CODEBAR – Comparatives in Decentralised Bargaining

Country Report: The Netherlands

Niels Jansen (n.jansen@uva.nl)
Frank Tros (f.h.tros@uva.nl)

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Executive summary

Collective bargaining in the Netherlands is based on private law. Within the framework of the Collective Labour Agreement Act, employers' associations and trade unions negotiate and make collective agreements on terms and conditions of employment; directly for their members, but also indirectly for non-unionised workers and non-organised employers in the case of sector agreements. During recent years, employers in the Netherlands have shown more interest in works councils as the bargaining party for workers. However, unlike trade unions, works councils are not 'associations' in terms of the CLA Act and their agreements with employers are not (directly) legally binding for individual workers.

Since the 1980s, industrial relations in the Netherlands have been decentralised. Sector agreements are still very dominant in the Netherlands but nowadays have more preamble parameters, giving companies more scope for deviations, for example, in the metal and electro-technical industry, where works councils and sometimes unions agree on tailor-made regulations on working hours and pay systems at the company level (this is also general practice in other sectors). In retail however, the discussion about the role of works councils in agreeing company regulations about terms and conditions of employment has cropped up in the last decade because of the employers' strategy of lowering labour costs and increasing labour flexibility (aspects that are difficult to agree on with trade unions). Generally speaking however, we do not find significant 'wild' or 'disorganised' decentralisation, as we see in some other European countries such as Germany. Still, around 80% of employees in the Netherlands are included in the collective bargaining system, and almost 89% of these workers are covered by sector agreements (with 11% covered by company agreements).

In this report, we have analysed 4 case studies on decentralised bargaining, based on semi-structured interviews and an analysis of documents. The first case is representative for large Dutch companies with a traditional division of the roles of unions and works councils, in a context of consensual and highly professional relations with the employer in the chemical/food industry. The second and third cases are retail companies that are 'experimenting' with new structures in decentralised bargaining that run contrary to traditional patterns in the Dutch system of labour relations. The employer in a large supermarket chain has pushed away the trade unions by agreeing an alternative company agreement with its works council (leading to lower labour standards for workers in distribution). The employer in the third case is avoiding the sector agreement by initiating a company agreement with another trade union than the unions around the bargaining table at sector level (with different levels of labour standards). The fourth case study deals with the Dutch postal services, where trade unions and works councils are challenged by the employer's strategy regarding outsourcing, subcontracting and labour costs reductions.

The overall conclusion in this report is that collective bargaining structures in the Netherlands are generally speaking stable. The continuing but limited decentralisation processes within the framework of sector agreements are much more a sign of continuity than of erosion of the Dutch collective bargaining regime. In the last decade, some experiments have been done in replacing or wanting to replace trade unions with works councils as the representative bargaining party, but these have been limited and some of them have been reversed. However, these recent developments have also shown up the peculiarities in Dutch labour law, where some competition can emerge among trade unions and between unions and works councils in decentralised bargaining on terms and conditions of employment.

Introduction

Decentralisation has been a central theme in the field of industrial relations in the Netherlands since the 1980s, initially to describe the withdrawal by the state from wage setting in the private sectors after 1982 and later to describe the less directive powers of employers' associations and trade unions' federations at the national level during more recent decades. Sector bargaining was given more freedom for variations, compared to the more uniform bargaining that was commonplace in the decades after the WW II. Moreover, as we will see in this report, sector agreements themselves became more in the way of frameworks for 'tailor-made' regulations at the company level during recent decades. In the 2010s, a new form of decentralisation appeared: it was not the trade unions but the works councils that were sometimes seen as the employees' representative body for bargaining in relation to terms and conditions of employment. This is problematic from the perspective of Dutch labour law and problematic in relation to the risk of losing the coordinating powers of the core actors in collective bargaining in the Netherlands: employers' associations and trade unions ('disorganised decentralisation'). The demarcation of the powers of trade unions on the one hand and works councils on the other hand is one of the central themes in this report, including the four case studies.

