrival. This change in interpretation has caused confusion to the educational

institutions on what advice to provide to their international researchers on Wlz coverage and public health insurance.

Fewer cases received concern international and European students. According to the reports, students are frequently recommended to obtain private insurance because they are not covered by Wlz when they are in the Netherlands only for the purpose of studying.

With regard to family members, it is reported that on some occasions, there is unclarity whether family members of both students and researchers should be insured under Wlz. Nuffic gives the example of a researcher's partner of Brazilian nationality who was not insured because she still had a house in Brazil in her name. However, the reason why this indicator led to the person not being insured under the Wlz was unclear.

It is informed that international researchers, students and their family members can find out whether they are insured under the Wlz by means of a test performed by the SVB. Due to the unclarity of the (changing) situation, often the educational institutions advise their students and researchers to carry out this test. The statutory period for that test is 8 weeks. During that period, the person is not insured and can only fall back on private insurance. However, taking out private insurance is also far from problem-free. Some medical pre-conditions (including pregnancy) are excluded from the coverage, and the person may be subject to high premiums. Furthermore, it is reported that often the Wlz-test takes longer than the statutory period of 8 weeks (up to 6 months), and the Wlz-test can only be conducted retrospectively after the person arrives to the Netherlands.

As these reported cases indicate, there is a lot of uncertainties and unclarities about the position of researchers, students, and their family members regarding entitlement to public health insurance and the scope of insured persons under the Wlz. Especially the rather subjective factors of assessing residence lead to confusion. Therefore, it is essential to perform a legal analysis of the situation of different groups that are allegedly affected by the issue of Wlz coverage (both EU and non-EU researchers, students, and their family members).

ANNEX II. Data

Information from the universities

The amount of EU and international researchers that are having problems with their health insurance position, and more particularly with their residency status, is rather unknown. To collect more quantitative data, ITEM has created a survey that has been distributed among the universities and higher education institutions in the networks of SOFIE and Nuffic. The survey included the following questions, requesting data of 2019 and/or 2020:

1. General: name institution and function of the respondent
2. European researchers:
    a. How many European researchers are there in your university?
    b. What is the average age of this group?
    c. What is the average length of stay in the Netherlands of this group?
    d. In how many cases do partners and/or children travel with them? Can you express this in numbers?
    e. Have you seen cases where the investigator or his/her relatives could not be insured under the Wlz?
        i. If so, could give a description of a case?
3. International researchers:
    a. How many international (non-EU) researchers are there in your university?
    b. What is the average age of this group?
    c. What is the average length of stay in the Netherlands of this group?
    d. In how many cases do partners and/or children travel with them? Can you express this in numbers?
    e. Have you seen cases where the investigator or his/her relatives could not be insured under the Wlz?
        i. If so, could give a description of a case?
4. Unpaid researchers, PhD students and postdocs
    a. How many unpaid researchers, PhD students and postdocs are there in your university?
    b. What is the average age of this group?
    c. What is the average length of stay in the Netherlands of this group?
    d. In how many cases do partners and/or children travel with them? Can you express this in numbers?
    e. Have you seen cases where the investigator or his/her relatives could not be insured under the Wlz?
        i. If so, could give a description of a case?
5. Scholarship researchers
    a. How many scholarship researchers are there in your university?
    b. What is the average age of this group?
    c. What is the average length of stay in the Netherlands of this group?
    d. In how many cases do partners and/or children travel with them? Can you express this in numbers?
    e. Have you seen cases where the investigator or his/her relatives could not be insured under the Wlz?

        i. If so, could give a description of a case?
6. European and international students
    a. How many European and international students are at risk of experiencing problems with Wlz coverage?
    b. What is the average age of this group?
    c. What is the average length of stay in NL of this group?
    d. In how many cases do partners and/or children travel with them? Can you express this in numbers?
    e. How many of these persons are working in addition to their studies in the Netherlands?
    f. Have you seen cases in which the student or his/her family members could not be insured under the Wlz?
        i. If so, can you give a description of the case?
7. Other remarks

ITEM received responses of the Rijksuniversiteit Groningen (RUG), TU Delft, TU Eindhoven, Universiteit Leiden, University of Twente, and Universiteit Utrecht. Data was also received from TU Eindhoven, however minimal and not comparable with the other results, therefore it was not included in the following tables. The gathered data does not give an exhaustive and representative reflection of the reality but allows for some descriptive and informative illustration. The respondents were also not always able to give an answer to all the questions and provide us with all the requested data. Finally, in the tables below we rely on the input given to the survey by the respective HR departments, without having it verified or double-checked in a way.

