

Translation by CNV of a

**Report on Placement of Personnel by Intermediaries Act
by the Dutch Labour Inspectorate**

Reference 2013450/18

Dated 29 July 2022

File number 2013450

Article of Act

With the exception of the provisions on an adequate pension plan, as referred to in the fourth up to and including the sixth paragraphs, workers provided in a payrolling context are entitled to at least the same employment conditions as those applicable to employees working in the service of the undertaking where the workers have been placed.

2 If the undertaking where the workers have been placed, does not employ any employees in similar or equivalent positions, the workers referred to in the first paragraph, with the exception of the adequate pension plan as referred to in the fourth up to and including the sixth paragraphs, will be entitled to at least the same employment conditions as applicable to employees in similar or equivalent positions in the professional or business sectors in which that undertaking operates.

3 If the undertaking where the workers have been placed is affiliated with a fund as referred to in Section 631.3 under c and d of Book 7 of the Civil Code, and the party providing the workers cannot become affiliated with the fund because it represents the interests of one or more branches of industry to which the party providing workers does not belong, that party will earmark a financial contribution in the amount of the same sum for the employee. The earmarked amount will be paid to the worker upon request, but at least once a year. If the provision ends, any earmarked amounts not yet paid will be paid to the worker. Personal contributions made by the party providing the workers to a fund that has the same objectives as the fund with which the undertaking where the workers have been placed is affiliated, may be deducted from the earmarked amount.

4 Save for the provisions of Article 97 of the Pension Act, an adequate pension plan applies to workers provided in a payrolling context, if:

- a. Employees working in similar or equivalent positions in the employment of the undertaking where the workers have been placed are entitled to a pension plan; or
- b. Employees working in similar or equivalent positions in the professional or business sector in which the undertaking where the workers have been placed operates, are entitled to a pension plan, if the undertaking does not employ employees in similar or equivalent positions.

5 A pension plan is at any rate adequate if the same basic pension plan as referred to in Article 1 of the Pension Act applies to the workers as applies to employees working in similar or equivalent positions, or, if this undertaking does not employ employees in similar or equivalent positions, the same basic pension plan as applicable to the employees working in similar or equivalent positions in the professional or business sector in which the undertaking where the workers have been placed operates.

6 A pension plan is adequate also if a basic pension plan applies to workers provided in a payrolling context that meets the criteria set by or by virtue of a general order in council for, at any rate, the qualifying or vesting periods, the amount of the employer's contribution and the types of pension.

7 It is not possible to deviate from this Article to the disadvantage of the workers provided in a payrolling context.

8 In deviation from Article 1.3 part c, this Article applies *mutatis mutandis* to the provision of workers in the context of a profession or business in which the party providing the workers and the undertaking to which the workers are provided are maintained by the same entrepreneur or are affiliated in a group as referred to in Section 24b of Book 2 of the Civil Code or if the one is a subsidiary of the other as referred to in Section 24a of Book 2 of the Civil Code.

9 It is possible to deviate from this Article by general order in council regarding workers who:

- a. Work in an employment relationship as referred to in Article 2.1 of the Sheltered Employment Act;
- b. Belong to a category of disabled workers as designated by general order in council as referred to in Article 38b of the Social Insurance (Funding) Act, or are considered equivalent to disabled workers as referred to in Article 38f.5 of that Act, or who work in an employment relationship as referred to in Article 10b.1 of the Participation Act.

10 Further regulations on paragraph 9 may be set by or by virtue of general order in council.

11 Any general order in council to be adopted pursuant to the ninth and tenth paragraphs will not be proposed until four weeks after the draft has been submitted to both Houses of the States General.

Rapporteur

Rapporteur [REDACTED], also labour inspector, is the author of this report. Co-investigators are labour inspectors [REDACTED] and [REDACTED].

These labour inspectors of the Dutch Labour Inspectorate, based in The Hague, are entrusted with supervising compliance with the provisions by or by virtue of the Placement of Personnel by Intermediaries Act also called Waadi Act.

Where necessary, the labour inspectors have identified themselves as supervisors as referred to in Article 5:11 of the General Administrative Law Act.