This report is structured as follows. Section 1 describes the institutional framework of collective bargaining and representative workers' participation in the Netherlands and the (interrelated and demarcated) positions of trade unions and works councils. Section 2 analyses the trends of different forms of decentralisation in the Netherlands and the approaches, strategies and debates among the collective bargaining parties in these issues. Section 3 to 5 are dedicated to four case studies in decentralised bargaining: one in manufacturing (section 3), two in retail (section 4), and one in the postal services (PostNL) (section 5). These cases are based on a qualitative research approach involving semi-structured interviews and document analysis. Section 6 provides a comparative analysis of the four case studies and the main concluding findings of the whole report.

1. Institutional framework of collective bargaining and employee representation in the Netherlands (legal perspective)

1.1 Introduction: different dimensions

When we discuss decentralisation in talking about the formulation of terms of employment in the Netherlands, we may be referring to different dimensions in that bargaining process. First of all, it can mean that government influence is waning or has waned in the field of finalising terms of employment. This has been happening in the Netherlands since the 1960s, when wage negotiations were freed up. The fact is that it took over twenty years for talks on terms of employment to disentangle themselves from the centralist tradition (Tros, Albeda & Dercksen, 2006). The expression 'decentralisation' when referring to talks on terms of employment might also refer to the decreasing influence of central workers' associations on the work done by the trade unions affiliated to them. Strong central coordination was a feature of post-war CLA negotiations in the Netherlands. In the 1990s, employers' and employees' organisations in the 'Stichting van de Arbeid' [Labour Foundation] agreed that CLA discussions should be characterised by tailor-made solutions and diversity. But this did not lead to a dismantling of central influence in all of the organisations. For instance, the largest trade organisation in the Netherlands, the FNV, still formulates a wages requirement every year that is used as the starting point for CLA negotiations at sectoral and individual business levels.[1] By contrast, the second largest trade union body, the CNV, has not imposed a central wage requirement since 2016.[2] Thirdly, decentralisation can mean an increasing importance of negotiations at the individual business level and – conversely – a diminishing importance of sectoral negotiations. Figures on CLA negotiations in the Netherlands show that the importance of the sectoral CLA remains as great as ever in this country. In terms of numbers, there are probably more CLAs concluded at an individual business level than at sectoral level, but of the 5.5 million workers who are subject to the ambit of a CLA, 5 million are covered by a sectoral CLA. It is worth mentioning here that these figures have been stable for years (Jansen, 2009: 31-33). Finally – and this is what the current investigation focuses on – the term 'decentralisation' can mean the increasing, albeit limited, role of works councils in the formulation of terms of employment. This has been a feature of Dutch labour relations since the 1970s.[3] This development has more or less continued and a members' survey in 2017 by the employers' association AWVN showed that over 60% of the respondents preferred works councils as negotiating partners for

[1] FNV, *Arbeidsvoorwaardenagenda 2021*, socialer uit de crisis [Agenda for terms of employment, more socially out of the crisis], p. 6.
[2] J. Leupen, '*Vakbond cnv vindt een looneis vanuit de ivoren toren niet meer van deze tijd*' [CNV union no longer considers a wage requirement from the ivory towers to be appropriate to these times], FD 16 September 2016.
[3] *Advies inzake het arbeidsreglement en het instemmingsrecht van de ondernemingsraad* [Advice on the employment rules and voting rights of the works council] (SER advice 94/06 of 20 May 1994), The Hague: SER 1994, p. 65

terms of employment.[4] It should be mentioned here that the importance and numbers of current CLAs are extremely stable and show no signs of wavering in this respect.

The most important aspects of Dutch law on CLAs will be discussed in the following section.

1.2 Dutch law on CLAs

The CLA is defined in Section 1(1) of the Collective Labour Agreements Act [*Wet op de collectieve arbeidsovereenkomst*] ("CLA Act") as the agreement between one or more employers' organisations and one or more employees' organisations, primarily or exclusively governing terms of employment.

The definition of the CLA as being an agreement (under private law) also means that the CLA is entirely subject to other principles of private law, such as contractual freedom and freedom to negotiate. These freedoms mean that there is no obligation to negotiate and conclude a CLA and that the CLA parties themselves determine the content and scope of the CLA (i.e. to whom and what the CLA applies). It follows from the statutory definition of the CLA that, from the employee's perspective, a CLA must be entered into by one or more employee associations with full legal competence. This means that employees cannot personally enter into a CLA but must always do so within the organised context of an association. One consequence of this choice by the Dutch legislature is that a works council, which does not have the legal format of an association in the Netherlands, cannot lawfully enter into a CLA. For employers, the CLA need not by definition be entered into by one or more employers' associations. This is because the definition allows an employer to become a party to a CLA itself, or else to become a direct party along with a number of other employers, even though there is no formal association. When a CLA is concluded for employers by an employers' association, it is described in practice and the literature as a sectoral CLA, while a CLA concluded by an employer is called a company CLA.

