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TOPIC 2
LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

CONTRIBUTION FROM THE NETHERLANDS

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INTRODUCTION

In order to be more competitive in the global market, modern enterprises increasingly focus on their core business. They separate the different production and commercial segments, keep strategic activities under their direct control and contract non-strategic activities out to other organizations. To implement this strategy of – what is called - productive decentralization, different types of arrangements can be used. Some of these arrangements, such as transfers, are already defined and regulated by European and national labour law. Other arrangements, such as outsourcing and subcontracting, are covered by the general rules of contract or commercial law, offering no special protection to the workers involved.

At the XVIII World congress of labour and social security law (Paris, 5-8 September 2006), labour lawyers from around the world will address the following issues:

(1) What are the consequences of productive decentralisation for the protection of workers of the affiliated (sister), subsidiary (daughter) or partner enterprise of a principal (parent) company?

(2) How can trade unions deal with the phenomenon of productive decentralisation and which strategies are available to protect workers in a decentralised organizational environment?

The purpose of this contribution is to investigate the different forms of productive decentralization in the Netherlands; to discover how far these arrangements are defined and regulated by Dutch law and to comment on the juridical and social consequences of productive decentralisation at the individual and collective level.

The information presented in this paper stems from different sources: laws and regulations, political debates, literature, case law and other sources such as newspapers and websites of governmental and non-governmental organizations (trade unions and employers-organizations). As some aspects of productive decentralisation are not fully developed yet, we were not able to foresee all juridical implications of certain arrangements. The discussions during the world congress will help us to develop new insights in the forces and weaknesses of labour law in the context of productive decentralisation.

The structure of this contribution corresponds to the different questions from the questionnaire. Information available after 30th November 2006 could not be taken into account.

1. TREND TOWARDS INCREASED PRODUCTIVE DECENTRALISATION

Before examining the different forms of productive decentralization and their impact on individual and collective labour relations, we have to find out if there is a real trend towards increased productive decentralization in the Netherlands. The information in this chapter is basically derived from two recent reports on relocation of business activities from the Netherlands, one of them issued by the Ministry of Economic Affairs, the other by the Netherlands Bureau for Economic Policy Analysis. The information was complemented by newspaper articles and abstracts of parliamentary discussions.

The reports mentioned above are accessible through the internet:

- Ministry of Economic Affairs, *Vision on relocation*. *The nature, extent and effects of relocating business activities*, The Hague: January 2005.[1]
- Netherlands Bureau for Economic Policy Analysis (CPB), *Relocation from the Netherlands*. *Motivations, implications and policies*, The Hague: February 2005.[2]

The relocation of business activities from the Netherlands to foreign countries is not a new phenomenon as the Dutch have a long tradition of international trade and investment. Companies relocate part of their activities abroad to reduce costs and gain access to foreign markets. Meanwhile new activities are started up in the Netherlands, often with a higher added value. The Dutch government takes the view that relocation is not a threat, but part of a dynamic economic process, a view that is sustained by prominent Dutch economists.[3]

[1] The Ministry's report is available in Dutch and in English at www.ez.nl.

[2] The CPB report, written by J. Gorter, P. Tang & M. Toer, is available in Dutch at www.cpb.nl. An English summary is available at www.cpb.nl/eng/pub/document/76/doc76_summary.pdf.

[3] Two documents of the Ministry of Economic Affairs sustain this view: Industrial letter (*Industriebrief. Hart voor de* industrie) and Future of industry (*Toekomst van de industrie. Zes deskundigen aan het woord*), both published

This view was expressed during an annual forum of the OECD in Paris (19 May 2005).[4] In a seminar on globalisation, outsourcing and structural adjustment of Western economies, the Secretary of State for Foreign Trade, Karien Van Gennip, advocated the advantages of outsourcing and globalisation. She presented figures to demonstrate that globalisation is not at the expense of jobs in Europe. Meanwhile thousands of French textile workers demonstrated outside as they feared to lose their jobs if European import restrictions on Chinese textiles were banned. An American trade union leader opposed, claiming that the United States has already lost thousands of jobs due to the globalisation of the American economy.

The Secretary of State suggested a couple of social measures to prevent the negative aspects of globalisation:

- Advocate flexible labour markets
- Strengthen national business climates to attract foreign companies
- Create adequate retraining facilities for employees whose job is relocated
- Improve communication on the effects of globalisation

Dutch politicians and "social partners" (employers' and workers' organizations) demonstrated that they are aware of the need for flexibility to attract new businesses and create new employment. The Flexibility and Security Act, 1998 is an example of this shared view.[5] However, flexibility cannot prevent businesses from relocating activities to foreign countries where labour costs are much lower and new markets can be explored. As long as outsourcing proves to be efficient, companies will continue to locate production and services outside their own organization.

More recently, the Dutch public has been given the impression of massive relocation of business activities to foreign countries. This impression is fuelled by newspaper headlines such as 'Relocation businesses good for Europe', 'One in ten companies goes abroad' or 'Cape town: the new Mecca for call-centres'.[6] A journalist from the Financial Daily suggested recently that companies threaten to relocate their business activities to put pressure on national employees to accept lower labour standards.[7] This is not illegal in itself but it is certainly not fruitful for the relations between personnel and management.

Following ongoing rumours on mass relocation, a Dutch MP asked the Minister of Economic Affairs in June 2004 whether it was true that 30 to 40% of Dutch companies were actively relocating their production capacity abroad. Did the Minister know about concrete plans of financial institutions and other big multinationals to outsource or offshore part of their business activities?[8] The Minister answered that the available macro-economic figures did not support this picture. He confirmed that offshoring is part of the normal economic process and does not present a real threat to the economy, as long as the Dutch business climate is attractive and flexible enough for foreign companies to locate into the Netherlands. Unfortunately,

inThe Hague in 2004.

[4] Het Financieele Dagblad 4 May 2005. Van Gennip's speech 'Fuelling the future: security, stability, development' is available at http://www.oecd.org/dataoecd/55/31/34901585.pdf.

[5] Law of 14 May 1998, *Stb.* (Government Gazette) 1998, 300 and 741.Text available in Dutch at www.overheid.nl, see also www.overheid.nl/guest.

[6] Financial Daily (*Het Financieele Dagblad*) 8 March 2005, 1 February 2005 and 14 September 2004.

[7] Financial Daily 8 June 2005.

[8] Questions by parliamentarian Douma (PvdA) about outsourcing and offshoring, sent to the Minister and Secretary of State of Economic Affairs on the 18th June 2004.

entrepreneurs are experiencing a decline in the business climate, which provoke an increase in the number of companies that relocate activities outside the Netherlands.[9]

The lack of precise data urged the Ministry of Economic Affairs to commission further investigations into the phenomenon of relocation. As a result of these investigations, the Ministry published its 'Vision on relocation' in January 2005 (see first reference above). The Netherlands Bureau of Economic Policy Analysis issued its own publication 'Relocation in the Netherlands' in February 2005 (see second reference above). The reports illuminate that there is indeed a trend towards increased productive decentralization. The consequences of this trend for employees working in the Netherlands are not very clear however.

Before focussing on the legal aspects of relocation, we will present the main results of the investigations.

- There is no evidence of mass relocation of activities abroad by companies based in the Netherlands.[10] However, the number of companies and sectors involved in relocation has increased constantly over the past 10 years.[11]
- Outsourcing is spreading from big companies to smaller ones, from industry to the service sector, from low value work to the medium level.
- Companies relocate production and/or service facilities abroad to benefit from cost differences and to gain access to foreign markets.[12]
- Relocation is often managed by the company itself (58%). Only 19% of the companies choose outsourcing to a third party as the best solution.[13]
- Relocation of business activities is not a significant determining factor in employment trends in the Netherlands, as only 1 to 1.5% of all job losses in the past few years can directly be attributed to relocation.[14]
- In 45% of all cases, relocation concerns low-skilled production. However, the relocation of higher-skilled production is on the increase. Companies involved in relocation are likely to transfer ICT-services (16%), sales & marketing (16%), and research & development (8%).[15]
- Dutch companies are strongly orientated towards European Union countries: 52% of companies that relocated activities did so to Central and Eastern Europe, and 42% to Western and Southern Europe. China (16%) and India (11%) are increasingly becoming relocation destinations.[16]

Conclusion: there is a trend towards productive decentralization, or at least a trend to investigate the possibilities of outsourcing by major Dutch companies. The recent decision of Ahold to outsource an important part of its IT-activities to partner companies fits this evolution.[17] Countries such as India are popular destinations, as they combine low wages with a highly educated workforce.

[9] Ministry of Economic Affairs 2005, p. 32.
[10] Ministry of Economic Affairs 2005, p. 30.
[11] Idem, p. 21.
[12] Idem, p. 10. See also CPB 2005, p. 9.
[13] Idem, p. 4.
[14] Idem, p. 30. See also CPB 2005, p. 2.
[15] This means that 16% of the companies that are involved in productive decentralisation relocate ICT activities. For sales and marketing this is 18%, for R&D 8%.
[16] Ministry of Economic Affairs 2005, p. 22.
[17] Financial Daily 15 november 2005.