Payroll Employer

Legal form	: private limited liability company
Name	: Modis International B.V.
Address	: Hogeweg 123
Postcode	: 5301 LL
Located in	: Zaltbommel

Hereinafter to be called: 'Modis'

Listed in the trade register of the Chamber of Commerce under number 34277257.

Annex 1 An extract from the trade register of the Chamber of Commerce regarding the payroll employer has been attached to the report.

Redaction of data I, the rapporteur, should like to point out that parts of the annexes to this report have been redacted. The redacted parts are not relevant to this report and/or contain personal or company-sensitive data. The redacted data are known to the Dutch Labour Inspectorate.

Reason for investigation On Monday, 18 May 2020 a worker notified the Dutch Labour Inspectorate that he/she did not get the same employment conditions as those applicable to employees working in similar or equivalent positions at the undertaking where the worker has been placed. The notification was reason for the Dutch Labour Inspectorate to carry out an investigation.

Annex 2 The notification has been annexed to the report.

Period of investigation The investigation relates to the period from 1 January 2020 to 30 June 2020 inclusive.

Position of worker The investigation concerns a worker of Modis provided to recipient European Space Agency, location ESTEC in Noordwijk, (hereinafter: ESA) and working in the position of Microwave / Mm-Wave Technology & Equipment Engineer - E3, hereinafter: 'the worker'.

Documents received from the worker In the course of the investigation I, the rapporteur, received from the worker the documents listed below:

Four e-mails from Modis to the worker about the subject of payrolling:

- An e-mail from [REDACTED], senior manager of Modis, to the worker dated 13 March 2020 on the subject 'Modis- Status update #2-Our business with ESA';
- An e-mail from [REDACTED], senior manager of Modis, to the worker dated 27 November 2020 on the subject 'Modis - WAB / Payroll status update';
- An e-mail from [REDACTED], HR Business Partner Modis to the worker dated 18 December 2020 on the subject 'Modis - Information regarding change to label payroll';
- An e-mail from Modis Talent Management to the worker dated 21 May 2021, on the subject 'Modis - Contract Annex for change to label payroll'.

Annex 3 Modis' e-mails to the worker have been annexed to the report.

Some other e-mails:

- An e-mail from the worker to the rapporteur dated 23 October 2020 on the subject 'Information relevant to the complaint ref. 1222104', with as attachments:
- An e-mail from a Business Manager of RHEA GROUP to an employee of RHEA GROUP who had been provided by Modis dated 23 October 2020;
- An e-mail from a worker who had been placed with ESA dated 9 September 2020 on the subject 'Anonymous report - WAB';
- An e-mail from the worker to the rapporteur dated 15 September 2020, on the subject 'Additional Information regarding complaint ref. 1222104';
- An e-mail from the worker to the rapporteur dated 26 September 2020, on the subject 'contractor signing MoM';
- An e-mail from a Recruitment Lead at Ajilon Technology Aerospace (Modis' legal predecessor) to the worker dated 14 April 2017 on the subject 'Ajilon - Interview Confirmation Microwave / Mm-Wave Technology & Equipment Engineer (TEC-PCE-350)'.

Annex 4

The other e-mails received from the worker have been annexed to the report.

Two documents used by Modis to explain the implications of the Balanced Labour Market Act to employees:

- A presentation by Modis entitled: 'The Balanced Labour Market Act';
- A document entitled 'The objectives of the WAB (Wet Arbeidsmarkt in Balans)'.

Annex 5

The documents about the implications of the WAB have been annexed to the report.

Some other documents:

- A job vacancy of Ajilon (Modis' legal predecessor) opening with the lines 'Technology Aerospace is looking for a Microwave / Mm-Wave Technology & Equipment Engineer E3 for an opportunity at the European Space Agency in the Netherlands';
- A document entitled 'Activity Domain PLT: RF Systems, Payload and Technologies' including the worker's so-called Work Package;
- An infographic entitled 'Contractor (Frame Contracting Bacteria) DISEASE SPREAD AND PREVENTION';
- A document entitled 'Taken and translated from Dutch government factsheet' including notes made by the worker;
- An organisational chart of the Radio Frequency Payloads & Technology Division where the worker used to work.