Dutch law does not impose any (representational) requirements on trade unions, in the sense that special rights in relation to collective bargaining are accorded to trade unions that are clearly or sufficiently representative or that a trade union may only conclude a CLA if it has a specified minimum membership (Jansen, 2019). There is one important exception to this principle, namely when a trade union is excluded from the CLA negotiations even when it has a significant number of members and is more representative than the trade unions that are participating. In certain circumstances, an exclusion of this type can be classed as an unlawful act and the excluded trade union can compel its admission to the CLA negotiations via the courts.[5] This right to be admitted to the CLA negotiations does not encompass the right to be or become a party to the CLA.

[4] AWVN, Results of members' survey 2017. AWVN trends and developments HR 2017, November 2017.
[5] Supreme Court, 8 July 2007, *JAR* 2007/162.

In terms of the CLA Act, a CLA should primarily or exclusively contain terms of employment, but the Dutch Supreme Court interprets this broadly.[6] Based on Supreme Court case law and the interpretation of that case law in the literature, we may say that CLAs may regulate everything associated with terms of employment. Often, the power relationships among the contracting parties and the position of each of them within their own grouping will determine the topics that are ultimately governed in the CLA, as well as how this is done. One important aspect of the CLA (and what it states) is that it is only possible to deviate from some peremptory statutory provisions by way of a CLA. This option for deviation offers social partners the exclusive facility for customising certain rules and harmonising the normative framework, within which individual arrangements are made, more closely to companies and sectors. In practice, these are called 'three-quarters peremptory' statutory provisions. Deviations are therefore reserved to the CLA and the CLA parties.

Section 9 of the CLA Act states that employees who are members of a trade union that has concluded a CLA are also bound by that CLA to the extent that their work is covered by the operational ambit of the CLA. To be bound by a CLA, one needs to be a member and to be involved. An employee who is not organised or differently organised is not therefore bound by the CLA in terms of the CLA Act and the same applies to an employee who is a member of a contracting party but whose work is not covered by the scope of the CLA. These non-unionised or differently organised employees are called unattached employees. Unattached employees retain their freedom of contract when it comes to formulating terms of employment. The same system applies on the employers' side, subject to the proviso that membership of a contracting employers' organisation is not a prerequisite for being bound by the CLA if an employer is a direct party to the CLA. The affiliation is then contractual, admittedly, but the consequences are the same as affiliation through membership and these consequences are governed by the CLA Act. The consequences are that the CLA is peremptory and automatically applies to employment contracts entered into by an employer and an employee who are both bound by the CLA. Deviations from the CLA are void and the CLA fills any lacunae left in the terms of the employment contract. The most significant consequences are governed by Sections 12 and 13 of the CLA Act.

As regards the invalidity of arrangements that deviate from the CLA, it important to note that the nature of the CLA provision will determine whether or not deviation is possible. Many CLA provisions in the Netherlands are in the nature of setting minima, meaning that they may be deviated from for the benefit of the employees. CLA provisions that do not contain any deviations are called standard provisions and may not be deviated from for the benefit of employees. Minimum CLAs often set a baseline in the market as regards terms of employment, which then opens up the possibility for more favourable rules (that may be agreed with the works council). CLAs sometimes contain option styles. In those cases, the CLA affords a framework within which an employer can make more detailed choices about the package of terms of employment and, in some instances, the works council has to be involved in those choices. If CLAs contain rules that have to be

[6] Supreme Court, 30 January 1987, NJ 1987/936.

elaborated at the individual company level, this is termed decentralisation, a topic to be dealt with in more detail in the next section.

