The Role of Private Regulation and Non-State Actors in the enforcement of Collective Labour Agreements. An Example from the Netherlands.

Dr. Herman H. Voogsgeerd

University of Groningen,
The Netherlands.

Abstract

In this contribution the focus is on the involvement of non-state actors in the enforcement of collective labour agreements and the position of the legislator and the courts concerning this involvement. The experience in the Netherlands since 2005 will take the center stage. The legislator in the Netherlands with its neo-corporatist culture generally supports rule-making by another party, especially the 'representative' workers and employers' organizations. The products resulting from this process, collective labour agreements, are therefore important within the Dutch legal system. Neo-corporatist heritage in combination with the popularity of 'outsourcing' of public tasks are reasons for effective enforcement of collective labour agreements by private parties.

1 Introduction

The interaction between the legislator and the courts on the one hand and private organizations such as trade unions, employers' organizations, works councils and other entities representing them is an interesting topic to analyze. Also in enterprise covenants between works councils and an employer working conditions are dealt with. The Netherlands is therefore a so-called 'dual channel country' in which the representatives of the workers' side can be trade unions as well as works councils (Voogsgeerd, 2009).
The Netherlands has longtime been a champion of employment or manpower agencies and the enlargement of the EU with ten new member states in 2004 has also increased the business opportunities of these agencies. In 2005, the social partners in this sector including the umbrella organization of employment agencies in the Netherlands, ABU, established the SNCU, a foundation intended to enforce the collective agreement in the sector, when declared generally applicable. The SNCU has according to its website www.sncu.nl, two main purposes: to provide information concerning the applicable standards and to promote and oversee the enforcement of this agreement. This private enforcement has been effective and its example has been followed in other sectors such as construction and the taxi branch. The main Dutch trade union, the FNV, has its own compliance section since the beginning of 2014. Mala fide employment agencies ended up in insolvency or gave up their activities after enforcement action undertaken by the SNCU.

That the work of SNCU and the FNV is not undertaken without reason is clear. Regularly complaints arise concerning the treatment of employment agency workers from other EU member states in the Netherlands. In 2018 the Spanish embassy in The Hague received 478 complaints of Spanish workers concerning working conditions including housing in the Netherlands. The Spanish government addressed complaints to the Dutch Labour Inspectorate. They also asked a Spanish professor to do research on the matter[i]. Complaints are related to inadequate housing in vacation parks, and also to the lack of proper information on working conditions. The Spanish workers often get a zero hours contract and on that basis come to the Netherlands. The Polish embassy, also, became involved in this issue. The embassy raised the issue of lack of compliance and enforcement with labour standards and the fact that Polish workers get a contract for limited duration does not help in this respect[ii].

The structure of the paper is as follows. In the next chapter an introduction into important theoretical concepts of this chapter will be given within the context of Dutch labour law. In the following chapter, the main part of the research, we will focus on a number of selected court cases in which some unique elements of Dutch labour law will be shown. Courts in the Netherlands have accepted and supported the arguments of the SNCU. I will focus on the following questions:

-Is private enforcement in agreement with the social partners a good alternative for public enforcement?

-Does this private enforcement also have implications for cross-border events, e.g. workers from other member states of the EU working for employment agencies in the Netherlands?

-Is the Dutch legislator and are the Dutch courts consistent in their approach to the representative trade unions and employers' organizations?

2 About autonomous, heteronomous and reflexive labour law

In many national systems of labour law, there is a continuum between autonomous and heteronomous law. Autonomous labour law is composed, without the legislator taking part in this process. Collective labour agreements are an example of autonomous labour

law, especially in case the agreements are related to topics that are not dealt with in legislation. Heteronomous labour law, on the other hand, is created by the legislator and implemented top-down. It is made within the context of the rule of law with input from a democratically elected representation of the people (Loonstra, 1997; Jacobs and Plessen, 1992). Both autonomous and heteronomous labour law influence each other. Topics may start as autonomous labour law and later be put by the legislator in heteronomous labour law. The legislator could even add something or fine-tune existing autonomous labour law. Autonomous labour law will then be embedded in heteronomous labour law. Another possibility is that the legislator imposes minimum norms on all workers and employers and gives their representatives the power to further implement these norms. Heteronomous labour law is further developed by autonomous labour law.

If the distinction between autonomous and heteronomous labour law is used in this way, it will be used without an ideological component. It is handled as a means to analyze the growth and development of labour law. The distinction can also be used a more ideological manner, as a means to bring forward a political view. Politicians may give a higher value to heteronomous labour law, because they are convinced that an issue should not be left to the social partners.