Comment of the rapporteur:

The organisational chart provided by the worker contains the names and photos of both employees of ESA and the worker and other external workers. It is apparent from the organisational chart that the worker is part of a team or group that also includes ESA employees. It is clear also that the

manager (Head of Section) of the team or the group is an ESA employee. Because of the immunity of ESA employees this organizational chart has not been attached to the report.

Annex 6

The other documents received from the worker have been annexed to the report.

Meeting with Modis 8 September 2020

On Tuesday, 8 September 2020 I, the rapporteur, had a meeting with representatives of Modis. On Tuesday, 8 September 2020 I, the rapporteur sent minutes of that meeting to Modis by e-mail. On Friday, 11 September 2020 I received an e-mail from Modis with some supplements to the minutes.

Annex 7

The minutes plus Modis' supplements (in red) have been annexed to the report.

Business data and documents Modis on direction and supervision

At the meeting on Tuesday, 8 September 2020 Modis stated that Modis was responsible for the direction and supervision. To support this statement Modis provided the following business data and documents on Monday, 14 September 2020:

- A letter elaborating on the other documents provided, among other things;
- A letter from SNCL to Ajilon (Modis' legal predecessor) dated 5 November 2012 on the subject 'Conclusion of investigation';
- A letter from Deloitte to StiPP dated 30 September 2014 on the subject 'Provision of data Ajilon companies, second tranche';
- A letter from StiPP to Ajilon dated 7 November 2014 on the subject 'investigation affiliation Ajilon undertakings';
- A decision of the Tax and Customs Administration dated 29 November 2019 on the differentiated premium percentages for 2020;
- Work Order no. 4000120651/17/NL/SFe (hereinafter: Work Order), accompanying ESA Frame Contract No. EFC2-02/17/NL/HE;
- Appendix 8 to ESA Frame Contract No. EFC2-02/17/NL/HE;

The following documents provided by Modis on 14 September 2020 have not been annexed to this report as they are not relevant to the investigation:

- A notarial deed regarding the amendment of the name Ajilon to Modis;
- An extract from the trade register of the Chamber of Commerce regarding Modis International B.V. dated 26 May 2020;
- A business card of an employee of Modis.

Annex 8

The documents received from Modis on 14 September 2020 on the direction and supervision have been annexed to the report.

Statement witness 1

On Monday, 2 November 2020 around 11:00 am, we, the rapporteur and labour inspector [REDACTED], heard a witness.

Annex 9

The statement of witness 1 has been annexed to the report.

Statement witness 2

On Friday, 6 November 2020 around 2:00 pm, we, the rapporteur and labour inspector [REDACTED], heard a second witness.

Annex 10

The statement of witness 2 has been annexed to the report.

**Meeting with [REDACTED]
[REDACTED] 15 December
2020**

On Wednesday, 15 December 2020, we, the rapporteur and labour inspector Jhingoer, met with [REDACTED], senior manager at Modis.

Annex 11

Minutes of the meeting have been annexed to the report.

**Meeting with Modis 18
June 2021**

On Friday, 18 June 2021, we, the rapporteur, and labour inspectors [REDACTED] and [REDACTED], met with representatives of Modis.

Annex 12

Minutes of the meeting have been annexed to the report.

**Questions to Modis
dated 24 June 2021**

On 24 June 2021, I, the rapporteur, asked Modis by letter to provide documents and information. Part of this information relates to these minutes. Part of this information related to two similar investigations of which separate reports were made. Only the information related to this report will be listed and included.

Annex 13

The letter to Modis dated 24 June 2021 has been annexed to the report.

**Received from Modis on
30 June 2021**

On Wednesday, 30 June 2021, I, the rapporteur, received the following documents from Modis:

ESA Frame Contract No. EFC2-02/17/NL/HE;

- a letter entitled 'response to information requested inspectorate 30062021'. In this letter Modis explained why certain information requested had not been provided.

Annex 14

The documents received from Modis on 30 June 2021 have been annexed to the report.

Demand Modis

As Modis had not provided all information requested, I, the rapporteur, orally demanded on Friday, 9 July 2021 that Modis would provide the information as yet, confirming my demand by e-mail. I furthermore responded by letter to Modis' reasons for not providing all information.

