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REPORT ON ACCESS TO A PAYMENT ACCOUNT FOR UNDOCUMENTED MIGRANTS

To: FNV Migrant Domestic Workers Network

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1. INTRODUCTION

At the request of the FNV Migrant Domestic Workers Network we address the question if, and if so how “undocumented migrants” in the Netherlands have a right to as well as practical access to a payment account.

Estimates are that in 2013 there were approximately 35.000 migrants residing without legal residence in the Netherlands.¹ These people, also referred to as “undocumented migrants”, do not have a valid residence status. They include, among others, people whose permits have expired, asylum seekers who have exhausted all legal remedies, victims of human trafficking who have not dared to report, people who have not reported to national authorities at all, and so on and so forth. As it turns out, it is a legal challenge for this group to open a payment account, while, as we will elaborate on further, it is for many reasons convenient to have one. It is a challenge because for opening a bank account in the Netherlands you need a so called ‘citizen service number’ (*burgerservice number, bsn*), valid identity documents (id) and a home address.² Most undocumented migrants fall short of at least one of these requirements.

Having a payment account is a daily life necessity, because it enables full participation in economic and social life in a modern society. For instance, purchasing goods and services, paying bills, receiving wages, withdrawing cash from an ATM, and even traveling by public transport, among other things, are almost impossible without a payment account. In this study, we will illustrate that undocumented migrants without access to a payment account are thereby excluded from full participation in our society. In the context of this study and to analyze our client’s needs, we interviewed three undocumented migrants working in the domestic sector in the Netherlands. They told us that the aspect of having a payment account you missed most was having the confidence and freedom to pay everywhere. Also, it would provide them with the sense of having at least some ‘status’, even though their migration status is precarious. Furthermore, a bank account would provide them with a feeling of safety.

This brief develops as follows. First, we present an analysis of the EU and national legal framework under which banks are stopped from granting undocumented migrants access to a bank account. This is followed by an international human rights law perspective, from which it becomes clear that a payment account is of great importance to fully enjoy human rights and participate in modern-day society, to which undocumented migrants are entitled to just as much as legal residents are. So while there is no legal obligation for banks to open a bank account for all undocumented migrants, we argue that

¹ Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Ministerie van Veiligheid en Justitie, ‘Schattingen illegaal in Nederland verblijvende vreemdelingen 2012-2013’.

² Article 11 *Wwft* (the Dutch law on Prevention of Money Laundering and Financing of Terrorism) and article 47b of the *Algemene wet inzake rijksbelastingen*.



governments can be said to have a moral obligation to facilitate financial inclusion in some form, if not through a bank account.

For this report we will mainly focus on the legal framework. We did not conduct field research or contact any other party other than our client. This means this report should be used as an overview of the relevant legal framework. The report can serve other parties in the future when there is a wish to start a legal procedure, to start a lobby campaign for more financial inclusion of migrant workers, even if they are 'undocumented' or to develop specific policy for this group of migrants.



2. ACCESS TO A PAYMENT ACCOUNT - AN EU AND NATIONAL LAW PERSPECTIVE

The right of access to a payment account has been acknowledged by the European Union in Directive 2014/92, a directive aimed to promote the functioning of the EU internal market for consumers. In this section we discuss to what extent this directive could give a legal ground for undocumented migrants to access a payment account. Like any other person, citizen and non-citizen alike, undocumented migrants do fall under the definition of ‘consumers’ and hence fall within the scope of this directive.³

The directive aims to serve consumer protection on the one hand while at the same time it aims to prevent money laundering. It does so by referring to the Anti-money Laundering Directive (Directive 2015/849, AMLD4). This directive has the objective to facilitate an economic system where there are sufficient safeguards with regard to preventing money laundering or terrorist financing. Some of these safeguards form a barrier for undocumented migrants to open a payment account. This can bring undocumented migrants in a unique situation since member states have to comply with both directives. The result is that an undocumented migrant can be a ‘consumer’ within the context of the first directive but still unable to open a payment account since he or she cannot meet the requirements of the second directive. He or she is then, as matter of speaking, ‘stuck in the middle’ of both directives, competing legal norms are at play. In this section will discuss the most relevant provisions of both directives and will forth review how these directives are implemented in Dutch law.

For this section it is of importance to divide the undocumented migrants into two groups for reasons we will discuss below:

1. Migrants *with* a valid passport from their country of origin, but *without* any documents regarding their residence status in the Netherlands and therefore without legal residence and thus commonly called ‘undocumented’
2. Migrants *without* any form of identity documents (including an expired passport of the country of origin) or documents regarding residence status in the Netherlands and therefore ‘undocumented’

³ Article 1(1), Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257 (hereafter: Directive 2014/92/EU).



2.1. EU Payment Accounts Directive 2014/92 and Anti-Money Laundering Directive 2015/849

The Payment Accounts Directive 2014/92 (PAD) constitutes the right of access to a payment account for consumers within the EU. This directive has, in brief, the objective to achieve a uniform set of rules that promote financial mobility for consumers within EU borders so they can benefit from the functional internal market.⁴ The directive is based on three pillars: the first is to facilitate the transparency and comparability of fees related to payment accounts, the second is the possibility of switching payment accounts and the third consists the right of access to payment accounts with basic features for consumers.⁵ We will focus on the last, third pillar since the other two mainly focus on improving the functioning of the EU internal market for EU citizens.