1a. Current forms of productive decentralisation

Relocation can be organised in different ways as illustrated in the following schedule of the OECD:

	Domestic	Abroad
Outsourced to third party	National outsourcing (outsourcing) I	International outsourcing (also called offshore outsourcing or outsourced offshoring) II
In own management	National investments (insourcing) III	Direct foreign investments (also called offshoring or inhouse offshoring) IV

Relocation of business activities has two dimensions: geographical location and juridical property, offering four different combinations. A company can contract-out business activities to third parties based in the Netherlands or abroad (I and II), or it can invest in national or foreign branches kept under its own control (IIII and IV). The first strategy is called outsourcing. The available data shows that foreign investment is more popular among Dutch companies than outsourcing: 58% compared to19% of the companies involved. Outsourcing is considered to be more risky.[18] A combination of both is chosen by 23% of the companies.

Some 200 Dutch companies, most of them multinationals, are involved in offshore outsourcing to India. Indian companies not only take over routine administrative work and computer programming, but also engage in financial and professional services such as bookkeeping, auditing, engineering, R&D, software development, medical analysis and design of technical systems.[19] The available data show that business process outsourcing – outsourcing of complete business processes – is not very popular among Dutch companies.[20]

In sectors with good labour conditions (e.g. banking, insurance, chemical and technical industries) employees in facility services are generally covered by the same – expensive - collective bargaining agreement as other employees. In most cases, contracting out these services will result in considerable cost reductions. Anita de Jong, partner at Lovells business law firm in Amsterdam confirms that employees of specialised service providers, such as Cendris, Océ Facility Services or Xerox Business Services, receive 20% less wages than their in-house colleagues.[21]

[18] A brochure of the Ministry of Economic Affairs, issued in May 2005, sums up the different ways of doing business abroad (*Starten met international ondernemen*, p. 46).
[19] R. van Koert, Toekomst van 'Nederland kennisland' in India?, at www.infoworld.nl, 25.10.2005.
[20] www.infoworld.nl.
[21] Anita de Jong in an interview with Jan Kloeze, 2005.

1b. Cases of Dutch companies involved in productive decentralisation

Productive decentralisation is increasingly popular among Dutch companies, as the following cases illustrate. The information presented in this section is taken from major Dutch newspapers. We did not check with the companies if and when the announced operation would be effective. In the report 'Vision on relocation' the Ministry of Economic Affairs warns that announced relocations are not always realised.[22]

In May 2005, ING bank announced its plans to outsource certain facilities, such as administrative processing, post and IT. The president of the board of directors informed the Financial Daily that the company had investigated the advantages of outsourcing in an attempt to control costs. The issue was raised by the trade union fearing that thousands of jobs in Belgium and the Netherlands would be lost as a result of this operation.[23]

Another major Dutch bank, ABN AMRO, plans to outsource 2,300 IT jobs by the end of 2005 in a continuing effort to cut costs. In recent layoffs, already 1,500 IT workers lost their jobs. An ABN AMRO spokesman confirmed that the bank is negotiating several outsourcing contracts and that some employees will be transferred to partner companies. ABN AMRO employs 97,000 workers in 3,000 branches around the world. In an effort to prevent the relocation of jobs to India, the Dutch trade union federation FNV proposed wage moderation in the Netherlands.

In June 2005, the Newspaper of the North reported on the loss of 20 out of 500 jobs as part of a re-organization at the Dutch division of Honeywell in Emmen. The factory in Emmen produces throttle valves for central heating boilers. The reorganization started in 2002 with the removal of production lines to the Czech Republic, as a result of which dozens of temporary production workers lost their jobs. The jobs that are now at stake involve managerial personnel with fixed contracts.[24]

In August 2005, Dutch Royal Airlines (or KLM) entered into negotiations with foreign companies to outsource its Facility Services (FS) division.[25] The division employs 350 persons and covers a range of activities, such as the direction of real estate, cleaning, catering, office equipment and postal services. As these activities are not strategic and do not require specific expertise, the board of directors of KLM plans to sell them to a partner company. This will save an estimated € 29 to €43 million in five year time. The operation is a consequence of the takeover by Air France and part of a € 650 million structural cost reduction. Outsourcing fits in the KLM strategy to focus on core activities (passengers, freight and technical maintenance). The company decided not to invest in training and education of the FS-personnel. The news caused great disturbance among KLM personnel. The works council did not succeed in negotiating other outsourcing scenarios with the board of directors. It agrees on selling FS under certain conditions, but criticizes the calculations put forward by the board of directors to demonstrate that relocating results in cost reduction.

Also in August 2005, publisher VNU announced that it will outsource part of its activities in the marketing information branch to low-wage countries such as India.[26]

[22] Ministry of Economic Affairs 2005, p. 26-27.
[23] Financial Daily (*Het Financieele Dagblad*) 3 May 2005.
[24] Noordelijke Dagblad Combinatie/Dagblad van het Noorden 1 June 2005.
[25] Financial Daily 18 August 2005.
[26] Financial Daily 11 August 2005.

According to the financial director, 1500 jobs will be transferred in the coming 4 years, which is about 7% of the existing personnel. Although the financial consequences of the proposed measures are not available yet, investors have already reacted enthusiastically to the news.

There are also examples of foreign companies successfully investing in the Netherlands. One of them is the Chinese telecom-operator Huawei, who started activities in Amsterdam following an agreement with Telfort for the development of new technology in telecommunications. The Chinese expect to create at least a hundred jobs in the Netherlands. In July 2005 the company signed an agreement with the Dutch telecom-operator KPN to build a telecom-network. Other Chinese companies investing in the Netherlands are Haier (distribution of household equipment), TCL (TV sets) and Lenovo (computers).

As production is relocated abroad, the Netherlands is advocating itself more and more as "distribution country". Two strongholds of the Dutch distribution network are the Port of Rotterdam (employing 57.943 people in 2004) and the Flower Auction of Aalsmeer (employing 1.991 people in 2003), where millions of products and goods from all over the world are handled every day.[27] Distribution requires a flexible, but at the same time motivated and experienced workforce.

In conclusion we can say that a growing number of Dutch companies are interested in relocating production and services to countries with lower labour costs, higher tax advantages and qualified personnel. At the same time foreign companies are expanding their activities towards the Netherlands. Strategic business activities and activities that require specific expertise or fluency in Dutch often remain in the Netherlands. Companies perceive outsourcing and offshoring as an opportunity to reduce costs and explore new markets.

1c. Impact of productive decentralisation on individual labour relations

In contrast with the liberal attitude of the Dutch government, the Dutch public seems more concerned about the negative consequences of relocation: loss of jobs, growing uncertainty about work and income, longer working hours, more pressure to except flexible working hours and employment contracts for a limited duration, more pressure on wages and other labour conditions, more stress etc. Because of this threat, the relocation of business activities to foreign countries has become a topic in the Dutch media. Some even call it the 'hottest topic of the year'.[28]

In his book 'The contracting organization. A strategic guide to outsourcing', Simon Domberger notes, that in the vast majority of cases, contracting leads to a reduction in manpower requirements for the performance of a function or delivery of a service: 'As a general rule, there are three possible outcomes for staff in the wake of contracting: transfer of the contractor, redeployment by the client organization, or redundancy. Which combination of these is applied in specific circumstances depends on the nature and size of the contracting organization.'[29]

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[27] *See* www.portofrotterdam.com and www.aalsmeer.com.

[28] Moderator Jean-Marc Vittori, during the OECD workshop on Globalisation, outsourcing and structural adjustment, held in Paris on 3 May 2005, in which the Dutch Minister for Foreign Trade defended further globalisation (see section 1).

[29] S. Domberger, *The contracting organization. A strategic guide to outsourcing*, Oxford University Press 1998, p. 135 and 136.

The impact of productive decentralisation depends on a variety of factors, such as the size of the company, the nature of the operation, the kind of activity, the number of employees involved, their bargaining position, government policies, and the balance of powers between board of directors, shareholders and employees. In general, domestic relocation seems less worrisome for Dutch employees than international relocation, as the Netherlands is only a small country, where employees can easily travel from one part of the country to another.