The term reflexivity was coined originally by Günther Teubner and applied in several branches and sub-disciplines of law (Teubner, 1983). The reason for this approach is an increasing awareness of the limits of governmental intervention through substantive public regulation, especially in branches and policy domains of high complexity. 'Reflexivity' is related to reflection by the subjects of law on effects of law in organizations such as companies. In order to have better law with less negative side-effects, other actors than state actors should become involved in the standard-making process. Reflexivity will definitely imply some decentralization away from the central state law-making institutions. How are governments of changing political color reacting in this respect?

Teubner sees reflexive law as a kind of legal structure. "Reflexive law is characterized by a new kind of legal self-restraint. Instead of taking over regulatory responsibility for the outcome of social processes, reflexive law restricts itself to the installation, correction and redefinition of democratic self-regulatory mechanisms" (Teubner, 1983, p. 239).

Collective labour agreements are the result of collective bargaining. The legal regulation of collective bargaining shows according to Teubner strong reflexive capacities, because the regulation is limited to the shaping of the organization of collective bargaining and defining procedures and the competencies of the parties in the bargaining process (Teubner, 1983, p. 276). The government is supposed to facilitate this process by the creation of a machinery of voluntary negotiations or by imposing the collective agreement on the economic sector in the country through a declaration of universal applicability. Governments are not supposed to intervene in the substance of the collective bargaining process in their country. Core conventions of the ILO concerning freedom of association (No. 87) and the Freedom to Organize and Collective Bargaining (No. 98) are very outspoken concerning this point.

The influence of the government in relation to the drafting process of collective labour agreements has remained limited. In 1979 the SER (Dutch Social and Economic Council), an advisory body of the government, did not receive favourably the idea of a legal regulation of the right to participate in the national collective bargaining process. The most interesting instrument for the analysis of the interaction between the legislator and the social partners is a declaration of general applicability of a specific collective labour agreement. This is a substantive legislative act, taken by the minister of Social Affairs and Employment. After this declaration, provisions in collective labour agreements have *erga omnes* force and are considered to be law. This is confirmed by the Dutch Supreme Court in a case from 8 February 2002, Jurisprudentie Arbeidsrecht, 2002/46. The parties to the agreement, however, have to request the Minister to start this procedure. In this respect the Ministry uses a set of rules to test these requests (*Toetsingskader algemeen verbindend verklaren*). The declaration will be valid for maximum two years (article 2, paragraph 2 Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten, Wet AVV). In case of a declaration of universal applicability the collective labour agreement concerned will also be imposed on non-members of the parties. Especially during the stage of the declaration of universal applicability of collective agreements the minister of Social Affairs and Employment has some influence. The Minister can refuse to declare a specific collective labour agreement on three grounds (article 6 Toetsingskader avv). First, the content of the agreement is

contrary to mandatory law. Second, the agreement violates the general (public) interest. Third, the agreement leads to a disproportionate disadvantage or harm to legitimate interests of third parties in or outside the sector concerned. Violation of the general interest has hardly been used as a ground to refuse a declaration, although governments have threatened to do this. Former minister of Finance G. Zalm of the right wing liberal party has pleaded for a refusal in case a certain agreement would impose too high and irresponsible wages in the context of international economic competition (Zalm, 1990). The second centre-right Balkenende government, threatened to withhold universal applicability of provisions in collective agreements which provided for wage-rises. A confrontation with the trade unions followed. In 2004, the government backed off and reached an agreement with the trade unions. The first Rutte government threatened to withhold a declaration of universal applicability to those collective agreements, that lacked a provision on life-long learning and employability (Koot-Van der Putte, 2011).

The *toetsingskader* has been adapted in 2007 to strengthen the main Dutch social partners and to weaken so-called newer 'yellow unions' without sufficient independence. It is made more difficult to get a dispensation from a directly applicable collective agreement. Conflicts concerning the scope of general applicable collective agreements are left to the courts. Also conflicts concerning the representativeness of the main social partners are dealt with by the courts. An example is a decision by the highest administrative court in the Netherlands, de *Afdeling Bestuursrechtspraak van de Raad van State* from 7 September 2011 in which another organization of employment agencies, the NVUB, requests dispensation from a general applicable collective agreement in the manpower sector. This is refused and the NVUB also protests against the general applicability because of lack of representativeness of the parties to the collective agreement in the manpower sector. The representativeness test in the Netherlands is limited to the number of employers being member of the employers' organization and the number of employees being member of the trade union(s). This number has to be an 'important majority' in the sector concerned, and this is self-evident above 60%. Between 55% and 60% might still be an 'important

majority' if there is 'sufficient support' for the agreement within the sector concerned. Below 55% there is not an 'important majority' present, unless there are special circumstances. Developments within the manpower sector are very contentious as will be analysed in the section on private enforcement. The NVUB lost the lawsuit before the Raad van State. It argued against the representativeness of the main parties to the general applicable collective labour agreement and counted also the number of illegal employment agency workers in the sector and therefore arrived at a representativeness number of 48%. According to the Raad van State, illegal workers in the sector may not be counted. Good and stable working conditions are essential and low wages for illegal workers are not welcome. Moreover, the Minister of Social Affairs and Employment, has some discretion in his decision to declare universal application of an agreement (Raad van State, Afdeling Bestuursrechtspraak, 7 September 2011, ECLI:NL:RVS:BR6877).