With regard of access to a payment account the directive targets three different groups of consumers. These groups can be found in article 16(2) of the PAD, which cites:

Member States shall ensure that [1] consumers legally resident in the Union, including consumers with no fixed address and [2] asylum seekers, and [3] consumers who are not granted a residence permit but whose expulsion is impossible for legal or factual reasons, have the right to open and use a payment account with basic features with credit institutions located in their territory [...].

Undocumented migrants could be identified as the third group mentioned in article 16 of the PAD. Therefor they have to fall within the scope is of the wording ‘*whose expulsion is impossible for legal or factual reasons*’. To find out who falls within this scope the Returns Directive can help. It is a directive that gives member states common standards on procedures how they should act when they want to return an undocumented migrant to their home country.⁶ For undocumented migrants the ‘non-refoulement principle’ can be of importance. In brief this principle aims to protect undocumented migrants from being returned to a country in which they would be in likely danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion. However, it addresses “forced” migrants and not “voluntary” migrants.⁷ For us this would mean that only migrants who fled for unsafe conditions in their home country fall in this category. In our opinion ‘*whose expulsion is impossible for legal or factual reasons*’ is therefore quite limited. However, it is forbidden to expel a stateless person so that person falls within the scope of the article.

⁴ Recital 9, Directive 2014/92/EU.

⁵ Recital 6, Directive 2014/92/EU.

⁶ Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348.

⁷ ‘Note on migration and the principle of non-refoulement ICRC, 2018’, International Review of the Red Cross, p. 1



Next to the right of access to a payment account there are some extra conditions that have to be mentioned. Article 16 PAD also gives member states the possibility to require new bank customers to show that they have a ‘genuine interest’ in opening such an account on their territory. It is up to member states how they shape their policy on this subject but the directive is explicit that to show ‘genuine interest’ the bank may not require physical attendance.⁸ So for example if an undocumented migrant can prove on paper they work in that specific member state one could argue that they have proven to have a ‘genuine interest’ in opening a payment account. In our opinion this ‘genuine interest’ will be no barrier for undocumented migrants to open a bank account.

However, the directive is more imperatively in article 16(4) PAD where it refers to Directive 2005/60/EC (current Directive 2015/849, known as the AMLD4). Once a bank foresees that opening a payment account would form an infringement of the provisions of the AMLD4 it ‘shall’ refuse the application. As mentioned earlier the AMLD4 aims to prevent the use of the financial system for the purposes of money laundering or terrorist financing. In order to achieve this article 8 AMLD4 obliges member states to enforce banks to have policies, controls and procedures in place to mitigate the risk on money laundering. These mechanisms shall include at least: “the development of internal policies, controls and procedures, including model risk management practices, *customer due diligence*, reporting, record-keeping, internal control, compliance management including, where appropriate with regard to the size and nature of the business, the appointment of a compliance officer at management level, and employee screening;”⁹

The mechanism of *consumer due diligence* is most relevant for undocumented migrants. From our clients we’ve learned that some migrants are afraid to provide banks their personal information, which results in banks not being able to carry out consumer due diligence. In this respect, article 11(a)(e) of the AMLD4 obliges banks to apply customer due diligence for every new business relationship or when there is any doubt on previously obtained customer information data. This is known as the *know your customer* or *know your client* principle which indicates that banks should know who they are dealing with before opening a payment account.¹⁰

To comply with the directive the customer due diligence shall at least consist of the criteria found in article 13(1) of the AMLD4:

⁸ Recital 37, Directive 2014/92/EU.

⁹ Article 8(4), Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L 141.

¹⁰ See: <https://wftvragenbank.nl>, consulted on 10 June 2019



(a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;¹¹

(d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the obliged entity's knowledge of the customer, the business and risk profile, including where necessary the source of funds and ensuring that the documents, data or information held are kept up-to-date.

Although banks have to apply this due diligence they have some leeway provided by the second paragraph of article 13 of the AMLD4 in which it is stated that banks may determine the extent of customer due diligence on a risk-sensitive basis. To make a determination as such banks 'shall' take into account the variables set out in Annex I of the directive:

ANNEX I

The following is a non-exhaustive list of risk variables that obliged entities shall consider when determining to what extent to apply customer due diligence measures in accordance with Article 13(3):

- (i) the purpose of an account or relationship;*
- (ii) the level of assets to be deposited by a customer or the size of transactions undertaken;*
- (iii) the regularity or duration of the business relationship.*

This leeway given by annex I is only to what extent they have to apply the customer due diligence. Some requirements can not be ignored. Below are the most important topics of the directive.

A. Identification

Article 14 paragraph 1 of the AMLD4 obliges, in line with article 13, banks to verify the identity of the customer before establishing a business relationship or carry out any transaction. When undocumented migrants have a valid passport the identification should not be a hurdle per se. However, not all undocumented migrants have valid id documents.

¹¹ In the next section we will discuss what documentation applies as a *reliable and independent source*.



B. Customer due diligence

In addition, on the basis of paragraph 4 of article 14 it is mandatory that as a bank is not able to comply with the customer due diligence it should not establish a business relationship. The article shows that identification is a hard criterion for applying for a payment account.

C. Simplified due diligence

In some cases a simplified due diligence is allowed. Articles 15 to 17 give banks this option when a business relationship presents a lower degree of risk. Annex II of the AMLD4 provides that a lower risk exist when the customer is resident in member states, third countries having effective AML/CFT systems, and third countries identified by credible sources as having a low level of corruption or other criminal activity.