1. Table 1 – Overview of categories

	European researchers	**International researchers**	**Unpaid researchers**	**Researchers with a grant**	**Students**
RUG	2019: 626 2020: 687	2019: 498 2020: 554	Only data of unpaid PhD: 2019: 528 2020: 525	2019: 435 2020: 460	N/A
TU Delft	440	1050	2300	N/A	N/A
ULeiden	2019: 317 2020: 324	2019: 142 2020: 161	2019: 1994 2020: 2116	2019: 335 2020: 324	N/A
UTwente	2019: 74 2020: 87	2019: 123 2020: 139	2019: 330 2020: 299	2019: 82 2020: 65	N/A
UU	324	336	294	N/A	900

2. Table 2 – Category 1: European researchers

	Amount of researchers	Average age (in years)	Average duration of stay (in years)	Family members	Problems with Wlz-coverage
RUG	2019: 626 2020: 687	2019: 35.6 2020: 36	2019: 5.3 2020: 5.1	No information	No, but no automatic coverage for partners
TU Delft	440	48	3.6	No information	Not yet
ULeiden	2019: 317 2020: 324	2019: 37.9 2020:36.8	N/A	N/A	N/A
UTwente	2019: 74 2020: 87	2019: 36,5 2020: 41	2019: 27 months 2020: 29 months	N/A	N/A
UU	324	28	2	127	N/A

3. Table 3 – Category 2: International researchers

	Amount of researchers	Average age (in years)	Average duration of stay (in years)	Family members	Problems with Wlz-coverage
RUG	2019: 498 2020: 554	2019: 34.7 2020: 34.5	2019: 4.3 2020: 3.9	Initial applications from employees and unpaid staff: 2019: 428 ; 2020: 437 Initial applications family members: 2019: 124 ; 2020: 233 TWV applications:	Unknown

				2019: 118 ; 2020: 138.	
TU Delft	1050	48	3.7	Over the past 2 years, 223 accompanying family members have been registered. This figure is based on the application for a residence permit.	Same as under table 2
ULeiden	2019: 142 2020: 161	2019: 35,4 2020: 34,7	Average over new inflow 2019/2020 and extensions of requested residence permits for paid and guest 1,2 years.	In 2019 and 2020, 135 salaried scientists with the job title "researcher" entered the programme. With them came 34 partners and 17 children. In 2019 and 2020, 256 extensions or changes of restrictions were applied for, with 102 partners and 63 children also involved.	No information
UTwente	2019: 123 2020: 139	2019: 42 2020: 36	2019: 39 months 2020: 35 months	2019: 22 partners and 7 children 2020: 16 partners and 5 children	N/A

UU	336	27	2,5	88	N/A

4. Table 4 – Category 3: Unpaid researchers

	Amount of researchers	**Average age (in years)**	**Average duration of stay (in years)**	**Family members**	**Problems with Wlz-coverage**
RUG	Only data of unpaid PhD: 2019: 528 2020: 525	Not available	Not available	Not available	Not available
TU Delft	2300	45	6.5	Over the past 2 years, 116 accompanying family members have been registered. This figure is based on the application for a residence permit.	No, not yet
ULeiden	2019: 1994 2020: 2116	2019: 40,3 2020: 39,6	1.07	In 2019 and 2020, 412 visiting scientists joined us. With them came 42 partners and 46 children. In 2019 and 2020, 397 extensions or changes of restriction were applied for, with 43 partners and 47 children also coming along	Not available

UTwente	2019: 330 2020: 299	2019: 36,4 2020: 36	2019: 39 months 2020: 40 months	2019: 30 partners and 16 children 2020: 20 partners and 11 children	Yes, multiple
UU	294	27	4	23	N/A

5. Table 5 – Category 4: Researchers with a grant

	Amount of researchers	**Average age (in years)**	**Average duration of stay (in years)**	**Family members**	**Problems with Wlz-coverage**
RUG	2019: 435 2020: 460	2019: 29.1 2020: 29.3	2019: 3.5 2020: 3.5	Not available	Yes, multiple
TU Delft	N/A, included under the previous table	N/A, included under the previous table	N/A, included under the previous table	N/A, included under the previous table	N/A, included under the previous table
ULeiden	2019: 335 2020: 324	2019: 33,9 2020: 32,3	N/A	N/A	N/A
UTwente	2019: 82 2020: 65	2019: 35 2020: 33	38 months	N/A	N/A
UU	N/A	N/A	N/A	N/A	N/A