Declining representativeness is therefore the biggest threat to the system of collective negotiations. It is not certain whether enterprise covenants between one employer and a works council can replace this system. These covenants are becoming popular in the Netherlands the last two to three years. The legislator and also the courts in general, supported the effectivity of collective labour agreements, when declared generally applicable.

3. Examples of the interaction with private regulation in Dutch Labour Law

This paper focuses on the enforcement of generally applicable collective labour agreements in the Netherlands. Before arriving at the enforcement stage let me give some examples of roles of the social partners in other parts of the policy cycle and the role of the legislature and the courts to these actors.

3.1 Private regulation creating and interpreting Labour Law

The extent of the influence the social partners are able to exert on the creation of labour law depends on whether there is (minimum) state legislation in place and whether there is a possibility for the social partners to deviate from state legislation with their own regulations. In this respect the Netherlands has different categories of (labour) law.
'Compulsory labour law' is meant to protect the weaker party, the employee. It is not possible to deviate from this labour law with a mandatory character. From semi-compulsory and non-compulsory law deviations by private regulations is possible. It has to be pointed out at this moment, however, that the increasing influence of EU labour law on Dutch labour law has led to the rise of more labour law with a mandatory character. The provisions on equal treatment and on the protection of employees during transfer of an undertaking in title 7.10 CC are all of mandatory nature. When European labour law does not allow for exceptions, there is simply no room for other labour law than of a mandatory character. This could be explained by the minimum-character of provisions in many EU labour law directives (Houweling and Langedijk, 2011, p. 17). Dutch labour law is still characterized by a large proportion of compulsory law. This is justified by the idea that the worker is legally subordinate to his employer and largely economically dependent on him. Some legal provisions explicitly do not allow a deviation from the provision to the disadvantage of the worker. A deviation by contract to the detriment of the worker will lead to the contract being null and void. On the other hand, a provision more favorable to the worker is legally enforceable in court. Apart from compulsory law, the title on the labour contract in the Dutch Civil Code (Book 7, title 10) also contains semi-compulsory law: legal provisions from which a deviation in an individual case is possible in written form. A third category is non-compulsory law ('aanvullend recht'). Here, a deviation from the legal provision is even possible orally.

The title on the individual labour contract in the Civil Code has been changed considerably in 1953. One of the new elements has been the introduction of so-called '¾ compulsory labour law'. Deviation from legal provisions is possible by either a collective labour agreement or by a decision from a competent administrative body. An example of such a body is the decision by the Minister of Social Affairs and Employment to declare a

provision of a collective agreement or the collective labour agreement as a whole universally binding. The idea behind this change in the CC was that the interests of employees were safeguarded sufficiently by trade unions, which are independent from the employer. Therefore, this union could make agreements of which parts could even be disadvantageous to the workers compared with the existing legal provisions. In this situation of ¾ compulsory law deviation by individual labour contract is impossible. ¾ compulsory law has precedence over semi-compulsory law.

In Dutch law, there is the legal obligation for the employer to pay wages during a period in which there is no work provided and the reason for this situation should come on reasonable grounds to the account of the employer (art. 7:628 par. 1 CC). This duty to pay workers can hardly be contracted out. Only for the first six months of a labour contract parties are allowed to make a different norm more disadvantageous for the worker (art. 7: 628 par. 5 CC). After these six months this semi-compulsory law becomes ¾ compulsory law: only by collective labour agreement a deviation is possible on condition that the work is incidental and not of a clear-cut nature (art. 7:628 par. 7 CC). This example of ¾ compulsory law can be adjudicated in court. The judge may deem a provision in such a collective labour agreement against 'reasonableness and fairness'.

The second important topic in which deviation from legislative provisions by collective labour agreement became possible is the prolongation of fixed-term labour contracts. In art. 7:668a CC the legislator introduced a maximum number of three prolongations of this kind of contracts within a period of 24 months. There are three exceptions to this rule. The chain of fixed-term contracts is broken in case an employee is not at the service of his employer for a continuous period of six months. After this period the same employee can be hired again by the same employer on a fixed-term contract. This right may be used by the employer but may not be misused. Deviation by collective labour agreement is possible with respect to the maximum period (maximum 48 months instead of 24 months) and the maximum frequency with which a temporary labour contract may be prolonged (maximum six instead of maximum three), another example of ¾ compulsory law. This option is limited to placement contracts and for specific functions where the nature of the business asks for this prolongation (art. 7:668, par. 5 CC). Generally, the social partners give more

possibilities to the employers in this respect. Many collective agreements contain such kind of provision. The Dutch legislator did not limit this possibility of deviation.