For example, a Filipino national who is a domestic worker in the Netherlands and has a valid Philippine passport falls under the simplified due diligence test, since the Philippines is member of APG, a group of Asia/Pacific countries that have been subject to assessment of the implementation of anti-money laundering and counter-terrorist financing (AML/CFT) measures by the World Bank.¹²

This would mean that non-returnable migrants who are able to identify themselves and originally come from a AML/CFT certified country could be subject to simplified due diligence. The ones who cannot identify themselves do on the other hand not fall within this scope. This is because an id-document is necessary to prove you are from an AML/CFT certified country.

D. Enhanced due diligence

The directive indicates that 'cash-intensive' businesses have to be subject to an enhanced due diligence. This because cash intensive businesses are more prone to be subjected to money laundering. It so would be favorable to receive salary electronically in order to avoid being subjected to enhanced due diligence.

E. Misuse of the AMLD4

Noteworthy is that the PAD foresaw in recital 34 of the **PAD** misuse of the AMLD4 by banks and states that this directive shall not be used to reject commercially less attractive consumers. It even emphasized that states should guarantee that consumers who intend to open a payment account are not discriminated against on basis of their nationality. This could be an argument to use if a bank refuses opening a payment

¹² See: [https://www.fatf-gafi.org/publications/?hf=10&b=0&q=philippines&s=desc\(fatf_releasedate\)](https://www.fatf-gafi.org/publications/?hf=10&b=0&q=philippines&s=desc(fatf_releasedate)).



account on basis of arguments that are vague and maybe are used to discourage undocumented migrants to open a payment account!

Furthermore, it is important to mention that it is prohibited on basis of article 41(2) of the AMLD4 to use personal information for any other purposes than to combat money laundering or terrorist financing. Undocumented migrants who are afraid the information will be used to expel them are protected by this article. It is however not clear how this article will be used in the daily practises of banks.

Why would banks comply with this directive?

Would a bank breach national provisions transposing the AMLD4, member states have to ensure that they can be held liable for the breach (article 58 AMLD4). Customer due diligence is one of those breaches that when ‘serious, repeated or systematic’ could/should lead to a sanction.¹³ That these sanctions form a real threat for banks is proven by the recent fine the Dutch bank ING received of 775 million euro for their failing anti-money laundering policy.¹⁴

To conclude, it is up to the member states to find a balance between the PAD and the AMLD4. These directives are no counterparts but have to be seen as representatives of different interests. As the PAD could form a ground for undocumented migrants to have a right to open a payment account with basic features, the AMLD4 limits this right by the hard criteria that, to open a payment account, one has to be able to identify themselves in order to prevent money laundering. However if someone could identify himself and the bank uses vague arguments to refuse opening a payment account you could refer to recital 34 of the Payment Accounts Directive and say it is prohibited to reject commercially less attractive customers and they may not discriminate one on basis of nationality.

2.2. Wet op Financieel Toezicht (Wft) and Wet ter voorkoming van witwassen en financieren van terrorisme (Wwft)

Most of the provisions we have discussed in the section on the EU directives have been implemented in Dutch law. We will now discuss these Dutch provisions. In the Netherlands the PAD is implemented in the Financial Supervision Act (Wft). Paragraph 4.3.1.8 of the Wft covers the right of access to a payment account with basic features for consumers. The scope of this paragraph can be found in article 4:71f sub 2 of the Wft which states:

¹³ Article 59, Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD4) [2015] OJ L 141.

¹⁴ Koen Haegens, ‘Hoogste boete ooit voor ING: winst bank ging boven controle op witwassen’, de Volkskrant 4 september 2018. Via: <https://www.volkskrant.nl/nieuws-achtergrond/hogste-boete-ooit-voor-ing-winst-bank-ging-boven-controle-op-witwassen~ba845cd1/>



Voor de toepassing van deze paragraaf wordt onder consumenten die rechtmatig in de Europese Unie verblijven mede verstaan consumenten die in de Europese Unie verblijven en die geen vast adres hebben dan wel in afwachting zijn van de beslissing op een asielaanvraag of die om wettelijke of feitelijke redenen niet kunnen worden uitgezet.

Our translation of this clause reads:

“To fall within the scope of this paragraph consumers who lawfully reside in the European Union also include consumers who reside in the European Union and who do not have a permanent address or who are awaiting the decision on an asylum application or whose expulsion is impossible for legal or factual reasons.”

As mentioned in the previous section article 16(2) of the PAD could form the basis for the right for access to a payment account for undocumented migrant workers with the words ‘*whose expulsion is impossible for legal or factual reasons*’ which translates directly in ‘*die om wettelijke of feitelijke redenen niet kunnen worden uitgezet*’. Remarkable though is, the first sentence of article 16(2) of the PAD compared with the first sentence of article 4:71f(2) of the Wft, as some differences can be noted:

16 (2) PAD: “Member States shall ensure that consumers legally resident in the Union, including consumers with no fixed address, [..]”

4:71f (2) Wft “To fall within the scope of this paragraph consumers who lawfully reside in the European Union include also consumers who reside in the European Union and who do not have a permanent address [..]”