Annex 15

The acknowledgment of my demand and letter to Modis dated 9 July 2021 have been annexed to the report.

**Received from Modis on
13 July 2021**

On 13 July 2021, I, the rapporteur, received from Modis the business data and documents listed below:

- A letter dated 13 July 2021 on the subject: 'Subject: acknowledgment of demand';
- 'Frame Contract between Modis (formerly Ajilon) & ESA';
- Advice from Prof. E. Verhulp dated 28 January 2020;
- An e-mail from law firm SteensmaEven dated 4 March 2020 on the subject 'Request for Expert Academie Advice-WAB';
- A report by Korn Ferry 'Total remuneration market data' dated 23 October 2020;
- A report by Serco Business entitled 'An assessment of the comparability of the Dutch legislative framework and the agency policy framework concerning labour and employment';
- An e-mail from Modis to the employees dated 2 July 2021 on the subject 'KornFerry Information Sessions';
- A document entitled 'Korn Ferry NL Market Analysis', attached to the e-mail of 21 July 2021.

Annex 16

The business data and documents received from Modis have been

attached to the report

**Received from Modis
regarding the worker**

In addition I received the following documents on the worker:

- An 'ESA Work Package description' of the worker's position: 'Microwave/Mm-Wave Technology and Equipment Engineer';
- A list of the worker's employment conditions.

Annex 17

The work package and employment conditions have been annexed to the report.

**Letter Modis 23 July
2021**

On 23 July 2021 I, the rapporteur, received a letter from Modis on the subject 'additional information Modis'. In this letter Modis announced that in August 2021 it would provide additional information.

Annex 18

The letter has been annexed to the report.

**Received from Modis 1
September 2021**

On 1 September 2021 I, the rapporteur received from Modis:

- An e-mail on the subject 'additional information Modis investigation period 1 January 2020 to 30 June 2020';
- A letter on the subject 'additional information Modis';

Annex 19

The e-mail and letter have been annexed to the report.

The letter came with 16 annexes. In the letter Modis expands on the annexes and refers to these by number. The 16 annexes to the letter have been listed below and have been included in the report. The numbers between brackets refer to the numbers used by Modis in its letter. The description of the documents was written by the rapporteur; for Modis' descriptions see the letter.

- Three job vacancies (1)

Annex 20

The job vacancies have been annexed to this report.

- a job vacancy posted on LinkedIn (2)

Annex 21

The job vacancy on LinkedIn has been annexed to the report.

- Two posts on LinkedIn highlighting a job vacancy. (3)

Annex 22

The job vacancies LinkedIn have been annexed to the report.

- A 'Modis-candidate template'. (4)

Annex 23

The candidate template has been annexed to the report.

- WhatsApp communications and e-mail about requesting references. (5)

Annex 24

The communication about the references has been annexed to the report.

- A salary proposal from Modis to an employee. (6)

Annex 25

The salary proposal has been annexed to the report.

- an e-mail from an employee to Modis on the subject 'Last questions for starting at ESA'. (7)

Annex 26

The e-mail has been annexed to the report.

- 'Appendix 1 to the employment contract' of an employee dated 12 August 2013. (8)

Annex 27

The appendix has been annexed to the report.

- an e-mail exchange between an employee and a Senior Talent Manager on the subject 'Lee Hecht Harrison'. (9)

Annex 28

The e-mail exchange has been annexed to the report.

- Seven vacation applications of employees to Modis and the approval letters (10)

Annex 29

The vacation applications have been annexed to the report.

- An e-mail from a Senior Talent Manager of Modis to person B on the subject 'Important toil hours'. (11)

Annex 30

The e-mail has been annexed to the report.

- An e-mail from a Senior Talent Manager to an employee, with as attachment a 'Modis assessment'. (12)

Annex 31

The e-mail and the assessment have been annexed to the report.

- An official warning of Modis to an employee. (13)

Annex 32

The official warning has been annexed to the report.

- An e-mail of a Senior Talent Manager to an employee dated 2 February 2017 on the subject '2nd Annual Executive Office Management Summit For EAs and Pas', with as attachment a document entitled '2nd annual executive office management summit'. (14)

Annex 33

The e-mail and the attached document have been annexed to the report.