In the case of collective dismissal of employees working in the Netherlands, social plans, severance payments and social security benefits will soften the effects of dismissal for the individual employee. However they cannot prevent businesses from relocating to low-wage countries or people from becoming unemployed in the Netherlands.[30] The threat of relocation to low-wage countries can put pressure on certain groups of workers to accept lower wages or longer working hours. Low-skilled production workers seem most likely to lose their jobs, although there are no figures to sustain this view.[31]

People who are likely to lose their jobs as a result of productive decentralisation need enough time to improve their knowledge and skills and look for new employment opportunities. Therefore, reorientation, outplacement and training should start as soon as possible. Information through regular communication and participation is equally important. Timely information on restructuring, contracting and outsourcing can prevent uncertainty among staff members, resulting in resistance and industrial trouble. As Domberger puts it: 'One persistent complaint by staff concerns the lack of proper communication regarding the process itself, how it will affect individuals, and what options might be available to them.'[32]

1d. Impact of productive decentralisation on collective labour relations

In theory, the relocation of production units to foreign countries has a negative impact on collective labour relations in terms of union membership and representation. However, we do not have sufficient data to support this view. According to the European Foundation for the Improvement of Living and Working Conditions, the trend in union density is downward across Europe. In the Netherlands, density declined by five percentage points. The overall membership of Dutch trade unions rose by 7.2% in the period 1993-2003, but this upward trend slowed after 1998. In absolute figures, the increase in membership is relatively small, as the Netherlands is a small country with low density of union membership (approximately between 20-29%).[33]

Trade unions may find it difficult to respond adequately to the trend of productive decentralisation, as most of them are used to operate in a national context. Attracting new members is not an easy task in times of ongoing individualisation. To respond to international developments, trade unions should become more global themselves: investing in new members, exploring new opportunities to protect workers rights, expanding international cooperation, etc. International cooperation between trade

[30] *Compare* François Gaudu, 'Deregulation and labour law', in: J-P Laviec, M. Horiuchi & K. Sugeno, *Work in the global economy*, Geneva: IILS 2004, p. 57.
[31] Netherlands Bureau for Economic Policy Analysis 2005, p. 43.
[32] Domberger 1998, p. 137.
[33] *See* http://www.eiro.eurofound.eu.int/2004/03/update/tn0403105u.html.

unions seems indispensable to make sure that companies respect the principles of decent work whatever their location.

There is however a dilemma: how can trade unions defend different and sometimes opposite interests at the same time? The interests of existing members in fixed employment are not always the same as the interest of new members in flexible working arrangements; the interests of Dutch employees are not the same as the interests of East-European, Chinese or Indian workers employed by the same company. In the long run it seems important for trade unions to look beyond these differences and focus on their core business, which is the protection of workers' rights and the promotion of decent work for all.

To deal with offshore outsourcing, companies need technical and management skills to control the organizational implications of their projects and to work in a networked company. They also need behavioural skills to deal with intercultural differences and to work in teams. It is argued that works councils and trade unions need the same skills to anticipate company developments and improve international co-operation.[34] This opinion is reflected by the Dutch trade union confederation FNV in a recent discussion paper on outsourcing and offshoring.[35] For FNV, outsourcing and offshoring is only acceptable when foreign contractors and sub-contractors respect the principle of decent work towards their workers.[36] Distance, language barriers and cultural differences make it difficult to control compliance with international labour standards and codes of conduct by foreign affiliates, subsidiaries and/or partner-organizations. The FNV therefore favours personal contacts between employees' representatives from the Netherlands and host countries in order to improve decent labour conditions.

2. GROUPS OF COMPANIES AND UNITY OF ENTERPRISES

The Dutch use the word "group" or "concern" to indicate a financial and economic entity composed of a principal company (or mother company) and a number of affiliate and/or subsidiary companies (sister and/or daughter companies) operating under its central guidance.. Since the Second World War, the number of companies operating in a group has increased steadily. The main advantage of this structure is probably the limited liability: entrepreneurial risk can be spread over different companies, which means that a negative result in one of the companies does not necessarily affect the position of other companies in the group.[37] Apart from the advantage of limited liability, there are other strategic, economic, fiscal and organizational motives to engage in a group, such as the opportunity to become more influential, scale advantages (e.g. by the establishment of a joint R&D, marketing, sales or personnel department), and the opportunity to build up a professional staff, employable at different locations.

Although a group of companies constitutes an economic unity, in legal terms each part of the group remains independent. As a result, (legal) acts of the daughter can not be attributed to the mother company, even when she holds 100% of the shares.[38]

[34] Gerhard Rohde (UNI Europe) at a MOOS conference held in Paris on 10 February 2005.
[35] See section 7 on the position of Dutch trade unions vis-à-vis productive decentralization.
[36] FNV Discussion paper, October 2005, pages 6 and 7.
[37] *See* C.M.E.P. van Lent, *Internationale intra-concernmobiliteit*, Deventer: Kluwer 2000, p. 293.
[38] Van Lent 2000, p. 321.

Rights and obligations of a daughter or sister company therefore do not pass on to other companies belonging to the same group. The combination of economic unity and legal plurality is a typical, but at the same time complicating, feature of groups of companies.[39]

For individual employees, the complex structure and continuous restructuring of groups of enterprises can make it difficult to identify their employer.[40] If not one, but two or three different companies exercise the authority to give instructions, the criterion of subordination is no longer decisive.[41] Some Dutch authors recommend that companies operating in a group should be treated as a single company for the purposes of labour law. So far however, Dutch law does not provide a legal basis for such an idea. In case of a conflict, District Court judges have to weigh all the relevant facts and circumstances to determine the identity of the legal employer.

In a case brought before the District Court of Utrecht, the judge considered that, although the worker was employed by the French affiliate from the 1st of April 2003, the Dutch company remained his formal employer. This was shown by the payment of wages, the signing of a new employment contract between the employee and the Dutch company at the request of the group to which both companies belonged, the fact that the employee was covered by Dutch social security provisions and was subjected to Dutch income taxes. The director of the French affiliate therefore couldn't legally terminate the employment contract.[42]

Working for a group of companies requires dynamism and flexibility, as employees have to move regularly between companies, functions and countries. Notwithstanding these requirements, individual employment law does *not* contain specific provisions on the relationship between an employee and a group of companies. The employment relationship with a group of companies is treated the same way as the employment relationship with a single company.[43] This means that only one company is responsible for the observance of labour laws and regulations, even when the employee is working for different companies at the same time or during his/her professional career.

Although affiliated and subsidiary companies are legally independent from the mother company, decisions taken by the mother often affect the position of affiliates/subsidiaries and their employees. In case of conflicting interests, the interest of the mother company prevails.

This is illustrated in the Dutch BATCO-case.[44] In 1990, BAT Netherlands decided to close down its factory in the Netherlands (employing 225 workers) and concentrate the entire production of cigarettes in Brussels. BAT Netherlands did not take this decision alone, as it was a 100% daughter of the British-American Tobacco Company Ltd. (BATCO) and part of the BAT Industrial Group. In agreement with Article 25 of the Dutch Works Councils Act (WCA), the works council of BAT Netherlands was given the opportunity to tender advice. In the interest of the Dutch

[39] Van Lent 2000, p. 321.
[40] Van Lent 2000, p. 338.
[41] Van Lent 2000, p. 316.
[42] District Court Utrecht 29 december 2004, *JAR* (Jurisprudentie Arbeidsrecht) 2005/44.
[43] Van Lent 2000, p. 279 and 285.
[44] Commercial Chamber of the Court of Amsterdam 28 November 1991, *NJ* (Nederlandse Jurisprudentie) 1992, 201 (*Batco II*).

employees, it proposed to transfer the production from Brussels to Amsterdam. The management of BAT Netherlands refused, because this option did not fit in the strategy of BAT Industrial Group. The Works Council lodged an appeal with the Commercial Chamber of the Court of Appeal in Amsterdam (see Art. 26 WCA), but lost the case. The Commercial Chamber ruled that BAT Netherlands, as part of a group of companies, could not take decisions that were not supported by BAT Industrial Group. Later case law confirmed that the fact that a company is part of a bigger company plays an important, but not always decisive, role in the decision-making process, and that the interests of the employees should be given fair consideration.[45]

The Works Councils Acts (WCA) contains some provisions to improve workers' participation in companies associated in a group. These provisions will be discussed in section 7.b. Apart from this, the Dutch Civil Code gives employees of a group of companies some influence in the appointment of the Board of Commissioners, provided the mother company is Dutch (Art. 2:153/263 CC).

In the *Konmar*-case, the Supreme Court emphasized that the identification of companies (considering them as one company for legal purposes) can not be based on the single fact that the mother company holds 100% of the shares of the daughter company.[46] Liability of the mother company is only conceivable if she also has a major influence in her daughters' policies, and knew (or ought to have known) that creditors of the daughter were harmed by her decision.[47]

Case law points out that district court judges are more likely to impose liability on other partners of the group than the Supreme Court. In a number of these cases, employees of daughter companies successfully claimed compensation from the mother company for the termination of their employment contract. These cases had in common that the mother company had complete control over the daughter and the acts of the mother could be considered as wrongful acts towards the employee(s) of the daughter company.[48] But even at the district level, success in not guaranteed, because of the absence of a solid legal basis.

3. TRANSFER OF UNDERTAKING AND OTHER MODIFICATIONS IN THE LEGAL SITUATION OF AN UNDERTAKING OR PARTS THEREOF

Introduction

Legal transfers and mergers of undertakings are interesting strategies from the economic and financial point of view as they offer companies the opportunity to expand, improve profitability and reduce costs. The social consequences of such a strategy can be either positive or negative. Positive when the transfer or merger creates new employment and leads to improved working conditions. Negative when jobs are reduced and shareholders interests prevail over the interest of employees.