In our opinion these wordings could be interpreted differently. Where the PAD speaks of consumers who are *legally resident* in the Union and have no fixed address the Wft speaks of consumers who *reside* in the European Union and have no fixed address. This would mean that the Wft has a broader scope than the PAD since the Wft does not require consumers to be legally resident within the European Union. Although the explanatory document with the Wft states that article 4:47f Wft only applies to consumers who are legally resident in the EU the explanatory document cannot be qualified as “law” and is therefore not legally binding.¹⁵

¹⁵ *Kamerstukken II*, 34 480, nr. 6, p. 4



The scope of the Dutch “*whose expulsion is impossible for legal or factual reasons*” is again similar to the directive. This group of people “*whose expulsion is impossible for legal or factual reasons*” do not have a valid residence permit but still have the right for access to a payment account. To be included as a consumer you have to be in one of the categories of article 8 (f-m) *Vreemdelingenwet 2000*.¹⁶ The categories are: people who are awaiting the decision on their residence application, people who have filed objection to this procedure, people who cannot be expelled because of medical reasons.

Yet, identification is still a hard criterion. Here the Wwft (Wet ter voorkoming van witwassen en financieren van terrorisme) comes into play. Article 4:71g(1) of the Wft refers to his act, as article 16(4) of the PAD refers to the AMLD4. The Wwft pursues the same goals as the AMLD4. Article 3 of the Wwft obliges banks to apply customer due diligence. In order to comply with the due diligence a bank has to get information on: the *identity of the customer* (2a), the purpose of the payment account (2c) and it has to be a continuous process of monitoring of the risk level of the customer (2d). This is similar to article 13 of the AMLD4.

To verify the identity article 11(1) of the Wwft states that the customer has to provide the bank documents or information from a reliable source to verify their identity. What documents can be used can be found in article 4(1) of the *Uitvoeringsregeling Wet ter voorkoming van witwassen en financieren van terrorisme*. One of these documents can be used to verify the identity of a new customer:

- a. *a valid passport;*
- b. *a valid Dutch ID;*
- c. *a valid ID issued by an authorised authority from another Member State including a photo and the name of the concerning person.*
- d. *a valid Dutch drivers licence;*
- e. *a valid drivers licence issued by an authorised authority from another Member State including a photo and the name of the concerning person;*
- f. *travel documents for refugees and aliens;*
- g. *alien documents, issued on basis of the Vreemdelingenwet 2000.*

¹⁶ *Kamerstukken II*, 34 480, nr. 6, p. 4



On basis of paragraph 5 of article 3 of the Wwft a bank has to apply customer due diligence at least every time a new account is opened or when the bank does not fully trust the information it is provided by the new customer. This assessment is made in the same way the AMLD4 directive prescribes it. Article 5 of the Wwft constitutes that it is prohibited to open a payment account without the customer due diligence and that if none the less a bank would open a payment account it is obliged to terminate the account. The article does not state how banks should terminate the account.

N.B. similar to article 41(2) of the AMLD4 it is prohibited for entities to use information acquired to comply with the Wwft for other purposes than the Wwft itself. This provision is found in article 46 of the *Uitvoeringswet Algemene verordening gegevensbescherming* (UAVG).

The reason banks will also ask new customers to provide their Burgerservicenummer (social security number) is that they are obliged to do so on ground of article 47b of the *Algemene wet inzake rijksbelastingen*. Banks are obliged to keep record of the payment accounts and provide the tax department information on the payment accounts. These records have to include a Burgerservicenummer (article 53(3) *Algemene wet inzake rijksbelastingen*). In order to get a Burgerservicenummer one has to be registered with the municipality of his or her home address. As soon as you are registered in the Basisregistratie Personen you will receive a Burgerservicenummer. Every person who intends to stay longer than 4 months in the Netherlands has to register at the Basisregistratie Personen. To register one has to have a valid residence permit.¹⁷ [dit haal ik uit de wet en de site van de overheid, ik neem aan dat dit klopt want als je in lijn met artikel 8 van de vreemdelingenwet hier komt wordt je ook geregistreerd]

To conclude, the Wft has a broader scope than the PAD. It includes consumers irrespective of their legal status. However, the Wwft, the *Algemene wet inzake rijksbelastingen* and the Basisregistratie Personen are strict. They require that new bank customers identify themselves with a valid document, provide their Burgerservicenummer (BSN) and linked the BSN provide their home address. For some undocumented migrants these requirements will form a unsurmountable barrier to access a bank account. In the next section we investigate the normative approach to having a bank account. Possibly, while some migrants may not have a *right* to open a bank account, government bodies are still obliged to *facilitate* some form of banking by undocumented migrants.

¹⁷<https://www.rijksoverheid.nl/onderwerpen/privacy-en-persoonsgegevens/vraag-en-antwoord/hoe-kom-ik-aan-een-burgerservicenummer-bsn>



3. ACCESS TO A PAYMENT ACCOUNT - AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

In international human rights law there is no explicit human right to a payment account. However, it could be argued that having access to a payment account is *facilitatory*, or even a *prerequisite*, to several fundamental human rights standards. Recipient of the 2006 Nobel Peace Prize and founder of a microfinance institution in Bangladesh Muhammad Yunus, has been advocating that everyone has the right to financial inclusion and that this is an obligation governments need to fulfil.¹⁸ Moreover, Oksan Bayulgen has argued that when people are financially excluded, they are basically excluded from realizing their full potential.¹⁹ As will be shown below, the notion of realizing your full potential can be linked to several human rights standards to which undocumented migrants are entitled just as much as legal residents are.