The peremptory effectiveness of the CLA does not apply when an unattached employer and/or an unattached employee is a party to an employment contract. Unattached employers and employees always retain their freedom of contract under Dutch CLA law. To prevent an employer who is bound by a CLA from concluding employment contracts only with unattached employees (the fact is that an employer cannot know whether the employee is a trade union member, as employers are forbidden from asking about this by Dutch law), with the aim of circumventing all or part of the CLA, Section 14 of the CLA Act specifies that an employer bound by a CLA is also obliged to comply with the CLA in relation to unattached employees who take up employment with it. Unattached employees cannot enforce this obligation at law, meaning that they cannot use this path to enforce the application of the CLA. Compliance with the obligation in Section 14 of the CLA Act is reserved to CLA parties, as this obligation is designed to protect the CLA and CLA parties and not to protect unattached employees.[7] In practice, employers often implement the obligation under Section 14 of the CLA Act by including a provision in the employment contract to declare that the CLA is applicable. This type of provision is called an incorporation provision and the bond to the CLA is then contractual in nature. In other words, CLAs can be binding *ex lege* or *ex contractu* under Dutch law. With Section 14, the CLA Act provides a system to encourage alignment, as far as possible, between employment contracts and the CLA, but even if the CLA applies, any deviations from it are nevertheless valid *ex contractu*.

In principle, a sectoral CLA does not apply to employers who are not members of the employers' association that concluded the CLA. If an employer does not want to be bound by a sectoral CLA, it must therefore refrain from membership of an employers' organisation. An employer that does want to involve employees or trade unions in its negotiations on terms of employment may conclude its own company CLA. CLA provisions may be declared binding in terms of a decree issued by the Minister of Social Affairs and Employment, at the request of CLA parties. This is all regulated in the Collective Labour Agreements (General Binding and Non-Binding Declarations) Act ("AVV Act"). The declaration that the CLA is binding is a document of substantive legislation and if CLA provisions are declared to be generally binding they become peremptory for all employers and employees covered by the scope of the CLA. The issue of membership, discussed above, then no longer makes any difference to the binding declaration (which also applies to binding CLAs *ex contractu*). The result of the binding declaration is that any provision made between the employer and employee that is in breach of the provisions in the CLA that have been declared to be binding is void and is replaced by the relevant CLA provision(s).[8] The legal consequences come into effect by operation of law. The decision on a binding declaration for CLA provisions requires that a CLA (or CLA provision) already applies to a significant majority of the individuals working in the sector. What the sector is and what individuals should be included are factors determined by the operational ambit of the CLA. Calculating the majority takes into account the total number of persons falling

[7] Supreme Court, 7 June 1957, NJ 1957/527.
[8] The distinction between minimum provisions and standard provisions also applies here.

within the scope of the CLA by the nature of the work they do. If more than 60% of them work for an employer who is bound by the CLA (irrespective of trade union membership[9]), then the majority requirement is automatically met and the Minister may proceed with his decision on a binding declaration.

In terms of the AVV Assessment Framework, which sets out more detailed rules on the binding declaration, the aim of the binding declaration is to support and protect the formulation of terms of employment by social partners (via the conclusion of CLAs), and the intended impact of the binding declaration is to prevent competition on terms of employment by underbidding on the part of unattached employers.[10] It follows from the requirements imposed by law on the binding declaration and also the aim of this mechanism that the CLA provisions in a company CLA cannot qualify for the binding declaration. This is because that type of CLA does not, in principle, apply to a significant majority of the individuals working in a business and is often restricted to that particular company as regards its operational ambit.

Binding declarations occur particularly in sectoral CLAs and this can result in conflicts with company CLAs or other terms of employment in force within the sector. The CLA provision that has been declared binding takes precedence if it conflicts with a CLA provision (or other rule) that has not been declared binding. What this system means is that an employer with its own company CLA (or other rules) must abide by the CLA that has been declared binding while that declaration is in force, unless it benefits from an exemption. Such exemptions can be created or formulated in three different ways. First of all, the employer may be specifically exempted by CLA parties from the operational ambit of a CLA. The Metalektro CLA is an example of this. The operational ambit (Annex A to that CLA) specifically exempts a number of legal entities from the operational ambit in clause 22. Secondly, CLA parties may grant dispensation. The Metalektro CLA also provides a fine example of this. The rules containing the terms for dispensation are included in Annex B to the CLA. CLA parties will often set up a committee to assess the applications. The requirements to be met by an employer may vary from one CLA to another. Finally, the Minister can grant dispensation. Dispensation by the Minister is only relevant if an employer has its own CLA, entered into by a sufficiently independent trade union and if the employer cannot reasonably be required, for onerous reasons, to abide by the CLA that has been declared binding. Onerous reasons exist if the specific business features differ in essential aspects from the companies that would be deemed to be included within the operational ambit. While Ministry figures show that the number of dispensation requests that are granted is in fact limited, the policy pursued by the Minister is not in breach of international treaties on the freedom of collective bargaining.[11]