- An e-mail from a Senior Field manager dated 28 February 2018 with a quote for a training requested for an employee. (15)

Annex 34

The e-mail and quote have been attached to the report.

- An e-mail from Talent Management to an employee about approval for a training as requested. (16)

Annex 35

The e-mail about the training has been annexed to the report.

**Investigation
recipient ESA**

In the period from October 2020 to February 2021 I, the rapporteur, spoke to representatives of ESA. During our conversations I repeatedly pointed out that the Dutch Labour Inspectorate wished to have access to the ESA premises in, wanted to talk to ESA employees and wanted access to the employment conditions ESA applies to its employees.

ESA took the position that this was not possible because of the inviolability of its premises and records and the immunity of the employees. ESA invoked the Convention for the Establishment of a European Space Agency (hereinafter: 'the Convention') and the Agreement between the Kingdom of the Netherlands and the European Space Agency concerning the European Space Research Technology Centre (hereinafter: 'the Headquarters Agreement').

I, the rapporteur, have presented ESA's position to a lawyer of the Ministry of Foreign Affairs, who held that the Dutch Labour Inspectorate can ask ESA to discuss Article XXII of Annex I to the Convention that requires ESA to cooperate at all times with the competent authorities of the member states to safeguard the labour inspectorate.

On Wednesday, 9 June 2021, I, the rapporteur, asked ESA by letter to provide information on all the employment conditions of its own employees working in the position of Microwave / Mm-Wave Technology & Equipment Engineer. I referred to Article XXII of Annex I to the Convention, stating that I, the rapporteur, had specific suspicions that provisions of Dutch law were being breached.

On Thursday, 8 July 2021 I received a written reply from ESA, which in summary came down to the following:

- In the Netherlands, ESA has immunity from jurisdiction and execution and ESA documents and records are inviolable;
- ESA cannot meet the request to forward the employment conditions as it would endanger ESA's immunity and inviolability;
- Where possible, ESA tries to cooperate without affecting ESA's privileged status in the Netherlands and for that reason can only offer to have the requested information perused at an office of the Dutch Labour Inspectorate;
- The information will be provided only for consultative purposes, but cannot be reported or forwarded to third parties.

Annex 36

The request to ESA and the latter's reply have been annexed to the report.

Annex 37

The Convention and the Headquarters Agreement have been annexed to the report.

Findings investigation

Further to the investigation described in this report I, the rapporteur, have come to the following findings.

Regarding the question whether this is a question of payrolling as defined in Article 8a of the Waadi Act:

On 13 March 2020 Modis wrote in an e-mail to the worker: "The Manpower Assignment Scheme (MAS) work under the ESA Manpower Frame Contract constitutes and should be defined as payrolling within the definition of the new legislation". (see Annex 3) That the worker's work is covered by this MAS is apparent also from the fact that the worker's name and position were included in a list of workers provided by Modis to ESA (see Annex 8)

Modis based its position on payrolling, as phrased in the e-mail of 13 March 2020, on an investigation of external legal specialists, among other things (Annex 16)

On 27 November 2020 and 18 December 2020, too, Modis sent an e-mail to the worker that this was a case of payrolling.

At least one other company providing workers to ESA under the MAS, has communicated the same message to its employees, as evidenced by the e-mail from RHEA Group provided by the worker (Annex 4)

On 8 September 2020, Modis told me, the rapporteur, that this was not a case of payrolling but of secondment, (Annex 7)

Later Modis stated that the work for ESA under the MAS would come under the label of payrolling effective from 25 November 2020 and that before that date it was labelled secondment (Annex 11)

In the conversations with Modis, Modis mentioned several circumstances that in its opinion meant that in the investigation period from 1 January 2020 to 30 June 2020 inclusive there had been no payrolling. Modis stated, among other things, that Modis was responsible for direction and supervision, more specifically its Talent Managers were. The worker, witness 1 and witness 2, contradicted this, arguing that ESA was responsible for direction and supervision (Annexes 4,9,10)

Modis also stated it had an allocation function and that for that reason, too, there was no question of payrolling. To support this position Modis submitted several job vacancies.(Annexes 20,21,22). The worker and both witnesses stated that at the time when they were applying for a job, they had responded to job vacancies of Modis, but that the interviews were conducted with ESA personnel only. The various statements and the information provided by the worker and Modis give the impression that Modis was looking specifically for candidates for positions available at ESA and was submitting profiles of those candidates to ESA. ESA then decides which candidate it will invite to an interview and to which candidate it will offer the position.