Another source underlining the importance of financial inclusion of migrants is the 2018 *Global Compact for Safe, Orderly and Regular Migration*. While it is a non-legally binding document, it has important political effects. Signatory states have agreed to provide access to and develop banking solutions and financial instruments for migrants, such as payment accounts, that permit direct deposits by employers, savings accounts, loans and credits in cooperation with the banking sector, by at the same time ensuring that measures to combat illicit financial flows and money laundering do not impede migrant remittances through undue, excessive or discriminatory policies.²⁰

In line with this, already in 2001, some of the largest consumer banks in the Netherlands²¹ recognized their social responsibility to offer as many people as possible access to financial services. They drafted the *Convenant Basisbankrekening*. This was pursuant to the efforts of banks to fully meet their responsibilities to respect human rights and human dignity across their operations.²² The purpose of the covenant is to provide access to a payment account for those in the Dutch society who, for whatever reason, did not yet have access to a payment account. While this Covenant is mainly focused on providing a payment account to homeless people, it shows that banks recognize the general importance of having a payment account.

¹⁸ Nobel Lecture by Muhammad Yunus, 10 December 2006, via: <https://www.nobelprize.org/prizes/peace/2006/yunus/26090-muhammad-yunus-nobel-lecture-2006-2/>

¹⁹ Oksan Bayulgen, 'Giving Credit Where Credit Is Due: Can Access to Credit Be Justified as a New Economic Right?', *Journal of Human Rights*, 12:4, p. 505.

²⁰ *Global Compact for Safe, Orderly and Regular Migration*, 11 July 2018, Objective 20, p. 27-28.

²¹ These banks included ABN AMRO, ING Bank, Rabobank, SNS Bank and Triodos Bank.

²² See for example: ABN AMRO Human Rights Report 2018 and Human Rights Report 2018 ING Groep NV.



However, such efforts by banks to provide for basic financial services come with a great deal of controversy. In 2007, Bank of America for instance announced a pilot program offering credit cards to individuals who lack a social security number, many of whom are undocumented immigrants. Supporters argued that this program simply provided financial services to underserved groups who are integral members of the communities in which they live and in which the banks operate. Critics however, maintained that the banks were ‘rewarding’ or even ‘aiding and abetting’ the illegal behaviour of immigrants who entered or remained in the country without authorization.²³

In this section, the fundamental human rights standards for the enjoyment of which a payment account is essential are set out. They are to be found in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). First, we aim to show that the human rights standards enshrined in these treaties apply to undocumented migrants. Secondly, the way in which obligations are to be discharged by states will be explained. Next, the fundamental human rights standards for which we believe a payment account is an essential necessity, will be set out.

N.B.: Everything stated in this paragraph is not (yet) established in policy or case law. The purpose here is to investigate if, and to what extent, having access to a payment account is facilitatory or even a prerequisite to meet several fundamental human rights standards and thus should become government or private sector policy or support the development of case law.

3.1. The applicability of international human rights standards to undocumented migrants

International human rights law is founded on the premise that all persons, by virtue of their humanity, should enjoy all human rights without discrimination. The 1948 Universal Declaration of Human Rights, the cornerstone of human rights law²⁴, recognizes this principle in article 2(1), which applies to ‘everyone’ and thus includes undocumented migrants. Similar non-discrimination principles can be found in the ICCPR²⁵ and the ICESCR.²⁶ The Human Rights Committee, which is a body of independent experts that monitors the implementation of the ICCPR, has explained that ‘the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or

²³ Calvin E. Bellamy, ‘Serving the Under-Served: Banking for Undocumented Immigrants’, Immigration Policy Center, 1.

²⁴ Malcolm N. Shaw, *International Law* (Cambridge University Press, 2017), 219.

²⁵ Articles 2(1) and 26, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²⁶ Article 2(2), International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).



statelessness'²⁷ and that states have the obligation 'to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.'²⁸ Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and non-citizens. Only with respect to political rights explicitly guaranteed to citizens, such as the right to vote, and the right to freedom of movement, the Covenant permits states to draw distinctions between citizens and non-citizens.²⁹ On the similar non-discrimination clause present in the ICESCR only one exception is possible: developing countries may determine to what extent they would guarantee the economic rights recognized in the ICESCR.³⁰

The comprehensive human rights framework of the Council of Europe includes two core human rights instruments: the ECHR and the ESC. The ECHR encompasses primarily civil and political rights, whereas the ESC guarantees a range of human rights with respect to everyday essential needs related to employment and working conditions, housing, education, health, medical assistance and social protection. The ECHR is of general application, meaning that its rights and freedoms apply to everyone within the jurisdiction of the contracting parties.³¹ Moreover, the European Court of Human Rights stated that the ECHR is intended 'to guarantee not rights which are theoretical or illusory, but rights that are practical and effective'.³² The personal scope of the ESC is more limited. The ESC covers foreigners only insofar as they are Council of Europe nationals lawfully resident or working regularly within the territory of the Council of Europe.³³ However, the European Committee of Social Rights stated that 'the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact'.³⁴ The application of the Charter to migrants in an irregular situation is only justified when excluding them from the scope of the ESC would create an unacceptable situation regarding the enjoyment of the rights enshrined in the Charter, as compared with the situation of nationals or foreigners in a regular situation.³⁵

²⁷ General comment No. 15 (1986) of the HRC on the Position of Aliens under the Covenant, par. 2.

²⁸ General comment No. 31 (2004) of the HRC on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, par. 10.