Some 40 years ago, the European Community came up with legislation to safeguard the rights of employees in the event of a change of employer. This was necessary

[45] Van Lent 2000, p. 292.
[46] Supreme Court 13 December 1996, *RvdW* (Rechtspraak van de Week) 1997, 3.
[47] *See* Supreme Court 25 September 1981, *NJ* 1982, 443 (*Osby*) in which case the liability of the mother company was based on wrongful act (Art. 6:161 CC).
[48] Van Lent 2000, p. 332-337.

because of the differences between national legislations and the international character of merger operations after the introduction of the common market. [49]

The first Council Directive on transfer of undertakings was enacted on 14 February 1977.[50] To implement this directive, the Dutch legislator inserted a new section into the Dutch Civil Code (nowadays Art. 7: 662 – 666 CC) and two new articles into collective labour laws.[51] The first directive did not define the key concept of 'transfer of undertaking', which led to considerable case law at national and European level. In 1998 the text was amended by Directive 98/50/EG and a couple of years later it was re-codified, resulting in Council Directive 2001/23/EG of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.[52] We will refer to this last directive as the Transfers Directive or simply the directive. In 2002 the Dutch legislation was brought in conformity with the directive.[53] The Dutch rules on transfer of undertakings will be discussed below.

Where necessary we will refer to the following literature (only available in Dutch). The contributions of Beltzer 2000 and Jellinghaus 2003 contain a summary in English.

- P.W. van Stralen, Behoud van rechten van werknemers bij overgang van ondernemingen (Maintenance of employees' rights in the event of transfer of undertakings) , Deventer: Kluwer 1999.
- R.M. Beltzer, Overgang van onderneming (Transfer of undertaking), Deventer: Kluwer 2000.
- R.M. Beltzer, Overgang van ondernemingen (Transfer of undertaking), Den Haag: Sdu Uitgevers 2003.
- S.F.H. Jellinghaus, Harmonisatie van arbeidsvoorwaarden in het bijzonder na een fusie of overname (Harmonisation of labour conditions in particular after a merger or acquisition), Deventer: Kluwer 2003

3a. Definition

The initial Council Directive defined the terms 'transferor', 'transferee' and 'representatives of the employees', but did not give a definition of 'transfer'. In the following years, several cases were brought before the Court of Justice, giving it the opportunity to clarify the concept of transfer. The present Transfers Directive gives the following definition: 'there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary' (Art. 1(b)).

Dutch law gives a nearly identical definition in Art. 7:662 (2) a CC: 'the transfer, as a result of an agreement, a merger or a split up, of an economic entity which retains its identity'. To determine if the conditions of a transfer are met, all facts and

[49] Van Straalen 1999, p. 8.

[50] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, *Official Journal* L 061, 05/03/1977 P. 0026-0028.

[51] Act of 15 May 1981, *Stb.* 1981, 400.

[52] *Official Journal* L 082, 22/03/2001 p.16-20. Directive 98/50/EG of 29 June 1998 was published in *Official Journal* L 201, 17/07/1998, p. 88.

[53] The Act of 18 April 2002, published in *Stb.* 2002, 215 and 2002, 245 took effect on 1 July 2002.

circumstances of the case should be taken into account.[54] The Transfers Directive itself does not mention the 'split up'; it applies to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger. Article 7:662 (2) b CC defines 'economic entity' as 'a grouping of organised means, intended to pursue an economic activity'. The Dutch Civil Code does not contain a definition of the terms transferor and transferee.

The personal scope of the transfer legislation is left to the competence of the Member States.[55] Art. 2 (1) d of the Transfers Directive defines the concept of employee as 'any person who, in the Member State concerned, is protected as an employee under national employment law'. This means that every member state determines for itself which workers are protected and which workers are not. Differences between national legislation are possible when it comes to directors of enterprises, civil servants and temporary workers. In the Netherlands directors are protected by the transfer legislation as long as they have an employment contract. Civil servants are excluded from the scope of the legislation. In this respect an exception is made for employees working in enterprises controlled by the government (Art. 7:662 (1)).

In a case brought before the Supreme Court, the question arose if under Dutch law, the rights and obligations of a suspended employee also pass on to the transferee. The Court considered that this was not the case, as the employee no longer formed part of the economic unity.[56]

The protection of flexible workers is an important theme in times of increased competition at national and international level.[57] Companies add flexible workers to their fixed workforce to anticipate peaks in production and/or services. In the 1990s the number of flexible workers and flexible working arrangements grew rapidly. As more and more workers felt outside the scope of labour law, employers' organizations and trade unions started negotiations to allow more flexibility in return for improved protection for flexible workers.

As a result of these negotiations the Dutch Parliament passed the Flexibility and Security Act 1998, which came into force on 1 January 1999.[58] This act improved the legal position of on call workers and workers employed through temporary employment agencies. Even so, flexible workers will be the first to lose their jobs in the event of a transfer of undertaking. This is inherent to the flexible nature of their jobs. As long as people choose to work in flexible jobs this is not a problem. Problems arise when genuine employment contracts are replaced by flexible working arrangements leaving workers without protection. A broad personal scope of labour laws and regulations covering different flexible working arrangements is therefore essential in order to offer protection to those workers most in need of it.

In line with these considerations, the Transfers Directive introduced a new Article 2 to ensure that employees with limited working hours, fixed-duration contracts and

[54] Dutch Supreme Court 10 December 2004, *JAR* 2005/14.
[55] For more details on the personal scope of transfer legislation we refer to Van Straalen 1999, p. 13-34, Beltzer 2000, p. 37-47 and Beltzer 2003, p. 13-19.
[56] Dutch Supreme Court, 11 February 2005, *JAR* 2005/67.
[57] The scope of the employment relationship is on the agenda of the International Labour Conference of 1996. A recommendation on the employment relationship would help to clarify the legal position of workers who are left without protection as their (flexible) employment relation is not recognised by national labour law. See on this issue: www.ilo.org, information of the department of social dialogue.
[58] Law of 14 May 1998, *Stb.* 1998, 300 and 741.

temporary employment contracts are not excluded from the scope of the directive. The corresponding Dutch provisions are scattered over different sections of the Code.

Since the coming into force of the Flexibility and Security Act, the Dutch Civil Code contains a legal presumption for people working for remuneration in someone else's service for more than three consecutive months, weekly or at least 20 hours a month (Art. 7:610 CC). When these conditions are met they are supposed to be working on the basis of an employment contract and will be protected by the legislation on transfer of undertaking. In the section on transfer of undertaking (the above mentioned articles 7:662-666 CC) the legislator refers only to employment contract and not to the broader term employment relationship as mentioned in the Transfers Directive. This could mean that small engagements are not protected in the case of a transfer, when the employer denies the existence of an employment contract. Workers with employee-status are protected by the section on equal treatment, even when they work only a few hours or for a limited period. The Dutch Civil Code prohibits the unequal treatment of employees on the basis of the number of working hours or the character (temporary or not) of their employment contract (Art. 7:648 and 649 CC). These provisions also apply in the case of a transfer of undertaking. Part-time work is widespread in the Netherlands, as are employment contracts for a limited duration.[59]

Another widespread phenomenon in the Netherlands is temporary employment.[60] Concerning the subject of transfer of undertakings, the main question here is whether temporary agency workers are protected in the case of a transfer of their agency. The Transfers Directive addresses this situation in Article 2 (2)c. It provides that temporary employment relationships will not be excluded as such from the scope of the Directive. Since the coming into force of the Flexibility and Security Act, the Dutch Civil Code contains a special section on the temporary employment contract. According to Article 7:690 CC the contract between a temping agency and agency-workers is considered to be an employment contract.[61] This means that the rights and obligations arising from a temporary employment contract are transferred to the new agency.

In agreement with the Transfers Directive, the Dutch regulation on transfer of undertaking does not apply to owners of seagoing vessels (Art. 7:666(2) CC). In the Dutch context, this is an important exception as the Dutch seagoing fleet consists of about 800 vessels, employing thousands of workers.[62]

3b. Rules for the protection of workers' rights

The rules for the protection of employees' rights in the event of a transfer of undertaking are laid down in different pieces of legislation:

i. Dutch Civil Code (Articles 7:662-666);

[59] According to the OECD Factbook 2005, 34.5% of the Dutch workforce is engaged in part-time employment, compared to 12.3% for other OECD countries.

[60] **See** the figures presented in section 5b (supply of workers through temporary work agencies).

[61] However, there are some exceptions laid down in the Placement of Personnel by Intermediaries Act, 1998 and the Collective Agreement for Temporary Employees of the Dutch association of temporary work agencies (ABU). The main difference is that the protection of temporary employees gradually improves with the length of their employment; see on this matter question 5b.

[62] This figure was mentioned by the Deputy Director-General Freight Transport and Aviation on 14 September 2004. See: http://www.minvenw.nl.

ii. Collective Labour Agreement Act, Article 14a;

iii. Collective Labour Agreements (Declaration of Universally Binding and Non-binding Status) Act, Article 2a;

iv. Bankruptcy Act, Article 13a;

v. Merger Code 2000.

The most important provisions of these Acts will be discussed below. We will also investigate whether they are in agreement with the Transfers Directive.

i. Dutch Civil Code

In conformity with Article 3 of the Transfers Directive, the Dutch Civil Code prescribes that the employer's rights and obligations arising from an employment contract existing on the date of a transfer shall, by reason of such transfer, be transferred by law to the transferee. It also provides that, for one year after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment existing on the date of the transfer (Art. 7:662 CC). These rules do not apply in relation to employees' rights to occupational pension schemes and savings schemes (Article 7:664 CC).