It follows from the exemptions outlined above that an employer that has agreed arrangements on terms of employment with the works council does not qualify for dispensation by the Minister because there is no CLA. In such cases, dispensation will also

[9] Supreme Court, 10 June 1983, NJ 1984/147.
[10] General principles for decree, AVV Assessment Framework
[11] ILO Committee on Freedom of Association 25 October 2019, *JAR* 2019/297.

not be granted by social partners as they also generally prescribe that a company should have its own company CLA (although this can vary from one CLA to another). There is often even a prescription to the effect that the same trade unions that are parties to the sectoral CLA are deemed to be parties to the company CLA. An employer may only continue to observe any arrangements with the works council if it has been specifically exempted from the operational ambit of a CLA and while that CLA is still affected by a binding declaration. The researchers are not aware of whether this occurs in practice.

1.3 Demarcation of powers

The powers of trade unions on the one hand and works councils on the other hand are delimited in the Works Councils Act (WCA) in relation to terms of employment. The statutory allocation of powers means that the works council does not in principle have any powers in relation to primary terms of employment,[12] such as fixing remuneration, the number of holidays or working hours. The expression "primary terms of employment" does not in fact appear in the law, which sometimes gives rise to discussion on whether or not the works council has any powers.[13] The fact is that it is not always possible to distinguish clearly between primary, secondary and tertiary terms of employment (Van Slooten, 1999: 114). It is also a consequence of the law that if the CLA provides an exhaustive set of rules, the works council loses its power in relation to secondary and tertiary terms of employment. This is called the primacy of the CLA. Rules are regarded as exhaustive if a CLA offers no further scope for elaboration at the company level. The following example serves to illustrate this: in terms of Section 27, WCA, the works council has a right of approval in relation to the introduction of work and rest time rules or holiday rules (Section 27(1)(b), WCA). But the works council has no right to approval where this relates to the total number of holidays or working hours, because these are primary terms of employment. The works council's approval is therefore confined to establishing working hours and holidays within the company. If a CLA contains exhaustive rules on this topic, then the works council's right of approval on this aspect also falls away (Section 27(3), WCA).

The WCA provides for the facility of extending the statutory powers of the works council in terms of the CLA or an agreement between the company and the works council. This is governed by Section 32, WCA. The extension of these powers may also mean that the works council acquires powers relating to primary terms of employment, according to case law from the District Court for The Hague in the *Grabowsky* case.[14] In this case, which was raised by the trade unions, the court was asked to issue its opinion on this extension since, according to the trade unions, it was incompatible with the statutory allocation of powers and was allegedly in breach of the ILO treaties (more specifically ILO Treaty 154). The District Court for The Hague held that the legislative history of the WCA revealed no

[12] *Parliamentary Papers II* 1975/76, 13954, 3, pp. 23 and 24, and SC 11 February 2000, *NJ* 2000/274.
[13] For instance, SC 11 February 2000, *NJ* 2000/274 on rules regarding special leave that boiled down to awarding extra holidays, so the WC had no right of approval . Also see SC 24 January 2014, ECLI:NL:HR:2014:159 concerning approval of a pension plan. As pension plans are included in Section 27, WCA, the Supreme Court held that this must be a secondary term of employment.
[14] District Court, The Hague (President), 19 May 1992, *JAR* 1992/22.

evidence that a works council was banned from negotiating on primary terms of employment, even if the principle was that negotiations would be undertaken by trade organisations.[15]

The fact is that the primacy of the CLA also applies even when the works council's powers are extended, meaning that if a CLA provides exhaustive rules, the powers of the works council will fall away (Section 32(3), WCA).