Concerning the topic of interpreting labour law, the legislator did not give many opportunities for self-regulation in the interpretation of legal criteria and terminology. Neither the social partners nor the parties to a labour contract are allowed to make binding agreements in this respect. Terminology in legislation has an autonomous meaning. It is possible, however, that parties influence the interpretation of legal criteria and terminology through mediation or binding advice.

In the law concerning worker participation self-regulation is, however, being used to give a workable meaning to legislative notions. Many important notions in for example the Law on the Works Council (Wet op de Ondernemingsraad, WOR) relating to the competencies of works councils, are rather vague. The works council has a right to advise (art. 25 WOR) with respect to intended decisions of the management concerning an 'important investment' (sub h) or concerning an important reduction, increase or other change of work of the company (sub d). In order to avoid conflicts hereabout, it is often established in an enterprise covenant with the works council, what at least will be considered as an important investment etc. One can decide for example that an investment of the worth of at least € 10.000,- is to be considered as an important investment in the meaning of art. 25 WOR. Agreements may also be concluded with respect to the point in time at which advice will be asked. Especially for serious reorganizations or consultations for a merger these agreements are made.

The enterprise covenant may also be based on a collective labour agreement. Social partners increasingly allow decentralization of the making of working conditions to the level of the individual firm. In this sense collective labour agreements contain more procedural norms than substantive norms.

3.2 Private regulation enforcing labour law

Even in the enforcement stage of the policy cycle we see the influence of private actors, today.

3.2.1 Enforcing rules: Private foundations *enforcing* private regulation, the generally applicable collective labour agreement on temporary agency employment

The Netherlands has longtime been a champion of temporary employment agencies. The enlargement of the EU in 2004 with ten new member-states has also implied a rise in so-called mala fide manpower agencies, not complying with social regulations. In 2005 the social partners in this sector including the ABU, the umbrella organization of manpower agencies, established the SNCU, a Foundation to enforce generally applicable collective agreements of manpower agencies' sector (Stichting Naleving CAO voor Uitzendkrachten).

This 'collective labour agreement police' or 'cao police' as it is called in everyday language is able, according to its 'statutes' to issue automatic compensation from 5000 to 100.000 euro, even with retroactive force. The focus is on the payment of social security contributions, holiday pay and payment of overtime or irregular time by the employees who work for the manpower agencies.

The founding document of the SNCU is to be found in an annex to the collective labour agreement of the temporary employment sector. Because this collective agreement has been declared universally applicable, the 'statutes' of the foundation are published in the Dutch Official Journal (Staatscourant 2009, nr. 116 of 26 June 2009). The SNCU has two main purposes. First, to inform about the standards derived from the collective agreement and/or other standards concerning working conditions. This function is there for parties who use manpower agencies, the employees and the agencies themselves (art. 3, sub a of the 'statutes'). Second, the promotion and overseeing of the enforcement of the collective labour agreement and the working conditions deriving from this agreement in connection with other legal standards, together with 'relevant institutions' (art. 3, sub b of the 'statutes'). In its plans for the year 2011, SNCU mentions some of these institutions with which it wants to increase cooperation, public as well as private institutions[iii]. Public institutions are the Labour inspectorate (now called Inspectie SZW), the tax authorities and the special squad against social security fraud (SIOD). Private ones are the pension fund in the field of manpower agencies (StiPP), the social fund in the field of manpower agencies

(SFU), the Foundation that is responsible for the setting of technical standards concerning work and labour (Stichting Normering Arbeid) and finally the Technical Office for the Construction industry (Technisch Bureau Bouwnijverheid). Cooperation between the Inspectie SZW and the tax authorities is difficult. The Inspectie SZW is allowed to do examinations on site, that institution focusses on illegal work and social and economic crime. As a regular task they do not control the enforcement of collective labour agreements, nor compliance with the European Agency directive. The Inspectie SZW only steps in these areas if a trade union requests the Inspectie to do so (Tamminga, 2017, p. 168). But this Inspectie hardly has the competence to issue fines.

The private SNCU does have this power as it is mandated by the parties to the collective labour agreement, including the employer side. The 'cao police' has been already quite effective. After on-site visits to some agencies, many of them ended up in a state of insolvency or decided to stop their activities. The work of the SNCU clearly complements the work of other institutions, such as the Inspectie SZW. In the annual report of the (former) Dutch Labour inspectorate for 2010 the Inspectorate admits that only 15% of the imposed fines have been collected in fact. Cooperation between the Inspectorate and the 'cao police' can therefore bring more enforcement in the area of mala fide manpower agencies.

Another element that helped raising the number of complaints of non-Dutch workers was the creation of a bureau with Polish-speaking persons to whom these workers could bring their complaint. The web-site of the SNCU us not only in Dutch, but also in Polish, English, Spanish and Romanian languages.