The rights and obligations arising from an employment contract include explicit promises on salary increases and career moves made before the transfer operation. The employee has to prove that certain promises have been made to him, if these promises are contested by the transferee.

According to the Transfers Directive, an employee cannot waive the rights conferred upon him by the Directive, and these rights cannot be taken away, even with his consent. Once the transfer is implemented, individual rights and obligations can be changed by the transferee if the transferred employee agrees on such a change. In most cases, changes are necessary to harmonize the employment conditions of old and new employees engaged by the transferee. Dutch labour law does not anticipate the situation that employees – for whatever reason – do not want to be employed by the transferee. Unwilling employees are left without protection as their contract ends on the basis of mutual agreement.

The transfer of an undertaking or business does not in itself constitute a valid reason for dismissal by the transferor or the transferee (Art. 7:670(8) CC). This is in agreement with Article 4(1) of the Transfers Directive. Transferred workers can however be dismissed for economic, technical or organizational reasons entailing changes in the workforce. This provision is not implemented in the Dutch Civil Code. In the case of termination for economic, technical or organizational reasons, the stringent Dutch rules on dismissals apply.[63]

The Dutch legal system offers the employer two possibilities to terminate an employment contract without the consent of the employee. In the first place he/she can ask the Centre for Work and Income (an administrative body set up during the second world war) to issue a licence for dismissal. The second way is to request the Court to terminate the employment contract on the grounds of change in circumstances. The Court is free to award a financial compensation to the employee

[63] *See* Antoine T.J.M. Jacobs, Labour law in the Netherlands, The Hague: Kluwer Law International 2004, p. 91 and Chapter 7.

concerned; the Centre for Work and Income does not have this authority. The amount of compensation depends on several factors including the question which party is responsible for the termination of the employment relationship.

Article 7:665 CC states that, if the Court decides to terminate the contract on the basis of Article 7:685 CC because the transfer of the economic entity involves a change in circumstances to the detriment of the employee, the employer is regarded as having been responsible for the termination.[64]

There are two differences between this provision and the corresponding provision in Article 4(2) of the Transfers Directive.[65] The first difference is that Dutch law restricts the provision to termination of employment by the Court overlooking other ways of termination, such as dismissal. This means that employees who do not want to be transferred have to request the Court to terminate their employment contract before the transfer is implemented. The transferor will then be responsible for the termination, which means that he has to pay the amount of severance payment fixed by the Court. In practise this possibility is not used very often, which could mean that employment contracts with unwilling employees are terminated by other means.[66] If an employee does not accept the working conditions of the transferee and does not request the Court to terminate the contract at the correct time, the relationship will end automatically, without period of notice nor severance pay.

Some authors indicate that the Dutch provision is broader than the directive, because a change in working conditions does not have to be 'substantial' as provided by the Transfers Directive.[67] As the Court can only terminate an employment contract for substantial reasons (see the already mentioned Article 7:685 CC) this argument does not seem very convincing.

ii. Collective Labour Agreement Act

Even more important than the rights and obligations arising from an individual employment contract are those arising from collective agreements (collective bargaining agreements and other agreements concluded between the transferor and the works council or trade union). The transferee does not become a party to the collective agreement, but only has to respect the rights and obligations arising from it.

The Collective Labour Agreement Act (CLAA)[68] provides that the transferee has to observe the rights and obligations arising from a collective agreement between the transferor and the employees at the moment of transfer. These rights and obligations end when a new collective agreement comes into force or the transferee is bound by the extension of another collective agreement (Art. 14a CLAA). The transferee also has to apply his own collective bargaining agreement at the basis of Article 14 of the Act. Unlike individual rights and obligations, the transferee is not allowed to change collective rights and obligations when the transfer comes into effect. The interest of the employees by maintaining their labour conditions is considered to be more

[64] Note that the termination of an employment contract by the Court is called "rescission" or "dissolution".
[65] Article 4(2) Transfers Directive states: 'If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'
[66] *See* Jellinghaus 2003, p. 110-111 and 123.
[67] *See* Beltzer 2003, p. 72 and Jellinghaus 2003, p. 121-122.
[68] Act of 24 December 1927, *Stb.* 415 amended by Law of 4 March 2004, *Stb.* 104.

important than the interest of the transferee not to apply different sets of labour conditions to different groups of workers. Clauses that are not in agreement with this rule are void (Art. 12 CLAA). In practise, the right to maintain existing labour conditions is often redeemed.

The question is whether transferred employees are free to choose the most favourable conditions from the collective bargaining agreement of the transferor and the transferee ('cherry picking'). Van Straalen argues that transferred employees can only appeal to labour conditions arising from the collective bargaining agreement of the transferor.[69] Beltzer does not give a clear answer, but warns of the unacceptable consequences of cherry picking.[70] A collective bargaining agreement with standard or maximum conditions can prevent this practise from happening.[71]

Article 3 (3) of the Transfers Directive is implemented in two different acts: the above mentioned provision of the Collective Labour Agreement Act, and the Collective Labour Agreements (Declaration of Universally Binding and Non-binding Status) Act, explained below. The first act applies to rights and obligations arising from collective bargaining agreements (and other collective agreements); the second to the extended provisions of such an agreement.

iii. Collective Labour Agreements (Declaration of Universally Binding and Non-binding Status*) Act*

In the Netherlands, collective bargaining agreements or certain provisions thereof can be extended by the Minister of Social Affairs and Employment, rendering them compulsorily applicable in all enterprises falling within the occupational and territorial scope of the agreement.

By the transfer of undertaking, the rights and obligations arising from extended provisions on labour conditions automatically pass on to the transferee (Art. 2a (1)). These rights and obligations end if:

- the transferee is bound by a new collective bargaining agreement concluded after the date of the transfer; or
- the transferee is bound by an extension of the provisions of a collective bargaining agreement (Art. 2a (2)).

At the end of every extension, the old labour conditions of both the transferor and the transferee regain their force. This means that the transferee has to re-apply the labour conditions arising from the collective bargaining agreement between the transferred workers and the transferor.[72] This situation will continue until the transferred employees accept the labour conditions of their new employer.

The transfer of individual and collective labour rights is illustrated in a case brought before the Court of Amsterdam.[73] Royal Dutch Airlines (or KLM) decided to transfer their catering activities to KLM Catering Services Schiphol (or KCS). The employees performing these services were transferred from KLM to KCS. Before their transfer to KCS the employees were covered by a collective bargaining agreement at enterprise

[69] Van Straalen 1999, p. 251-252.
[70] *See* Beltzer 2003, p. 56-57.
[71] Anita de Jong in an interview with Jan Kloeze, 2005.
[72] *See* in this sense Dutch Supreme Court 10 January 2003*, JAR* 2003/38.
[73] Court of Amsterdam 18 September 1996, *JAR* 1996/228.

level (the KLM Agreement). KCS itself was bound by an extension of the sectoral Catering Agreement. The level of labour conditions of this agreement was considerably lower than the KLM Agreement. The Court judged that the provisions of the KLM Agreement remained applicable as long as the Catering Agreement was not extended. Meanwhile, KCS could negotiate other labour conditions with the transferred employees. As soon as the provisions of the Catering Agreement were extended by Ministerial decision, the provisions of the KLM Agreement were set aside by the binding provisions of the Catering Agreement. After the extension the old KLM conditions –revived, but only for the transferred workers formerly employed by KLM. [74]

iv. Bankruptcy Act

One of the main reasons to adopt a new Transfers Directive in 2001 was to prevent the misuse of insolvency proceedings intended to deprive employees of their rights.[75] The rules on transfer of undertakings are not applicable if the employer has been adjudicated bankrupt and the undertaking forms part of the bankrupt estate (Art. 7:666 (1) CC). They do however apply in the case of a judicial settlement, a pre-bankruptcy stage in which the payment of debts is suspended.[76]

Article 13a of the Bankruptcy Act[77] provides that, if the bankruptcy statement is annulled the ordinary rules on dismissal apply. From the date of the annulment, the employee has 6 months to invoke the nullification of the dismissal. The dismissal will be declared void, because it was given without prior consent of the Centre for Work and Income as required by Dutch labour law.[78] The employer is obliged to pay wages for the period during which the employment contract was not legally terminated.

v. SER-Resolution concerning the Merger Code 2000

In May 1970, the Socio-Economic Council of the Netherlands[79] adopted a resolution providing for a Code of Conduct to be observed during the preparation and implementation of mergers of enterprises. The code was revised several times, until the SER adopted a new resolution concerning the merger code 2000 for the protection of the interests of employees.[80] At this event, the rules concerning public takeover bids were transferred to the Stock Exchange Surveillance Act; the remaining section of the Code remained largely unchanged. With the introduction of the new Merger Code, the SER advised the government to extend the scope of the code of conduct to the non-profit sector, independent professionals and the public sector, but this proposal was rejected. The same happened to the SER proposal to provide a legal basis for the protection of employees. This means that employers' organizations and trade unions comply only voluntarily with the rules laid down in the merger code.