The literature mentions that because an agreement between a company and a works council can make arrangements on (primary) terms of employment, while CLA parties are not obliged to confine themselves in CLAs to the regulation of primary terms of employment, CLA parties and works councils can often cross over into each other's domains (Jansen, 2019: 204). As already mentioned, the WCA sets out the demarcation of duties in the sense that if some matter is regulated exhaustively in the CLA, the works council has no further powers in relation to the topic. However, this demarcation of duties does not contain any prohibition, meaning that even if there is a CLA in force, works councils can still negotiate on terms of employment pursuant to the WCA. If these arrangements are contrary to the CLA, they may be null and void in terms of the Dutch law on CLAs (Sections 9, 12 and 13, WCA and Section3, AVV Act). As regards the demarcation of duties between works councils and trade unions, the Minister commented during a review of the WCA in the 1970s that he hoped that trade unions would limit the exhaustive regulation of topics in the CLA as far as they could if those topics could be regulated just as well or perhaps even better at company level between the company and the works council.[16] And the Minister said this was particularly the case in relation to topics that were subject to the right of approval by the works council in terms of Section 27, WCA.

The demarcation of duties between trade unions and works councils in relation to collective bargaining on terms of employment also has an international dimension, as ILO Treaties 135 and 154 specify that the role of works councils in this process may not undermine the position of trade unions. The treaties, ratified by the Netherlands, compel the Dutch legislature to adopt appropriate measures in order to safeguard the position of trade unions in negotiations. This is all the more cogent since the statutory system (see the *Grabowski* case discussed above) allows the works council to make lawful arrangements on (primary) terms of employment. The District Court indicated that awarding powers to the works council in this area does not restrict employees in their right to organise, far less does it impinge upon the right of trade unions to negotiate collectively.[17] The literature contains discussion on answers to the question whether the position of trade unions is being undermined within the current system. Zaal and Koot-Van der Putte consider that the statutory demarcation of duties in Sections 27(3) and 32(3), WCA, adequately safeguard the position of trade unions in negotiations on terms of employment, and that this is no different if works councils are also involved in negotiations on terms of employment (Zaal, 2007: 2017-219). Jansen (2019: 209) doubts

[15] District Court, The Hague (President), 19 May 1992, *JAR* 1992/22, at 4.2.
[16] *Parliamentary Papers II*, 1975/76, 13954, 3, p. 45.
[17] District Court, The Hague (President), 19 May 1992, *JAR* 1992/22.

whether the statutory demarcation of duties is adequate to prevent a company from opting for the works council as its negotiating partner on terms of employment in cases where there is no CLA, thereby taking the trade union out of the game. Recently, the FNV trade union petitioned the District Court in The Hague to be admitted to the negotiations on terms of employment at TUI. TUI was negotiating with the works council and did not want to admit the trade union. The District Court dismissed the application by the trade union because there was no evidence that the personnel who would be subject to the terms of employment were dissatisfied with either the consultation structure (negotiating with the WC) or the method of representation. Also, the trade union had not provided an adequate explanation as to why the interests of the cabin staff would be better championed if CLA negotiations were initiated with the trade union as a negotiating partner.[18]

The statutory powers of works councils and trade unions coincide during reorganisations. If a reorganisation results in collective redundancy, the employer is obliged in terms of the Collective Redundancy (Notification) Act to inform the trade unions and enter into discussion with them on matters including the consequences of redundancy. These discussions need not result in agreement but, as a rule, a redundancy plan is often agreed between the employer and the trade union(s), which regulates the legal consequences of the reorganisation, such as redeployment efforts, payments and outplacement. At the same time, the works council has the power in terms of Section 25, WCA, to issue its advice on the proposed decision for matters such as reorganisations and this right to issue advice also encapsulates the staffing consequences of the decision and the steps to be taken in relation to the decision. What this means is that the works council's advisory right also extends to any redundancy plan agreed with the trade unions. In fact, a redundancy plan need not be confined to a specific reorganisation and may also pertain to a specific period. In those cases, the redundancy plan may apply to multiple reorganisations occurring within that period.