Many cases concerning the right to impose a fine end in the courtroom. In almost every case the Dutch courts have supported the arguments of the SNCU. Even concerning the amount of compensation in the form of a pre-fixed indemnity and/or the imposition of substantive 'fines' the courts gradually supported the SNCU, especially after a case was decided by the Supreme Court (sub e). A proper enforcement of the collective agreement is qualified as important by the courts (see case a, hereunder). At the time of writing of this article (mid-August 2019) there are 358 court cases in which the SNCU was involved (www.sncu.nl; vonnissen en arresten)[iv]. The following bones of contention regularly return:

1. The competence of a private foundation to do research and demand compensation in the form of a pre-fixed indemnity;
2. Conflicts concerning the applicability of the collective labour agreement concerning the employment agency sector and applicability of another agreement from another sector;
3. Conflicts over the question whether the court should have lowered or mitigated the amount of pre-fixed indemnity and the combination of imposing a compensation and a substantive fine for wages and contributions not paid to employees;
4. Privacy arguments in that employers could not hand over detailed information concerning individual agency workers;
5. Conflicts concerning the representativeness of the ABU involving the decision to declare the collective agreement generally applicable in the country (see for an example Raad van State, 7 September 2011, see chapter 2 above).
6. The additional question whether the directors of the agency are directly and individually liable in addition to the agency itself.

Let us look at 10 court cases in greater detail. One administrative law case is selected (sub h). The important Supreme Court case in Tido Veste is selected (sub f). The other cases deal with the six issues mentioned before.

a. Court of Appeal Arnhem (Leeuwarden), 31 August 2010 (ECLI:NL:GHARN:2010:BN5884).

The first important case in appeal is that from August 2010. SNCU demanded compensation in the form of a fixed amount of 100.000 euros from an employer for not complying with the two generally declared applicable collective labour agreements in the manpower sector. The fixed amount of compensation is due, according to the applicable statutes of the SNCU, in case the employer did not, or did not completely inform the SNCU of working conditions in its premises. The regulations are incorporated in the collective labour agreement. The employer was too late in handing over some of the missing pay slips of some of the workers and that fact in itself triggered the maximum amount of

compensation. The employer protested the applicability of the general applicable collective agreements by questioning the representativeness of the ABU. Moreover, it protested that the collective agreements had some effect after their end date. The appellate court did not accept the arguments of the employer. Controls by SNCU are often only possible ex post after the collective labour agreements concerned came to an end. If SNCU would not be able to control immediately after the end date of the collective agreements, its control competence would, at least partly, become illusory. Compliance and enforceability of the provisions of the collective agreements would in that situation diminish. That the SNCU would not be able to get the fixed amount of compensation after the end date was deemed to be an 'unwelcome' result. This effect is acceptable, according to the court, as long as the freedom of contract is not limited for a long term. Such a limitation, it must be said, could violate article 16 of the Charter of Fundamental Rights of the EU, the freedom to do business.

b. Court of Appeal 's-Hertogenbosch, 29 May 2012, (ECLI:NL:GHSE:2012:BW7262)

This case between SNCU and Daxxa is relevant because of the issue of privacy. Also here the court paid attention to the 'statutes' of SNCU stating the complete and active cooperation an employer has to give to SNCU. Daxxa also tried to contest the representativeness of ABU and therewith also the declaration of general applicability of the collective labour agreement, but this complaint was already turned down by the highest administrative court in The Hague in a decision of 7 December 2011 (see the last part of chapter 2). The court turned down the complaint of Daxxa that privacy issues of the workers were involved as Daxxa did not show any specific violations. According to the statutes the SNCU and its compliance committee CNCU are only competent to ask information within the scope of their duties and not beyond this. Information is sent back to the employer after eight days. Moreover, the CNCU has a duty of secrecy with respect to the information received. So, the court did not find and privacy-related legal problems.

c. Court of Appeal Amsterdam, 18 December 2012 (ECLI:NL:GHAMS:2012: BY9449).

This case between Arbeidsbemiddeling Interpool and SNCU is largely about the combined obligation to pay a pre-fixed amount of indemnity and a substantive fine or penalty. Interpool complained that it only had short-term employment contracts with the agency workers and that the investigation bureau 'Providius', who was asked by SNCU to do specific investigations, only looked at a limited number of pay slips of individual workers. The court decided that the substantive penalty was to be qualified as a fine and it was needed to give an incentive to the employer to comply with the duty to pay the wages and holiday pay required by the generally applicable collective labour agreement.

d. Court of Appeal Arnhem-Leeuwarden, 5 November 2013 (ECLI:NL:GHARL:2013:8306)