²⁹ Articles 25 and 12(1), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

³⁰ Article 2(3), International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

³¹ Article 1, European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

³² ECtHR *Airey v Ireland*, 9 October 1979, application No. 6289/73.

³³ Appendix of the European Social Charter, ETS 173, 1.

³⁴ *International Commission of Jurists v. Portugal*, Complaint No. 1/1999, decision on the merits of 9 September 1999, par. 32.

³⁵ *Conference of European Churches (CEC) v. the Netherlands*, complaint No. 90/2013, decision on the merits of 10 November 2014, par. 65.



3.2. The obligations of states under international human rights treaties

Under general international law the manner in which an obligation is supposed to be discharged is not specified. States simply have to do what they commit themselves to, and discretion is left as to the means by which they do so. With human rights treaties this approach will not suffice, because of the broad and comprehensive character of the obligations involved and the responsibility to make them meaningful for individuals.

Therefore, scholars in international human rights law have come up with a tripartite concept of how obligations are to be discharged by states.³⁶ States need to *respect, protect and fulfil* the human rights obligations they commit themselves to. ‘Respect’ first of all, entails the negative obligation of states not to take any measures that result in a violation of a given right. ‘Protect’ second of all, means the positive obligation of states to proactively ensure that persons within their jurisdiction do not suffer from human rights violations. For this states thus need to create an environment in which human rights are enjoyed. Moreover, states can actually become liable for failing to protect, which is called the *indirect horizontal effect*. Lastly, the notion to ‘fulfil’ entails a positive obligation for states to take steps for greater enjoyment of human rights.³⁷

When applying this tripartite concept to the case of payment accounts for undocumented migrants, this does not lead to the conclusion that there is an obligation for banks to provide for payment accounts for undocumented migrants, since banks are not parties to international human rights treaties. However, when Dutch banks do provide a payment account to undocumented migrants in the future, international law could be said to create an obligation for the Netherlands not to stand in the bank’s way of this. Moreover, the Netherlands needs to create an environment in which people do not suffer from human rights violations and proactively needs to take steps for greater enjoyment of human rights in general. At the least, this would also mean the state should not stand in the way of banks facilitating payment accounts to undocumented migrants.

³⁶ This concept was first developed by Henry Shue in *Basic rights: subsistence, affluence and US foreign policy* (Princeton: Princeton University Press, 1980) and has become widely used in the international human rights law context. See also: Frédéric Mégret, ‘Nature of Obligations’ in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (3rd edition, Oxford University Press 2018), 97-99.

³⁷ Frédéric Mégret, ‘Nature of Obligations’ in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law* (3rd edition, Oxford University Press 2018), 97-99.



3.3. Fundamental human rights standards which require a payment account

As is already stated at the beginning of this chapter, there is no codified *human right* to a payment account. However, it could be argued that having access a payment account is facilitatory or even a prerequisite to several fundamental human rights standards. Many undocumented migrant workers do not have access to a payment account, and therefore are excluded from full participation in our society. As we have seen in the previous paragraphs, they nonetheless enjoy human rights encompassed in the ICCPR, the ICESCR, the ECHR and the ESC, and states both have negative and positive obligations under these treaties. In this paragraph, the human rights are laid down for which it is essential to be in the possession of a payment account.

Article 1(1) International Covenant on Civil and Political Rights & International Covenant on Economic, Social and Cultural Rights:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In article 1(1) of both the ICCPR and the ICESCR, the fundamental *right to self-determination* is laid down. By virtue of this right, people are free in determining their political status and in pursuing their economic, social and cultural development. You could argue that to freely pursue your economic development in our modern-day society, a payment account is essential: according to the World Bank, having access to a payment account is a first step towards economic development since a payment account allows people to store money, and send and receive payments. Payment accounts facilitates day-to-day living, but also helps people store their money safely for everything from long-term economic goals to unexpected emergencies.³⁸

Article 11(1) International Covenant on Economic, Social and Cultural Rights:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

³⁸ <https://www.worldbank.org/en/topic/financialinclusion/overview>



The fact that a payment account facilitates day-to-day living, also links to the the *right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*, enshrined in article 11(1) of the ICESCR. According to article 2(1) ICESCR, each state is committed to to take steps to achieve the full realization of the rights enshrined in the ICESCR. In line with the adequate standard of living-principle which lays down a right to basic human needs, the European Committee of Social Rights (ECSR) has stated that migrants in an irregular situation must not be deprived of the protection of their most basic rights enshrined in the ESC ‘when human dignity is at stake’, which includes food, clothing and shelter.³⁹ The ECSR’s decisions are however, non-binding. Of course, it is possible to acquire basic necessities as food, clothing and housing using cash only. However, as financial transactions in the 21st century are increasingly done through electronic payment systems, a payment account enables people to participate in this modern-day reality. They no longer rely on and transact *solely* in cash, or store their cash savings in their homes, which entails an increased risk of theft. Furthermore, payment accounts connect people into the formal financial system, they make day-to-day living easier and allow undocumented migrants to build assets, mitigate shocks related to emergencies, illness or injury. Moreover, the Netherlands (at any level of government), as a signatory to the ICESCR, has the obligation to take steps to ensure the enjoyment of the right to an adequate standard of living, having special regard for economic and technical means in doing so.