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[74] As discussed by Jellinghaus 2003, p. 135-137.

[75] This purpose is explicitly laid down in Article 5 (4) of the Transfers Directive. The previous Directive did not contain any provisions on the situation of bankruptcy or insolvency.

[76] Jacobs 2004, p. 92.

[77] Law of 30 September 1893, *Stb.* 140 amended by Act of 21 February 2004, *Stb.* 86.

[78] Art. 6 and 9 (1) Extraordinary Decree on Labour Relations, 1945.

[79] The Sociaal-Economische Raad or SER is the main advisory body to the Dutch government and parliament on social and economic issues. An English brochure on the Council is available at www.ser.nl.

[80] This Resolution of 17 March 2000 is referred to as the SER Resolution concerning the Merger Code 2000. It came into effect on 5 September 2001 (*Government Gazette* 11 September 2001) and is available in English at www.ser.nl.

A merger is defined as the direct or indirect acquisition or transfer of the control over an enterprise or part of an enterprise, as well as the formation of a group of enterprises (Art. 1(1) d). The code of conduct shall apply if (a) the merger involves at least one enterprise that is registered in the Netherlands and normally has at least 50 employees; (b) one of the enterprises involved in the merger is a member of a group of enterprises and the total number of workers together employed by those members of the said group that are registered in the Netherlands is at least fifty (Art. 2(1)). The scope of the protective rules can be amplified by collective bargaining agreement. The code of conduct does not apply if all enterprises involved in the merger form part of the same group of enterprises (Art. 2(3)).

The trade unions shall be informed about the contents of any public announcement concerning the preparation or implementation of a merger before such announcement is made (Art. 3(1)). The same notification will be sent to the Secretariat of the SER (Art. 8). The parties to the merger (either legal or non-legal) provide the trade unions with a written explanation of their motives, the company's policy regarding the merger, the expected social, economic and legal implications and the measures to be taken (Art. 4(2)). Partners and trade unions will then share their views and discuss the proposed merger at a moment when the opinion of the trade union is still relevant for the decision to be taken. The opinion of the trade union will be communicated to the works council in order to prepare their advice on the basis of Article 25 of the Works Councils Act. Upon request, the parties provide the trade unions with additional information (Art. 4(5)). The information that a merger is in preparation shall be treated as confidential (Art. 7).

If an entrepreneur wishes to effect a merger by means of a public offer other than on the basis of an agreement or by means of the gradual acquisition of shares or options on the stock exchange, he of she has to observe the procedure set out in Article 4 of the Merger Code (Art. 5 and 6).

The SER appointed an Arbitration Committee to settle disputes concerning the observance of the Merger Code (Art. 9-16). Both parties involved (trade unions and/or partners) can bring a matter before the Committee claiming that the other party failed to comply with the provisions of the Code (Art. 18).The claim contains a description of the circumstances that have given rise to the dispute and the conclusions drawn from them by the claimant (Art. 20). The procedural rules are laid down in Articles 17 to 29 of the Merger Code. If the Arbitration Committee, which comprises five members, considers a complaint to be legitimate, it may issue a public reprimand (Art. 33).

Antoine Jacobs notes that the Merger Code does not operate well in case of a genuine struggle to take over a company: 'Under the pressure of time, vital decisions may be taken as to the future of the enterprise, such as a merger with a third party (…), which do not always make it possible to organize the compulsory information and consultation within due time.[81]

3c. Consultation and information of employees' representatives

The information and consultation of employees' representatives is prescribed by Article 7 of the Transfers Directive. The first section of this article provides that the transferor and transferee must inform the representatives of their respective employees affected by the transfer of the following information:

- the proposed date of the transfer;
- the reasons of the transfer;
- the implications of the transfer, and

[81] Jacobs 2004, p. 171.

- the measures envisaged in relation to the employees.

The transferor must give such information in good time before the transfer is carried out; the transferee must give such information in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

As in most continental European countries, employees are represented by both trade unions and works councils (obligatory in companies with more than 50 employees). In the case of a legal transfer, both institutions have to be informed and consulted.

Trade unions will be informed on the basis of voluntary rules laid down in the *Merger Code 2000* (see 3b (v)). They also have a statutory right to information and consultation in the case of collective dismissals, laid down in the Notification of Collective Dismissals Act, 1976 (NCDA).[82] Under Article 3 NCDA, an employer intending to terminate the employment contract of at least 20 workers within a period of three months is required to give written notification to the Centre for Work and Income (CWI). The notification must contain the reason for the intended collective dismissal, the proposed date of dismissal, the selection criteria, and the number of workers involved, sub-divided according to their function, age and sex (Art. 4). The CWI is only allowed to deal with the employer's application after the lapse of one month (Art. 5). During this period, the employer should explore the possibilities for mitigating the consequences of the collective dismissal and prepare the ground for redeployment of the redundant employees.[83]

The rules for the consulting and informing works councils are laid down in the Works Councils Act (WCA).[84] The obligations of the WCA are directed towards enterprises with at least 50 employees (Art. 2). Employers of small-scale enterprises (employing between 10 and 50 workers) can be requested to set up a staff representation. A staff representation has the same rights of information as a works council, but only limited powers of consultation and co-determination (Art. 35b and c WCA). Multinational enterprises have to establish works councils and a central works council for their subsidiaries in the Netherlands if they fit the criteria of the Act.[85]

According to Article 25 the employer had to consult the Works Council on any economic decision he proposes to make such as (a) the transfer of control of the enterprise or a section thereof (b) the establishment or the take-over of another enterprise, (c) the termination of operations of the enterprise or a major section thereof, (d) significant reduction, expansion or other change in the enterprise's activities, (e) major changes to the organization or to the division of powers within the enterprise; (f) a change of the location of the enterprise's operation, etc. Considering this provision the employees' representatives have to be consulted when the employer intends to outsource certain of its operations.

The employer is also obliged to provide the Works Council in good time with all the information and data reasonably required to perform their work (Art. 31 WCA). Twice a year the employer shall provide the Works Council with general information regarding the activities and the results of the enterprise in the preceding period (Art. 31a). General information on the numbers and different groups of staff working in the

[82] Law of 24 March 1976, *Stb.* 223, amended by Law of 29 November 2001, *Stb.* 625.
[83] Jacobs 2004, p. 111.
[84] Law of 28 January 1971, *Stb.* 54 amended by Law of 14 November 2002, *Stb.* 584.
[85] Jacobs 2004, p. 177.

enterprise and the social policy of the enterprise shall be provided at least once a year (Art. 31b).

Article 7:665a Civil Code gives an additional rule in case there is no works council or staff representation installed. In that case the employer has to inform his employees directly about (a) the projected decision to transfer; (b) the proposed date of the transfer; (c) the reason for the transfer; (d) the legal, economic and social implications of the transfer for the employees, and (e) any measures envisaged in relation to the employees. This provision is in line with Article 7(6) of the Transfers Directive.

In December 2003 the Social and Economic Council discussed whether employee participation should be made more flexible at enterprise level. In an advisory report on amendments to the Works Councils Act, different opinions were presented. The employers' representatives within the SER would like to give employers and works councils the opportunity to enter into agreements that restrict the powers given by law to the works councils. In their view extension of these powers is not required as works councils already have a wide range of powers and facilities. The opinion of the union representatives is quite the opposite. They consider, together with the Crown-appointed members of the SER, that works councils should not be able to abdicate powers. The employees' representatives rather advocate the reinforcement of the right of initiative and the right to prior consultation of works councils.[86]

Under Dutch law there is no legal obligation to negotiate on these topics. One of the main features of Dutch industrial relations is that consultation between employers' and workers' organizations ("social partners") and the government is based on consensus.

4. LEGAL SITUATION OF THE EMPLOYEES OF CONTRACTORS AND OTHER AFFILIATED ENTERPRISES VIS-À-VIS THE PRINCIPAL/PARENT ENTERPRISE

The response to this question will be sent later.

5. LEASE OF WORKERS AND OTHER FORMS OF SUPPLY OF WORKERS

5a. Lease of workers and the legal protection of their rights

Idem

5b. Supply of workers through temporary work agencies

Introduction

Employment through temporary work agencies (TWA) is a widespread phenomenon in the Netherlands. The number of TWA increased rapidly from the 1950s and is still growing. Nowadays, temping agencies provide work to an estimated 650,000 workers a year. The number of daily full-time jobs carried out by temporary workers is

[86] See www.ser.nl/_upload/databank_engels/2003_12.pdf.

estimated at 238,782.[87] More than 7 million people worked as temporary workers in the Netherlands over the last ten years.

The supply of workers through temping agencies is regulated by Articles 7:690 and 691 of the Dutch Civil Code, the Collective agreement for temporary employment, and the Allocation of Employees by Intermediaries Act, 1998. These regulations will be discussed below. They came into force at the 1st of January 1999 and mark an important – and at that time rather progressive – turning point in the thinking about flexible work in the Netherlands. If Dutch enterprises were to remain competitive, they should be able to "hire and fire" more easily (flexibility). At the same time flexible workers should not be deprived from protection by labour law (security) as they are the most vulnerable workers. The Flexibility and Security Act, mentioned before, tried to reconcile both interests.