This decision is the most critical concerning the rights and competence of SNCU to demand compensation. This court noted that earlier court decisions were contradictory on the issue whether SNCU was able to demand both a pre-fixed amount of indemnity as well as a substantive fine. The statutes of SNCU, annexed to the collective labour agreement, were not extremely clear on this. Article 6, paragraph 1 of this agreement is about the pre-fixed amount of indemnity with a minimum of 5000 euro and a maximum of 100.000 euro. Paragraph 2 of article 6 talks about an additional indemnity to be paid by the employer for damages undergone by SNCU, costs it had to make etc., and the precise amount of which is to be decided by the board of SNCU. This large discretionary freedom of SNCU to decide unilaterally the exact amount to be paid is contrary to the Dutch system of indemnities in private law, according to the court of appeal. Some form of legal control by courts is necessary in this respect. That the relevant collective labour agreement is declared universally applicable cannot change this, there can be no talk of delegation of this freedom to one foundation. There is no legal basis for such a large discretionary power. General applicability of the agreement cannot lead to an additional layer of obligations on top of private law. The SNCU argued that it would lead reputational damage if it could not impose penalties on non-compliant employers. The court asked SNCU to show in greater detail the damage that it suffered.

e. Supreme Court (Hoge Raad), 28 November 2014 (ECLI:NL:HR:2014:3458).

The Dutch Supreme Court has supported private enforcement of collective labour agreements by the SNCU in its decision from November 2014 in the case Tido Veste. The Supreme Court followed the opinion of its Advocate-General Langemeijer. The Advocate-General asked himself whether enforcement of collective labour agreements by civil law was the favoured option in the Netherlands compared to enforcement by penal and/or administrative law. He studied the parliamentary history of the legislative framework with respect to collective labour agreements and the declaration of general applicability of such agreements from 1936 and 1937 and a letter by the Minister and state secretary of Social affairs and Employment from December 2009. Notwithstanding a certain public interest, the conclusion and content of collective labour agreements primarily belongs to the prime responsibility of the concluding parties. The government may facilitate such agreements in order to promote social peace, but the government or minister is not a party to the agreement. Enforcement of such agreements by means of penal law does not exist in the Netherlands. It is therefore implied that supervision on enforcement of such agreements belong to the prime responsibility of these private parties, the government should play a reserved role here. The Supreme Court, subsequently, reiterates the view of the appellate court mentioned sub a, that the end of the term of a generally applicable collective agreement does not imply that the SNCU has no competence anymore to introduce a claim. SNCU is competent to do this, delegation to the SNCU by the parties to the collective agreements and its competence to bring claims to court follow directly from the provisions of the relevant collective labour agreement and related statutes in annex thereof.

f. Court of Appeal The Hague, 17 March 2015, 200.115.112 and 200.104.359-1 (ECLI:NL:GHDHA:2015:615 and 614).

The decision of the Supreme Court (Hoge Raad) was of influence in a subsequent decision of the appellate court in The Hague. This decision is of interest because former agency workers of Polish nationality were involved in packing vegetables, potatoes and fruit. The employment agency Axidus, bound between 2005 and 2007 to the generally applicable collective labour agreement, vehemently protested against the request from SNCU to pay ex post the wages of the workers concerned, including the former Polish workers plus the pre-fixed amount of indemnity. The court in first instance mitigated the compensation to 50.000 euro under the condition that Axidus would ultimately comply with the request for

information from SNCU. In appeal the employment agency particularly protested against the 'private police task' of SNCU, by arguing that Dutch law explicitly reserves research and investigation tasks to the Minister of Social Affairs and Employment (art. 10 Wet AVV). Here, the appellate court refers to the decision of the Supreme Court (sub e). The agency protests that it has to pay the salary the workers concerned did not get additional to the pre-fixed indemnity. The appellate court admits that this indemnity is qualified as a fine according to Dutch private law and it is perfectly possible to claim a fine on top of the part of the salaries not paid, the latter being substantive non-compliance with the obligatory labour conditions. The appellate court raises the amount of the pre-fixed indemnity back to the maximum of 100.000 euro, because Axidus continues to fail to comply with the request from SNCU and the collective labour agreement concerned. An interesting element in this case is the difficulty to pay the Polish workers, as it would be difficult to trace many of these workers. The SNCU admits that this could be a major problem. An alternative claim would then be the payment of additional indemnity or compensation to SNCU.

g. Court of Appeal 's-Hertogenbosch, 22 December 2015, HD 200 143 090-01 (ECLI:NL:GHSHE:2015:5277).