6. Table 6 – Category 5: Students

	Amount of students	**Average age (in years)**	**Average duration of stay (in years)**	**Family members**	**Working next to studies**	**Problems with Wlz-coverage**
RUG	N/A	N/A	N/A	N/A	N/A	N/A
TU Delft	N/A	N/A	N/A	N/A	N/A	N/A
ULeiden	N/A	N/A	N/A	N/A	N/A	N/A
UTwente	N/A	N/A	N/A	N/A	N/A	N/A

UU	900	20	6 months	N/A	N/A	N/A

7. Other remarks:

The RUG shared additional information with us (received in May 2021) on the Programme Promotion education (*promotieonderwijs*), scholarship PhD with university funding, that started in 2016. The experiment runs for eight years, from 1 September 2016 to 1 September 2024. At the start of the experiment, the RUG received a commitment to fill 850 positions; in early 2020, following a second application, 650 positions were added. Some of these positions are used for PhD students of the UMCG. In total, approximately 600 RUG PhD students are paid each month (as well as approximately 300 from the UMCG). Of the 600 RUG PhD students, around 320 receive a full scholarship and 280 a supplementary scholarship. In the group of PhD students, the RUG received more and more reports of rejections for the WLZ, despite the fact that the vast majority come to the Netherlands for 4 years and have a residence status for 4 years from the start.

Also regarding TCN-PhD researchers, the RUG shared additional information through some casuistry. As of December 2020, the HR department of the RUG received multiple rejections for the WLZ-test of Chinese PhD-researchers with a scholarship of the Chinese Scholarship Council (CSC). They come to the Netherlands with a scholarship of €1350 per month and receive an additional scholarship by the RUG (of €636, then, that through opting-in is salaried fictitiously. There are about ten cases who have a contract and a residency permit for 4 years, but were rejected for the WLZ with the arguments:

"*- ... on the basis of your circumstances you are not regarded as a resident of the Netherlands. Your PhD activities/work as a PhD student is not considered equal to/does not qualify as (salaried) employment.*

- ... because, judging by the circumstances, you do not live in the Netherlands

- ... (via email to me) there is no question of an 'employment relationship' and no question of residency. The form states that she came to the Netherlands to study, and she does not intend to stay in the Netherlands after her PhD.

- ... because, according to the circumstances, you do not live in NL and your work as a PhD student is regarded as fictitious employment."

A Turkish PhD student with a full scholarship of 2120 euros gross (fictive salary) for 4 years has been rejected for the WLZ. The letter states: "You are not insured for the WLZ from 6 September 2019. You are not insured for the WLZ because, judging by the circumstances, you do not live in the Netherlands. This is because you are staying in the Netherlands solely for study reasons." The RUG has been in contact with the SVB's practitioner in which it has been explained once again what doctoral education entails. The practitioner promised to discuss the case internally again. A few weeks later, the partner of the person involved (also with a residence permit for 4 years and looking for work, from Armenia) received a request to have a WLZ examination carried out. Both have indicated that they no longer have any ties with their country of origin and that they intend to stay in the Netherlands. This case is still ongoing.

A final example shared by the HR department of the RUG concerns a Russian PhD researcher. In December 2020, the WLZ-status was initially withdrawn retroactively (from January 2018), but was later revoked. The arguments of the SVB for withdrawal were (as shared with the RUG):

- the fictitious contract is no reason to fall under WLZ. N.B. the fact that the contract is for 3 or 4 years is not relevant. No decisions are made on future events. In the SVB's view, for example, she could stop earlier.
- so the assessment must be based on residency (applies to non-EU people)
- she was alone when she came to NL. At that moment there was no "manifestation" of the intention to stay in NL. Examples of this kind of "manifestations" can be (it is about "proof", so saying that you wanted to stay is not sufficient):
    - if she had come to NL to live with a partner who already lived here and had a house, preferably with a cohabitation contract
    - If she had children who went to school here
    - If she came here together with a partner
    - If she had bought a house (she now lives at an address with 11 other residents)
    - if she had taken NL lessons (SVB says they have no indication that she took an exam Dutch as a second language)
- on 21-09-20 she applied to the IND for a change of residence permit on the basis of residence with a partner (is an Italian). N.B. this is different if she had lived with someone from the beginning. N.B. And then it also makes a difference whether the partner is Dutch or Italian, because the important thing is what is the connection with NL. That Italian can of course also go back (her words)
- Only in the WLZ examination that the PhD researcher applied for in December did she express her intention to stay in NL.
- Based on the change of residence + the indication in the WLZ application of December 2020 that she wants to stay in NL + that she had been in NL for almost 3 years at that time, the SVB has now said that they want her to be covered by the WLZ from September 2020. The SVB will send the revised decision. It is possible to object to this.