Since, the relationship between a temporary worker and a TWA is legally recognized as an employment relationship (Art. 7:690 CC). The contract between the TWA and the user company is considered as a contract of services governed by Art. 7:400 et seq. CC as well as by the provisions of the Allocation of Employees by Intermediaries Act (see below). The TWA pays the wages and administers the taxes and social security contributions of the worker, while the user company (the agency's client) exercises factual authority over the worker.

According to the collective agreement mentioned before, a temporary employment contract can be concluded in three different forms (Art. 7 ABU-CAO):

(a) An employment contract with a "posting-clause" for the duration of the posting period. The relationship between the temporary worker and the TWA ends by law at the end of the contract between the TWA and the user company (Art. 7:691(2) CC). The temporary worker can end the contract at any moment without giving notice.

(b) An employment contract for a definite period of time, concluded for a limited period defined in advance by time or by the end of a specific project. The relationship between the temporary worker and the TWA ends by law without further notification as soon as the period or project agreed upon is concluded.

(c) An employment contract for an indefinite period of time.

We will come back to these different forms when discussing the system of progressive protection introduced by the collective agreement for temporary employment (see below).

Before entering into the different regulations on temporary employment, we would like to add that posting or leasing of workers is permitted in all cases and all sectors of economic activity. The former ban on posting in the construction sector was abolished with the introduction of the Allocation of Employees by Intermediaries Act in July 1998. Enterprises in the construction sector are now free to hire temporary workers through TWA whenever they want, except in the event of a strike or lock-out. The employment of a temporary worker is not subject to time limitations.

In July 1998, the licence system for TWA and other intermediaries was abolished. Due to a strong increase in illegal work in recent years, employers' and workers' organizations in the temporary employment sector asked for the development of a voluntary certification system that should be in place by the end of 2005.

[87] Data from ABU 2002 and CBS 2002.

Dutch Civil Code

The temporary employment contract is defined in Article 7:690 CC: 'The temporary employment contract is an employment contract whereby the employee is put at the disposal of a third party by the employer, who is acting in the execution of his profession or enterprise, to perform work under the supervision and direction of this third party by virtue of an order given to the employer.' The relationship between the third party (the user company) and the employer (the TWA) is governed by Articles 7:400 CC et seq. and regulated by the AIEA (see below).

As we have already seen before, the section on temporary workers (Articles 7:690 and 691 CC) was inserted into the Civil Code in January 1999 as a result of the Flexibility and Security Act. This Act provided more flexibility for employers in return for a better legal position for flexible workers. The Act confirmed what was already accepted in case law, namely that the temporary worker has an employment contract with the agency he of she is working for, not with the user company.[88] A temporary worker posted for more than 24 months in the user company is taken into account for the purpose of the Works Councils Act, 1971 (Art. 1(3) WCA). This means that he or she be counted as employees if assessing whether a works council has to be installed and that he or she has the same rights and duties as other employees under the WCA.

Despite the absence of a contractual tie between them, the user company is liable for the damages a temporary worker suffers in the execution of his or her task (Art. 7:658(4) CC and Art. 16 AIEA). The user company should also respect the temporary worker's rights under the Working Conditions Act and the Working Hours Act.[89]

To guarantee the flexible character of the agreement, Article 7:691(1) CC stipulates that successive temporary employment contracts will only be considered an employment contract for an indefinite period of time if the employee has been working for more than 26 weeks with the same TWA. This term could be prolonged by collective agreement. The current ABU-CAO 2004-2009 stipulates that it must take 78 working weeks (the number of hours worked in those weeks is not relevant) before this final phase of protection is reached.

Collective Agreement for temporary employment

On 29th March 2004, the second Collective Agreement for temporary employment, also called ABU-CAO, came into force.[90] The agreement was negotiated between the *Algemene Bond van Uitzendondernemingen* (General League of Temporary Employment Enterprises) or ABU and the three major trade unions (FNV, CNV, and Unie). The ABU organizes approximately 60% of the temporary employment market. Another 5% is organized by the NBBU, the remaining 35% of the market consists of unorganized temporary employment agencies, some of them engaged in illegal practices.

The purpose of the second collective agreement was to simplify the existing system and make it more transparent. It offers more flexibility for user-companies, making it easier for them to adjust the nature and length of the temporary employment to their

[88] *See* for instance Dutch Supreme Court 27 November 1992, *NJ* 1993, 293.
[89] Article 1(1) a 2e Working Conditions Act and Art. 1:1(1) a sub 2e Working Hours Act.
[90] *See* www.abu.nl.

specific needs. In the new system, there are three different phases in which the protection of the temporary worker increases phase by phase.

In *Phase A*, the employment contract between the temporary worker and the TWA will end without further wage obligations at the end of each task. The length of Phase A is set at 78 weeks, thus extending the legally provided term by 52 weeks, which seems a rather long period (Art. 8(1) ABU-CAO). However, after 26 weeks in the same enterprise, the temporary worker will receive the same wages as comparable employees of the user-enterprise (Art. 22 ABU-CAO).

In *Phase B*, parties can agree to a maximum of eight employment contracts for a definite period of time (with a maximum length of two years and intervals of no longer than 13 weeks) before entering the next phase (Art. 8(2) ABU-CAO).[91] If the temporary work finishes during one of these contracts, the TWA is obliged to pay wages till the end of the foreseen period. According to the ABU-CAO, the TWA is committed to look for suitable work. He also has to provide the worker in Phase B with a personal schooling budget to improve his or her labour market position.

In *Phase C*, which is reached after 3.5 years of temporary employment for the same TWA, the worker obtains an employment contract for an indefinite period of time, thus receiving all the benefits of the employment law (Art. 8(3) ABU-CAO).

More details about this system are available on the website of General League of Temporary Employment Enterprises at www.abu.nl.

The phases mentioned here correspond with the different forms of temporary employment contract mentioned in the introduction of this chapter. In Phase A the temporary worker will usually have a temporary employment contract with “posting-clause” (form a). However, the TWA can decide to offer him an employment contract for a definite (form b) or even an indefinite period of time (form c), which is of course a question of supply and demand on the labour market. Entering in Phase B of the above described system, the worker is entitled to an employment contract for a definite period of time (form b), but the TWA can once again decide to offer an employment contract for an indefinite period of time (form c). In the last Phase of protection (Phase C) the TWA has to conclude an employment contract for an indefinite period of time (form c).

Allocation of Employees by Intermediaries Act

The Allocation of Employees by Intermediaries Act, 1998 (AEIA)[92] defines the placement of workers as ‘putting workers at the disposal of a third party, to perform work under the direction and control of this party, other than on the basis of an employment contract, and in return for payment.’ Temporary workers are entitled to the same wages and compensations as other employees working in similar or comparable functions, unless the TWA has its own collective agreement or the collective agreement of the user company contains specific provisions on the payment of temporary workers (Art. 8 AIEA). There are no rules in the case where both exceptions happen at the same time.

[91] When the intervals are longer than 13 weeks but shorter than 26 weeks, Phase B recommences. When the interval is longer than 26 weeks, the temporary worker has to restart in Phase A.
[92] Law of 14 May 1998, *Stb.*1998, 306, amended by Act of 15 April 2003, *Stb.* 2003, 192.

TWAs should refrain from charging fees to workers, or providing services to companies hit by a strike or lock-out (Art. 9 and 10). The agency is obliged to provide the temporary worker with information about occupational qualifications and safety rules (Art. 11).

Article 12 AIEA makes it possible to set out rules for posting activities in one or more business sectors or labour market segments. This includes the possible re-introduction of a license system. Regulation is only possible by Ministerial Decree and should be in the interest of sound labour market relations or the workers involved. This is also true for the introduction of a license system.

In 1970, TWAs were brought under a license system in an attempt to improve the situation of temporary workers and prevent agencies from operating in certain sectors (construction and road-transport). After the abolition of the license system in July 1998, the temporary employment sector experienced an increase in illegal activities, putting the whole sector in a bad light.[93] The turnover of *mala fide* temporary employment enterprises is estimated at 1 billion euros a year, compared to an estimated 4 billion euros in the organized temporary employment business. On its website www.abu.nl, the General League of Temporary Employment Enterprises (ABU) speaks of 210,000 illegal temporary workers, 100,000 of whom are placed by some 6,000 illegally operating agencies. These figures raised questions on the need to re-introduce a license system.

In a reaction to the increase in illegal posting, Dutch parliamentarians discussed the reintroduction of a license system for TWA. In March 2005 they decided to promote a system of voluntary certification with periodic checks on the temporary employment sector as a whole. At the moment of writing (September 2005), employers' and workers' organizations in the sector are developing a register and determining the conditions for certification and checking.