Another case concerning workers from Poland concerns another employment agency not being member of the ABU, Euro Aktief Uitzendbureau B.V., who cooperated with SNCU end of August 2008 by sending to them information concerning thirteen employees posted by Euro Aktief to third parties. Only in April 2010, one year and eight months later, SNCU communicates to Euro Aktief that there is a suspicion that the agency did not comply with the generally applicable collective labour agreement. One suspected problem was related to the calculation of certain costs for housing of the Polish agency workers. The agency argued that the workers agreed in writing to deduct part of their costs of housing prepaid by the agency from their paid leave and leave days of the workers. The Court of Appeal looked to article 35 of the generally applicable collective labour agreement and decided that one of the limitations in this provision was not upheld; that there should be a written version of the alternative labour conditions of these workers in the administration of the agency. Moreover there were other problems, e.g. a too low hourly wage for these agency workers. Therefore, SNCU was entitled to claim payment of the not paid arrears of the wages of the agency workers including a pre-fixed indemnity of 88.688 euro, because the

foundation had to incur costs in order to successfully claim these arrears. Then there is the issue of the individual liability of the directors of the agency. SNCU cannot proof serious blame of the individual directors of Euro Aktief. Only in 2010 the suspicions were communicated to Euro Aktief and in December of that year the definitive amount of the claim of SNCU became known to Euro Aktief. After that day no payments of dividends were made to the individual directors, as there had been before that date. Moreover, Euro Aktief had no official agency activities anymore.

h. Court Limburg (administrative law), 15 August 2016, AWB 15/1614u (ECLI:NL:RBLIM:2016:7316)

One company refused to cooperate after being asked to do so by the SNCU and the SNCU subsequently claimed the pre-fixed amount of indemnity. The company started a legal action before the administrative court. The court in Limburg declined to give a decision, as the SNCU is not an official public body or private legal body, to which public law competences (e.g. the competence to unilaterally decide on the legal position of other legal subjects) have been assigned by legislation. This would only be different, according to the court, if the collective labour agreement at stake creates unilateral legal consequences for third parties, not being party to the collective agreement. This is not the case, as the pre-fixed amount of indemnity will only be binding after a decision of a private law court. Now that the public authorities do neither contribute financially to the activities of the SNCU, nor steer or guide it as regards content, the legal request of the company is turned down.

i. Court Rotterdam, 5 March 2018, C/10/543047/ KG ZA 18-66 (ECLI:NL:RBROT:2018:1443).

This is an injunction asked for by the agency All Round Detacheringen against SNCU and here, again, the importance of the Supreme Court case in Tido Veste (sub e) is shown. Again, an agency protests against the competences of SNCU to do research on compliance with the generally applicable collective labour agreement and to claim indemnity. The view of All Round Detacheringen that only the government is competent to do research is refuted by the case of the Supreme Court. In Dutch legislation (art. 10 of the Law on general applicability of collective labour agreements, Wet AVV) it is stated that the Minister of Social Affairs and Employment (or the labor inspectorate) can do research. But this does

not imply that the government is the only body that has this kind of investigatory competence.

j. Court North Netherlands, 19 July 2016, 4232993 \ CV EXPL 15-4745 (ECLI:NL:RBNNE:2016:3364) and 12 March 2019, 4232993 CV Expl 15-4745 (ECLI:NL:RBNNE:2019:1294).

In this case it is the SNCU who hired an independent controlling organization Providius to confirm lack of compliance with generally applicable collective labour agreements. The SNCU demands payment of wages of the former employees of an employment agency active in the Dutch province of Drenthe. There is a substantive non-compliance of more than 704.000 euros in payments of wages, overwork etc. A pre-fixed indemnity of more than 70.000 euros is also demanded. The employment agencies had, in the meantime, been liquidated, and argued that they were not able to fulfill the request of SNCU. The court of first instance in Assen asks an independent financial expert to answer the question whether the employment agencies were able to pay the requested amounts of money to SNCU.

The financial expert decides that the agencies were at least able to pay partly the amounts requested, but that it is not clear which agency should pay what part. The court in its decision of 12 March 2019 decides that the directors in their personal capacity are now liable for the damages, there is a situation in which payment was deliberately frustrated and that the directors are personally liable for the damage.

3.2.2. The example of the employment agencies sector is followed in other sectors

The example of enforcement in the employment agencies' sector and the general success of the private type of enforcement in the Dutch courts has encouraged actors in other sectors to come with comparable regulations. And also some of these regulations were tested before the courts. An interesting example is the social fund for taxi drivers (Stichting Sociaal fonds taxi, SFT). Before the Court of Appeal in Leeuwarden (Court of Appeal Arnhem-Leeuwarden, 15 July 2014 (ECLI:NL:GHARL:2014:5666) an employer protested against a court case in first instance and disputed the competence of SFT to control and oversee compliance with the general applicable collective labour agreement in the taxi sector. The employer also complained about the everyday increasing fine imposed in

addition to the fixed amount of indemnity. The employer lamented about his position as a small employer, not being able to hold a detailed administration and not able to pay such a large fine. This all would harm the freedom of business of the small corporation. These arguments did not convince the Court of Appeal as the employer is bound to the collective agreement. The issue in this case is whether a fine is imposable in addition to the pre-fixed amount of indemnity, Dutch civil law is against such a combination. The fine is, according to the applicable regulations meant to be an incentive to compliance by the employer within a limited amount of time. It is also meant to compensate immaterial and material damage in accordance with provisions of the Dutch law on collective labour agreements and the damage led by SFT. SFT is required to be more precise concerning that part of the damage. In a subsequent decision of 20 January 2015 (ECLI:NL:GHARL:2015:333) SFT made the damage led more concrete and specific. Apart from the fixed amount of indemnity of 50.000 euros, the employer has to produce a better administration and offer information to SFT.