Article 1 Protocol 1 to the European Convention on Human Rights:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

Last but not least, access to a bank account can also be linked to the *right to property* under article 1 of Protocol 1 to the ECHR. This thus means that everyone within the Council of Europe is entitled to protection of his property, which also includes money. Without a payment account, undocumented migrants are obliged to keep their money elsewhere. In a modern-day society this is more the exception rather than the rule. One could say that you cannot enjoy your money ‘peacefully’ if there is no safe place to store it.

³⁹ Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, par. 28.



3.4. Conclusion

In conclusion, we argue that without a payment account, something that is *essential* for economic development, the right to an adequate standard of living and the right to property, undocumented migrants remain trapped in a disadvantaged and vulnerable situation. A payment account is a fundamental necessity, without which people are excluded from social and economic life and therefore from full participation in modern-day society, to which they are entitled irrespective of their legal residency rights. Theoretically, it is of course possible to acquire one's basic necessities and economic development using cash only, but this does not enable *full participation in society* like a payment account would do. A payment account is thus not necessarily a 'prerequisite', but it certainly is more than solely 'facilitatory' for the enjoyment of the above mentioned human rights standards. In conclusion, we argue that a payment account is *essential* to pursue one's right to economic development, right to an adequate standard of living and right to property.



4. MOVING FORWARD

As follows from section 2, it is a legal challenge for undocumented migrants to open a payment account, although for many reasons, it is essential to have one: purchasing goods and services, paying bills, receiving wages, withdrawing cash from an ATM, and even traveling by public transport, among other things, are almost impossible without a payment account. Without a payment account, undocumented migrants are thus excluded from social and economic life and therefore from full participation in modern-day society. Moreover, international human rights law also shows that without a payment account, undocumented migrants remain trapped in a disadvantaged and vulnerable position: a payment account is *essential* for one's economic development, one's right to an adequate standard of living and one's right to property.

Unfortunately, international human rights law is limited in what it can do to solve the issue at hand. However, we do believe that the problems experienced by undocumented migrants not having access to payment accounts will grow in the near future, because financial transactions in the 21st century are increasingly done through electronic payment systems.

In our opinion, there is not enough legal basis to achieve the goal of financial inclusion through a bank account through a clear-cut legal procedure. If a decision to refuse an undocumented migrant a payment account handed down by a bank is challenged, the legal procedure would definitely be time-consuming and also costly. In order to bring a complaint to the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, or the European Court of Human Rights, it is necessary to first exhaust all national legal remedies. Though, if funding was provided by a pro bono fund for instance, time and money should not stand in the way of following this road. The limited chances of succeeding are however a risk to keep in mind if this were a road to follow.

We believe that results can be achieved quicker through lobbying at the municipal level. Lobbying at the EU or national level could be an option, challenging the fact that the PAD in combination with AMLD4 insufficiently cover the interests of undocumented migrants in respect of their right of access to a payment account. However, given the current political climate at European and national level in the Netherlands, we would suggest starting at the local level, where the *bed bad brood* is developed as well. From a practical point of view, this can be faster in achieving financial inclusion for undocumented migrants.



5. SUMMARY AND CONCLUSION

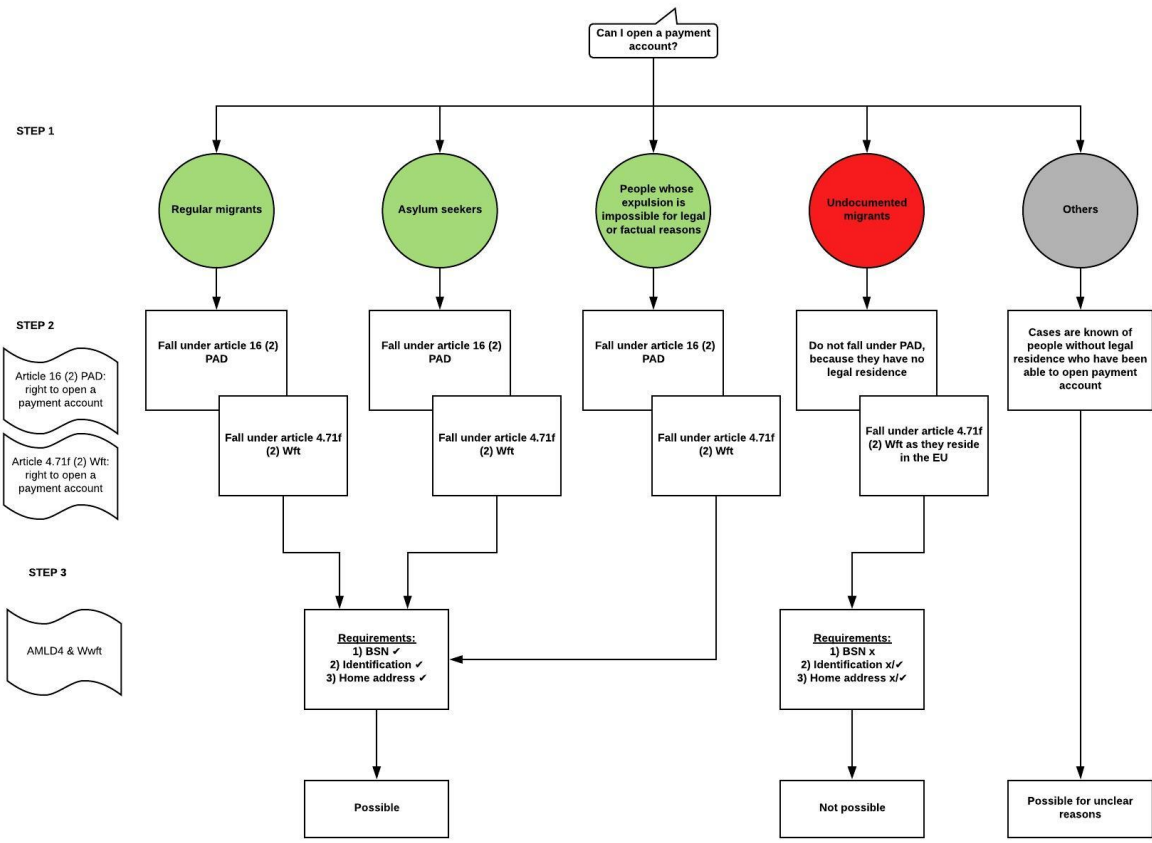
At the request of the FNV Migrant Domestic Workers Network we have addressed the question if, and if so how undocumented migrants in the Netherlands have a right to as well as practical access to a payment account. The right of access to a payment account with basic features is acknowledged by the EU in the *Payment Account Directive* (PAD) and by the Dutch government in the *Wet op financieel toezicht* (Wft). The PAD is implemented in a broader sense in Dutch law. Where the Wft addresses every consumer who *resides* within the European Union, the PAD addresses only *legally resident* consumers. This would suggest Dutch law is more lenient toward undocumented migrants, who are consumers too, and want to open a payment account. However, banks have to comply with the provisions of the *Anti-Money Laundering Directive* and the *Wet ter voorkoming van witwassen en financieren van terrorisme*. These two laws require banks to apply customer due diligence ('know your client') for every new customer they recruit. To comply with the customer due diligence, every new customer has to identify himself before he is able to open a payment account. This is a hard criterion. In addition, new customers will be asked to provide their Burgerservicenummer, because banks have to keep record of the payment accounts they hold for the Dutch tax department.