1.4 Continued effect of arrangements with the works council

The principle in Dutch law is that arrangements with the works council on terms of employment do not automatically permeate to individual employment contracts. The situation is different for CLAs. Under Dutch law, CLAs have peremptory effect for members in their individual employment contracts. When a works council makes arrangements on terms of employment with the company, the works council may well be able to enforce compliance with these arrangements, but such claims can never result in the arrangement becoming part of the employment contract. The individual employees are not bound by the works council. The question that then arises is how these arrangements can legally permeate to employment contracts. It can happen in one of three ways. Firstly, the employer may adjust the employment contract with the employee to coincide with the arrangements made with the works council. The adjustment is made by amicable arrangement and the agreement with the works council is then used as the

[18] District Court, The Hague, 11 February 2021, ECLI:NL:RBDHA:2021:1028.

style for the adjustment. Secondly, the employer and employee can incorporate the arrangement with the works council into the employment contract (see case study 2, section 4). A provision is then included in the individual employment contract referring to the agreement with the works council. There are discussions in case law and the literature about whether a provision of this type can also deal with future amendments of such an agreement.[19] Thirdly, an employer can try to amend the employment contract unilaterally to coincide with the arrangements made with the works council. Unilateral amendment of the employment contract is done without the employee's approval and cannot be done easily under Dutch law. Whether a unilateral amendment is admissible will depend on the mutual interests that are involved, with the approval of the works council only being one factor to be taken into account when these interests are weighed up.[20]

There has been acceptance in case law for the notion of employees being bound automatically to an arrangement with the works council in one specific instance, i.e. when the arrangement with the works council has some basis in the CLA. If the parties to a CLA provide in that CLA that they grant authority to the works council and the employer to make arrangements for the further detailing of a particular topic, then those more detailed arrangements may permeate to the employment contracts of employees who are bound by that CLA.[21] It seems to be a requirement for this that the CLA has to rule that individual employees may be bound by such an arrangement (Jansen & Zaal, 2017). These sorts of rules in CLAs are termed 'decentralisation provisions' in the literature (Laagland, 2014). Jansen, Poelstra and Zaal (2019) have undertaken research into CLAs regarding how topics are delegated to works councils in CLAs. Their research indicates that decentralisation provisions are quite commonplace, take a variety of forms and that there is no uniformity. The role of the works council in decentralised negotiations about terms of employment is the same as regards subject matter in the different sectors, so that in this sense there are no (major) differences as regards the topics left to decentralised negotiation in each sector. According to Jansen, Poelstra and Zaal, the subject matter of decentralisation provisions mirrors the statutory allocation of duties between the trade union and the works council. The researchers indicate that the extent of delegation varies not by sector but rather by CLA. In other words, the differences between CLAs in each sector are sometimes just as significant as the differences between CLAs in the same sector. Based on their research, Jansen, Poelstra and Zaal (2019) also feel that one cannot say that the size of businesses within a sector or the extent of the flexible shell has any impact on how much scope the CLAs offer for decentralisation of negotiations on terms of employment.

[19] For a positive answer, see District Court, Limburg 13 December 2017, ECLI:NL:RBLIM:2017:12159 and J.P.H. Zwemmer & I. Zaal, *'Ter visie – Faciliteer de arbeidsvoorwaardenregeling tussen werkgever en ondernemingsraad'* [For discussion – Facilitate the regulation of terms of employment between employer and works council], *TAO* 2018/2, p. 51-53. For a negative answer, see R. van Steenbergen, *'De vakbond inruilen voor de OR, kan dat zomaar?'* [Swap the trade union for the WC; as easy as that?], *TRA* 2019/106.
[20] SC 29 November 2019, ECLI:NL:HR:2019:1864.
[21] Court of Appeal, Den Bosch, 5 November 2013, *JAR* 2014/13 and Court of Appeal Amsterdam, 4 March 2014, *RAR* 2014/88.

1.5 Relationships with the law and the CLA

As I have already discussed, arrangements made with the works council are in principle lawful, but they are void if they are contrary to the CLA (or the law). That comment says all that needs to be said about the relationship between arrangements with the works council and the law and the CLA.

Dutch law has a number of provisions that are described as 'three-quarters peremptory'. These are peremptory statutory provisions that may only be departed from by means of a CLA. As an arrangement with a works council does not qualify as a CLA in terms of the law, it cannot deviate from three-quarters peremptory legal provisions. That limitation means that the works council arrangement is not a viable alternative in some sectors. An example might be the temporary employment sector, which is described, as a sector, as having derived its right to exist in part from the CLA and the three-quarters peremptory deviations that it contains.