Another payrolling element cited by Modis, which is supposedly absent, is exclusive provision to ESA. Effective from 26 November 2020 the element of exclusivity was added to employment contracts already concluded by means of an addendum. Witness 2 stated that the nature of the work was not suitable for placement with a client other than ESA and he/she had been hired by ESA because of his/her specific experience and education.

I refer to Annexes 19 to 35 inclusive for further substantiation of Modis' position that there was no question of payrolling in the investigation period from 1 January 2020 to 30 June 2020 inclusive.

Although Modis has argued in detail that in the investigation period there was no question of payrolling, it has not become clear to me, the rapporteur, also because of the above findings, why Modis' argument should outweigh the statement made by the worker of 13 March 2020 that at that point there was indeed payrolling going on.

The worker, witness 1 and witness 2 stated that their positions were held also by ESA employees and that they did the same work as ESA employees in the same positions. Witness 2 said that the only difference was that she/he had no signatory powers, unlike the ESA employees. Witness 2 said that

in practice no distinction is made between ESA employees and external workers (Annexes 2,9,10)

Modis mentioned several differences between its employees and those of ESA. (Annex 5)

ESA, too, mentioned several differences between its employees and external workers (Annex 36)

The differences mentioned by Modis and ESA, in summary: signatory powers, degree of responsibility, representing ESA or not, and whether or not being in a position to acquire executive positions, are no reason for me, the rapporteur, to assume that the positions are not similar or equivalent.

Conclusion about provision of workers in a payrolling context

The investigation shows that Modis has provided the worker under a contract for services that was not concluded as part of bringing together supply and demand on the job market, to work under the direction and supervision of client ESA, under than under an employment contract with the latter, with Modis having the right to provide the worker to another party only with the consent of client ESA.

Based on the facts and circumstances, I, the rapporteur have established that:

- The worker was provided by payroll employer Modis in a payrolling context and the latter has worked for client ESA, and
- The worker was working under the direction and supervision of a manager in the company of client ESA.

Position of worker

The investigation shows that the worker provided in a payrolling context held the position of Microwave / Mm-Wave Technology & Equipment Engineer.

The investigation furthermore shows that the company where the worker has been placed employs employees in a similar or equivalent position, i.e. Microwave / Mm-Wave Technology & Equipment Engineer.

Comparison of employment conditions

As it has been established that the worker was working in a position similar or equivalent to that of employees in ESA's service, the worker is entitled to at least the same employment conditions as employees in ESA's service.

It is not possible to compare the employment conditions because of ESA's interpretation of Article XXII of Annex 1 to the Convention, the cooperation with competent authorities of member states to safeguard the labour inspectorate.

ESA did not grant access to the employment conditions applicable to employees in the position Microwave / Mm-Wave Technology & Equipment Engineer.

Invoking immunity and inviolability ESA did not grant me, the rapporteur, access to its premises and employees, which made it impossible to ask ESA employees about their employment conditions and to thus make a comparison.

From the investigation I, the rapporteur, conclude that a comparison of the employment conditions is not possible.

Exception clauses

The exception clauses of Article 1.3 sub a and b of the Waadi Act do not apply to the worker provided in a payrolling context.

Closing report

The observations and/or actions of the labour inspectors who took part in the investigations have been recorded by the rapporteur in this report. The labour inspectors named below agree to this report and in evidence of their agreement have electronically approved the report in the integrated information system of the Dutch Labour Inspectorate (Inet) supporting all primary processes.

Names of labour inspectors: [REDACTED] and [REDACTED].

This report was drawn up on solemn affirmation, signed and closed in The Hague.

[REDACTED]

Labour Inspector of the Dutch Labour Inspectorate

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[REDACTED]

[REDACTED]

Labour Inspector of the Dutch Labour Inspectorate