During the conversation between the practitioner of the SVB and the HR department of the RUG, the RUG was told that she would then receive WLZ status from September 2020, but it was finally confirmed in writing that she would keep her WLZ status for the entire period. This was good news, but unexpectedly.

The TU Delft indicated that regarding researchers and their family members could be insured under a Dutch health insurance in the years 2019 and 2020. This based on registration in the BRP, having a BSN and a valid residence permit. Yet, there are concerns that some researchers and/or family members might be unrightfully insured. As of 2021, TU Delft can offer them a private insurance due to amalgamation with Insure to Study.

The UTwente had a scholarship PhD from Indonesia, where an appeal was filed to the SVB in 2021. The PhD has an Indonesian scholarship and a residence permit for 5 years. There was no intention to stay after completing the PhD, but the plan to return to Indonesia. In its decision, the SVB indicated that it, for example considers: whether you have a right of residence in the Netherlands, whether you have independent accommodation in the Netherlands which is permanently at your disposal, whether you have family members or relatives who live or work in the Netherlands, whether children go to school in the Netherlands, whether one is taking a Dutch language course or pursuing a course of vocational training, and whether one is member of a club or society in the Netherlands. In this case, they addressed the policy rules regarding the length of stay. Referring to SB1022 and SB1027 on the duration of stay, the SVB indicated that, given the duration of the PhD of more than 3 years and thus a stay of more than 3 years in the Netherlands, the SVB concluded that no other conclusion can be made than classifying the PhD researcher as resident since arrival in the Netherlands. Indeed, the policy rules stipulate that if it is upfront clear that one will be for more than 3 years in the Netherlands, residency will be presumed. The length of stay is also a relevant factor in case law. Yet, all other facts and circumstances still have to be examined. In this case, the SVB did not address or further elaborate on the contra-indications such as the intention (if objectively verifiable).

Other datasources

We also requested the SVB to provide us with some data, more concretely regarding the amount of requests for a Wlz-test and the share of international and/or European PhD-researchers in this amount. Furthermore, the amount of rejected Wlz-tests would be relevant to know. Unfortunately, this data was not available or could not be shared with us. From the SUWI Annual Report of 2019 it becomes clear that in 2019, 26.583 requests for a Wlz-test have been received and handled by SVB. For 2018 the number of requests was 22.656.[253] For other years, no information on the amount of requests is openly published and available. Nevertheless, the amount of requests seems to be increasing structurally. Based on an interview that ITEM conducted with SVB, around 10% of these requests are coming from PhD researchers.

Very relevant data are that are gathered and shared by the Rathenau Instituut. This Institute gathered data around the internationalization of scientists in the Netherlands and made data publications on the share of foreign scientific staff and the development of foreign staff and countries of origin.[254] Using data of a.o. CBS and Universiteiten van Nederland, they produced several graphs. These are relevant to illustrate the development over time and the relevance of this reports' topic in this context.

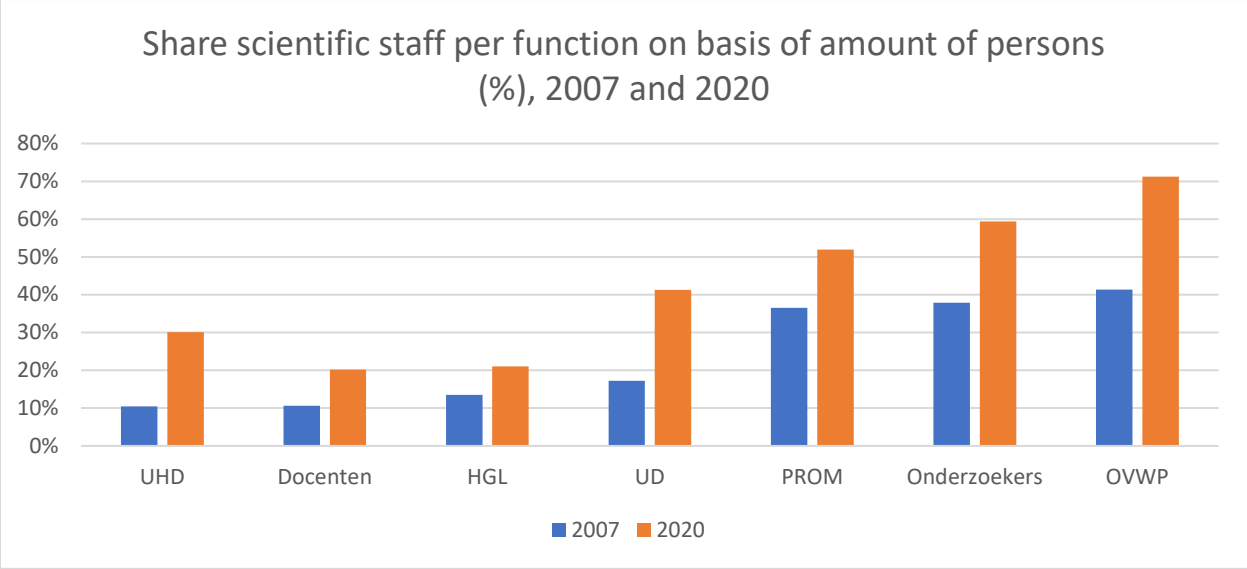
First, the share of international scientists is increasing over time. Where it was around 20% in 2003 (19,8%), it is over 40% in 2020 (43,7%). At TU Delft, Maastricht University and TU Eindhoven the share of international scientific staff is relatively the greatest, with over 50%. Of the foreign scientific staff, 58,8% is from within the European Union and thus intra-EU mobility. Within the EU, the south of Europe and Germany are important regions of origin. Outside the EU, China (7,5%), India (6,64%) and the Middle East