In the summer of 2005, the employers' and workers' organizations in the temporary employment sector signed a collective agreement on law enforcement with the purpose of driving illegal agencies out of the market. They requested the Minister of Social Affairs and Employment to extend the agreement to the sector in general, which means that it will bind enterprises where the employer is not a member of the signatory employers' association (which will often be the case with illegal operators). Even with this juridical instrument in hand it is not easy to tackle the problem of illegal employment, because of the difficulty to obtain the necessary evidence, such as pay slips. It should be noted that the Dutch government intensified its efforts to combat illegal employment with the introduction of administrative fines and increasing checks by the Labour Inspectorate.[94]

The AEIA also regulates the activities of private employment services, such as head-hunters, outplacement offices, and commercial recruitment enterprises. An intermediary provides professional services on behalf of an employer, a jobseeker, or both, helping them to look for employees or employment, aimed at the conclusion of an employment contract or an appointment as civil servant. The intermediary is not allowed to charge the jobseeker for his services and refrains from placing jobseekers in a company affected by a strike or lockout (Art. 3). Further rules for specific categories of job seekers or employers may be set out in a Ministerial Decree (Art.

[93] An investigation into illegal activities in the temporary employment sector (2004) is available in Dutch at: www.ABU.nl.

[94] *See* www.szw.nl. The administrative fine is € 4.000 for individuals and € 8.000 for companies.

4). Since the last amendment of September 2003, these other intermediaries do not need a licence for their activities.

6. FRANCHISING

The information in this chapter is mainly derived from two sources:

- The contribution of Simon van Steenbergen & Gert-Jan Monster, 'The Netherlands', in: Bogaerts, G. & Lohmann U. (eds.), *Commercial agency and distribution agreements. Law and practice in the Member States of the European Union*, The Hague-London-Boston: Kluwer Law International 2000, p. 447-502.
- The website of the Netherlands Franchise Association (NFV) at www.nfv.nl, representing 80% of all franchising organizations in the Netherlands.

6a. General information

The concept of franchising has become a well-known and increasingly popular method of doing business in the Netherlands.[95] The Netherlands Franchise Association (NFV) provides figures on franchising in the food, non-food, services and catering sector for the year 2004. There were 453 franchisors (franchisors with less than three franchisees are not included) with a total number of 19.600 franchise outlets, employing 187.000 staff members (including part-timers).[96] The NFV expects further growth of the use of franchising in the future.

There is no legislation which focuses directly upon franchising, nor is any legislation contemplated in the near future.[97] As the franchise contract is not explicitly regulated under Dutch law, the general rules of contract law apply. This means e.g. that the franchisor should provide future franchisees with full and correct information on the franchise form before entering into an agreement. If not, the contract may be declared null and void on the basis of imperfect consent. Unlike the general rules of contract law, the franchise contract should be in writing and in Dutch as prescribed by the European Code of Ethics of the European Franchising Federation and the NFV.

Franchising is also subject to national competition regulations and fair trading laws. Both parties to a franchise agreement must comply with the tax laws relevant to independent enterprises and to the laws concerning the establishment of a new business, bookkeeping and annual accounts.[98]

In Dutch literature the following definition of franchising is used: 'Franchising is a form of commercial operation between independent undertakers, whereby one party, the franchisor, gives one or more other partners, the franchisee(s), the right to use his trade name or trade mark or other distinguishing features in the sale of products or services. This sale takes place on the basis of an exclusive marketing concept developed by the franchisor. In return, the franchisor receives royalties. The use of

[95] Van Steenbergen & Monster 2000, p. 492.
[96] *See* www.nfv.nl.
[97] Idem, p. 492.
[98] Idem, p. 494.

those rights by the franchisee(s) is supervised by the franchisor in order to ensure uniform presentation to the public and uniform quality of the goods or services.'[99]

The essential elements of a franchise agreement are: collaboration, independency, uniformity and transfer of know-how, training support, selection of franchisees, supervision by the franchisor and payment of royalties in return for the services supplied by the franchisor.[100] The contract should contain provisions on the rights and obligations of the parties; the terms of payment by the franchisee; the duration of the agreement (usually 5 years) and the basis for renewal; the terms upon which the franchisee may sell or transfer the franchised business; the use of the franchisor's distinctive signs, trade name, trade mark, service mark, store sign, logo or other distinguishing identification; and the termination of the agreement.[101]

Under Dutch law, the transferor may communicate prices guidelines which are not binding for the franchisee. However, price fixing is strictly forbidden under EC law.[102]

6b. Legal position of the franchisee

The franchisee is an independent entrepreneur acting in his own name for his own account and risk. He is not authorised to represent the franchisor. If the franchisee is considered to be an employee of the franchisor, the franchisor risks the payment of social security premiums and income tax. This happened in a case brought before the Central Appeals Tribunal (*Centrale Raad van Beroep*), in which the judges decided, that a particular franchisee was subordinated to a very large extent to the franchisor and that the franchise fee was not established as payment for a total franchise contract, but only as payment to obtain the lease of the building.[103] In another case, the Central Appeals Tribunal was not convinced about the equality of the parties to the franchise agreement and qualified their relationship as an employment relationship. As a result of these judgements, most parties to franchise agreements are well aware of the fact that the element of independency (or absence of subordination) should be clearly formulated and put into practice. In the Netherlands, judges will not only consider the terms of the agreement, but also the reality of the facts. There are no recent decisions of civil courts holding that a franchisee was in fact a subordinated agent to a franchisor.

6c. Legal position of the franchisee's employees

As the franchisee is considered an independent entrepreneur, there is no relationship between the franchisee's employees and the franchisor. In theory they are not affected by the termination of a franchising contract. In practice, the termination of the franchising contract will generally result in the termination of their employment. Employees of the franchisee are covered by labour law, which means that the ordinary rules of dismissal are applicable.

[99] Idem, p. 493.
[100] Idem, p. 493-495.
[101] *See* www.nfv.nl.
[102] Idem, p. 498.
[103] Central Appeals Tribunal 15 November 1985, *Rechtspraak Sociale Verzekering* 1986/174.

7. COLLECTIVE ACTION AND COLLECTIVE BARGAINING IN A CONTEXT OF PRODUCTIVE DECENTRALIZATION

7a. Position of Dutch unions

In section 1 we saw that there is a trend towards increased productive decentralization in the Netherlands. As a result of the negative predictions, there is an increasing focus on outsourcing and offshoring on the part of employers' and employees' organizations, politicians and society. Trade unions are pointing out the potential negative consequences for employment and asking for an adequate response from the Dutch government.[104]

In the Netherlands approximately 1.9 million people or 27% of the working population are affiliated to a trade union. Women still account for less than 30 percent of the membership. Young people are showing less interest in trade union membership, which means the unions are ageing.[105] The FNV is the largest trade union confederation with 14 affiliated trade unions jointly representing over 1.2 million members (about 60% of all trade union members). The Christian national trade union confederation (CNV) represents 360.000 members (about 18% of trade union members) divided over 11 affiliated trade unions. The trade union confederation for middle and higher management (MHP) represents 8% members.[106]

In September 2005 the FNV organised a discussion on outsourcing and offshoring. The discussion paper summarizes the main policy headlines:

- In an open economy such as the Dutch one, outsourcing and offshoring are inevitable phenomena.
- From a macro-economic perspective outsourcing and offshoring are advantageous to the Netherlands and host countries. The Netherlands benefits from cheaper products and services, host countries benefit from foreign investment and job creation.
- Outsourcing and offshoring is socially acceptable if the following conditions are met:

  (a) Employers and government should take measures, like training and reorientation facilities, to improve the employability and labour market position of employees in sectors threatened by relocation.

  (b) Before deciding on outsourcing/offshoring companies should apply an efficiency test.

  (c) Companies and government should create new employment and improve entrepreneurship in sectors affected by outsourcing and offshoring.

  (d) In the case of a reorganization or closing down of an enterprise, employers' and workers' organizations should focus more on job-security, training of redundant employees, validation of their work experience and outplacement-facilities.

[104] Ministry of Economic Affairs, Vision on Relocation. The nature, extend and effects of relocating business activities, The Hague 2005, p. 7.
[105] *See* www.cbs.nl. Latest figures March 2003.
[106] Figures presented at www.fnv.nl (10 October 2005). *See also* www.cnv.nl and www.vakcentralemhp.nl.

(e) In host countries, the ILO principles of decent work should be respected by partner-companies and their subcontractors.

(f) Cooperation with local trade unions and works councils can help to monitor the application of core labour standards and voluntary codes of conduct.

(g) International framework agreements between multinational enterprises and trade union can also be useful to improve employment conditions in host countries.[107]

7b. Collective representation at a group's level

Although Dutch labour law does not pay much attention to the reality of groups of companies, the Works Councils Acts (WCA) contains some provisions to improve workers' participation in companies associated in a group. According to the WCA, an employer who runs two or more enterprises in which at least 50 people are normally employed (including temporary workers) must set up a joint Works Council for all or a number of these enterprises. The enterprises are then considered as one enterprise (Art. 3 WCA). An employer who has set up two or more works councils can set up a Central Works Council or a Group Works Council for the enterprises which he runs (Art. 33 WCA). When the employer is one of a number of employers associated in a group, the employer is obliged to inform the works council on the power structure within the group as well as the names and addresses of those who may have actual control over the employer (Art. 31 (2) b WCA).

7c-d-e

Note that the response to these questions will be sent later.

[107] *See* www.global-union.org. The criteria are abstracted from the FNV Discussion paper 'Offshoring, outsourcing', published by FNV Press, October 2005.