4 Final conclusion concerning the interaction between the legislator and self-regulation

A stable and peaceful system of industrial relations is an important public interest. Governments of different political colour have different priorities. They can introduce legislation in case they are not happy with the outcome of the collective labour negotiation. A refusal to declare a collective agreement or a provision thereof universally applicable on the other hand, should not be used as a threat. Not only in the first stages of the policy cycle, but also in the field of implementation and enforcement, the role of the social partners has become important. The involvement of non-state actors with the agreement of the social partners in the manpower sector is a great success. It is recently copied in other sectors, e.g. the taxi branche. A large number of vehement legal struggles before courts have followed. Substantive fines of more than 1 million euros have been imposed. The courts in general have upheld the position of the SNCU and its internal statutes. The Dutch

Supreme Court referred to the will of the legislator to leave a large discretion in this respect to the social partners, neo-corporatist traditions therefore indirectly through 'legislative history' are reflected in case law. Private enforcement seems to be more effective than public enforcement. Payment of wage arrears was ordered in the form of compensation even in case the original employees from Central and Eastern European countries already returned in their countries of origin. For the near future one of the main problems will become the decreasing representativeness of the social partners. Decreasing representativeness affects the option of the minister to declare the collective agreement generally binding.

In general, the Dutch legislator is in favour of autonomous labour law, and, in practice, it is consistent in its approach and only occasionally threatens the social partners with the introduction of heteronomous (state-based) labour law. The Dutch legislator supports and facilitates the representative social partners in sectors and the Dutch courts after studying legislative history support these partners even in their self-chosen role of enforcing the generally applicable collective labour agreement. This trend of the last ten to fifteen years is also in line with the tendency to outsource tasks originally done by public actors.

Bibliography

A.R. Houweling and L.J.M. Langedijk. Dwingend recht in het arbeidsovereenkomstenrecht: van confectie naar couture. Arbeidsrechtelijke Annotaties, 2011:1, 9-32.

A.T.J.M. Jacobs and W. Plessen. Deregulering in het arbeidsrecht. Sociaal-Economische Wetgeving 1992/2, p. 83-111.

E. Koot-Van der Putte. Selectief avv van cao's bij ontbreken van afspraken van afspraken over scholing. Tijdschrift Arbeidsrechtpraktijk, 2011/1, 16-25.

C.J. Loonstra. Zelfregulering in het arbeidsrecht. K.F. Haak a.o. (ed.), Recht in bedrijf. Rotterdam, Sanders Instituut, Gouda Quint 1997, 13-31.

www.sncu.nl.

M. Tamminga. De vuist van de vakbond. Een recente geschiedenis. De Bezige bij. 2017.

G. Teubner. Substantive and Reflexive Elements in Modern Law. Law & Society, 1983:17, 239-285.

H.H. Voogsgeerd. Works Councils and Trade Unions, complement or supplement? Recent experiences in dual channel countries: the Netherlands and France. Th. Blanke, E. Rose, H. Voogsgeerd and W. Zondag (eds.). Recasting Worker Involvement? Recent trends in information, consultation and co-determination of worker representatives in a Europeanized Arena, Kluwer, Deventer, 2009, 23-19.

Ines Wagner and Lisa Berntsen. Restricted rights: obstacles in enforcing the labour rights of mobile EU workers in the German and Dutch construction industry. Transfer 2016. Vol. 22(2), 193-206. DOI: 10.1177/1024258916636025.

P. Westerman. Outsourcing the Law: A Philosophical Perspective on Regulation. Edward Elgar Publishing, 2018.

G. Zalm. Paradoxen en taboes in de economische politiek. Lecture, Free University of Amsterdam, 1990.

[i] NRC Handelsblad, Friday 1 March 2019, p. E8. The Spanish academic is prof. Pablo López Calle.
[ii] Interview with the Polish ambassador to the Netherlands. NRC Handelsblad, Monday 1 April 2019, p. 11.
[iii] See www.sncu.nl/NL/speerpunten-sncu-2011.aspx.
[iv] According to the web-site there were the following number of cases between the SNCU and other parties: 2008 (38), 2009 (22), 2010 (22), 2011 (32), 2012 (39), 2013 (33), 2014 (59), 2015 (48), 2016 (25), 2017 (31), 2018 (9 cases, the last one mentioned on the website being from the 25th of September 2018).