We also argue that a payment account is *essential* for economic development, the right to an adequate standard of living and the right to property. Hence without one, undocumented migrants remain trapped in a disadvantaged and vulnerable situation. A payment account is a fundamental necessity, without which people are excluded from social and economic life and therefore from full participation in modern-day society, to which they are entitled irrespective of their legal residency rights. Theoretically, it is of course possible to acquire one's basic necessities and economic development using cash only, but this does not enable *full participation in society* like a payment account would do.

In conclusion, the European Union, the Dutch government, and Dutch consumer banks all recognize the importance of a payment account. However, Dutch banks have to comply with anti-money laundering and anti-terrorist financing laws and are therefore holding back on undocumented migrants opening a payment account. This is problematic, since payment accounts are essential for economic development, the right to an adequate standard of living and the right to property. Undocumented migrants are thus excluded from full participation in modern-day society. We believe that this deserves more attention. In our opinion, although it could be possible, this should not be done through a legal procedure, but through lobbying, especially at the municipal level, which could be more cost efficient and have timely results. We hope this report provides useful building blocks for such legal procedures or lobby and a future of financial inclusion for all, including undocumented migrants.



ANNEX I - FLOWCHART 'CAN I OPEN A PAYMENT ACCOUNT?'



**ANNEX II - OVERVIEW OF THE REQUIREMENTS OF DUTCH BANKS TO OPEN A PAYMENT ACCOUNT**

For this research, we have contacted the most commonly used consumer banks in the Netherlands, to find out what the requirements to open a payment account are in practice. The requirements to open a payment account are the following:

Bank	Convenant basisbankrekening	BSN	Identification			Address in NL	Particularities	Undocumented
			Passport	ID	Aliens document			
ING	✓	✓	✓	✓	✓	✓		✗
ABN AMRO	✓	✓	✓	✓	✓	✓		✗
Rabobank	✓	✓	✓	✓	✓	✓		✗
Triodos	✓	✓	✓	✓	✓	✓	Verification deposit	✗
ASN	✓	✓	✓	✓	Not transparant	✓		✗
SNS	✓	✓	✓	✓	✓	✓		✗
Regiobank	✓	✓	✓	✓	Not transparant	✓		✗
Moneyou Go	✗	✓	✓	✓	Not transparant	✓	Verification deposit	✗
Knap	✗	✓	✓	✓	✗	✓	Verification deposit	✗

**ANNEX III - ALTERNATIVE PAYMENT METHODS: PREPAID CREDIT CARDS**

At the moment there are 4 types of prepaid credit cards available in the Netherlands. These cards can be used as alternative payment methods to regular payment accounts since they do not have the same requirements for opening the account. The maximum amount these cards can store a month is 250 euro. However, we would not recommend any of those cards. The ‘N26 Debit card’ and ‘Money2go card’ require a verification deposit through iDeal. To be able to use iDeal you have to have a Dutch payment account so these two cards can not be used as an alternative to a regular payment account. The ‘VIABUY’ card and ‘Cash Passport’ do not require a verification deposit as such but do not provide the best general terms and conditions and next to that have bad reviews in general.

Cardname:	DEBIT N26	VIABUY	Money2Go	Cash Passport
Year contribution	Free	€ 19,90	€ 19,95	Free
Purchase costs	Free	€ 69,90	€ 9,95	€ 15
Deposit costs	Free	Free	2%	€ 10
withdrawal costs	1.7%	2.75%	2.5%	5.75%
Shipping time	1 week	24 hours	2-5 workdays	take away
BKR-test	none	none	none	none