[253] SUWI Jaarverslag 2019, p. 16
[254] https://www.rathenau.nl/nl/wetenschap-cijfers/wetenschappers/internationalisering-van-wetenschappers

(6,33%) are relatively the greatest shares in nationalities. Possibly a bit surprising, Belgium ranks lower (4,89%) than for example North- (5,34%) and South- and Middle America (5,5%)

The table below illustrates the share per scientific function in general. Here UHD stands for associate professor, UD for university lecturer, HGL for professor, PROM for PhD-researcher, OVWP for other scientific staff. Onderzoekers and Docenten are Researchers and Teachers respectively.

Table 7 – Share of scientific staff per function on the basis of amount of persons (%)[255]



In the categories of PhD-researchers, researchers and other scientific staff, high shares of international staff can be seen. This share has also been increasing over time. Yet, the Rathenau Instituut furthermore concludes on some differences between foreign and Dutch scientists. Non-Dutch scientists have more often a temporary appointment, which is also due to a substantial bigger share of foreign PhD-researchers and postdocs. The higher the position, the lower the share of international staff is. Regarding the quality of the incoming researchers, the Rathenau Instituut concludes that the quality is high looking to the citation scores and prestigious ERC-grants.

Zooming in to the PhD-researchers, in 2021 there were 36.472 PhD-researchers affiliated to Dutch universities and medical centra.[256] In general, 48% is employed by the university as *werknemer-promovendus*. Of the *werknemer-promovendi*, the share of foreign nationalities is increasing over the years: from 37% in 2007 to 52,6% in 2021. Within this foreign group, it is about 50-50 divided between EER and non-EER.[257] Even though scholarship PhD-researchers and other types were excluded from the analyses in the report '*Eindevaluatie experiment promotieonderwijs'* by ResearchNed[258], the data pictured of the RUG makes clear that of all the external scholarship PhD-researchers that started in 2020, almost

[255] The table is based on numbers collected by Rathenau Instituut: https://www.rathenau.nl/nl/wetenschap-cijfers/wetenschappers/internationalisering-van-wetenschappers
[256] https://www.universiteitenvannederland.nl/nl_NL/Gezonde+praktijken+Promotiesysteem
[257] https://www.rathenau.nl/nl/wetenschap-cijfers/wetenschappers/van-promovendus-tot-promotie
[258] ResearchNed, Eindevaluatie experiment promotieonderwijs, rapport in opdracht van ministerie OCW, januari 2022.

all (96%) came from abroad, while for employee PhDs less than half came from abroad. In the report it stated that this is in general also true for the total group of scholarship PhD-researchers in the Netherlands. In the test case that ITEM assisted on childcare benefits for scholarship PhDs, it became also clear that non-Dutch nationals were to a greater extent represented in the group of scholarship PhDs while Dutch nationals were better represented in the group of employee PhDs.

With around 48% of the PhDs not being employed by the university and 13% on a scholarship, this has serious implications for this reports' topic: the insurance position. Indeed, also the evaluation of the 'promotieonderwijs' indicated that scholarship PhD-researchers are often foreign researchers and are in a disadvantaged and vulnerable position.[259]

[259] Ibid, p. 81.