1.6 Conclusions

This section has shown that collective bargaining in the Netherlands is legally based on private law. Within the framework of the CLA Act, employers' associations and trade unions' associations negotiate and make collective agreements on terms and conditions of employment; directly for their members, but also indirectly for non-unionised workers (CLA Act) and non-organised employers in the case of sector agreements (through the AVV Act). This section has described several legal options/ways for individual employers not to be bound by sector agreements or to have dispensations. During recent years, employers in the Netherlands have shown more interest in works councils as the workers' bargaining party for workers. However, in contrast to trade unions, works councils are not 'associations' in terms of the CLA Act and their agreements with employers are not (directly) legally binding for individual workers. In the whole Dutch system of labour law, collective agreements and regulated labour standards and provisions have (clear and strict) primacy over arrangements between the employer and works councils.

2. Trends and debates on decentralisation

2.1 Decentralisation within high institutional stability

At first sight, institutions in industrial relations in the Netherlands has been broadly unchanged in the last seven decades. Just after the Second World War, bodies in national social dialogue were established, with trade unions and employers' organisations playing an important role through their seats in the tripartite Socio-Economic Council (SER) and the bipartite Labour Foundation (STAR) at the national level. Nowadays, social partners still have their seats in these bodies, but their actual functioning has undergone a gradual transformation, whereby the system has essentially changed its character and generates lower impacts than before (De Beer & Keune, 2018). As a result of shifting power relations between trade unions and employers since the 1980s (caused by decreasing memberships, rise of atypical work etc), the 'Polder institutions', including collective agreements, more and more serve the interests of employers, to the detriment of workers, who are confronted with prolonged wage moderation, increasing demands for flexibility and sometimes the exclusion of the largest trade union FNV from collective bargaining (Been & Keune, 2019).[22] These conclusions about the changes in the Dutch industrial relations system are in line with institutional theories, that apparent institutional stability can hide important changes in the functioning and outcomes of these institutions (Streeck & Thelen, 2005). Also in our analysis about 'decentralisation' in this report, including the case studies, we make distinctions between the formal institutional structures – such as the legally based sector and company bargaining and the dual channel system in workers representation – on the one hand, and the functioning and outcomes of these institutions on the other hand.

Literature is quite ambiguous about the assumed trend of decentralisation in industrial relations in the Netherlands towards the company level. Literature is consistent that 1982 was a turning point because of the withdrawal of the national government from wage setting in the private sectors (Visser & Hemerijck, 1997; Tros, 2000; De Beer, 2003).[23] Inter-sectoral coordination among social partners continued after 1982, but through less binding methods than the government used to apply. Formally, employers and trade unions involved in collective bargaining enjoyed more freedom in negotiating terms and conditions of employment at the sector and company levels. In 1993, the Labour Foundation's pact titled 'A New Course', validated this development with the view that collective agreements should offer more possibilities for tailor-made solutions in sectors and enterprises. The peak organisations argued that all would benefit from greater differentiation in collective agreements that allowed for better adjustments to the needs,

[22] In the 2010s, several agreements have been concluded without the FNV as employers are more able and willing to cherry-pick the unions that will agree with more of their demands. The FNV is often unable to stop this process, but also refuses to sign what it considers bad agreements.
[23] In 1982, the peak organisations of employers and trade unions in the Labour Foundation signed the so-called '*Akkoord van Wassenaar*' in which they agreed to implement 'responsible, moderate wage policies'. As a consequence, the government no longer needed to intervene in autonomous wage bargaining by collective bargaining parties in the private sectors.

preferences and competitive positions of sectors, companies and workers. Despite the intentions in this Pact, the outcomes of wage bargaining stayed quite similar across the economy (De Beer, 2013; Visser, 2013; Verhoeff, 2017). But real wages can differentiate more between companies if sector agreements become less standard and change into minimum agreements. Furthermore, in dialogue with works councils, companies can make more differentiated regulations in salary systems and variable pay within the framework of collective agreements. In this section, we will search for more evidence of the assumed trend of decentralisation towards the company level by asking and answering the following questions.

- To what degree have collective bargaining structures decentralised from sector to company level? (section 2.2)
- Have sector agreements become more frameworks for collective bargaining at the company level, with trade unions and/or works councils? (section 2.3)
- Have employers, trade unions and works councils focused their strategies and practices more towards decentralised bargaining? (section 2.4)

2.2 Collective bargaining structures and levels

The Dutch collective bargaining system covers around 80 per cent of the employees in the Netherlands. This percentage has been fairly stable over recent decades. Nevertheless, it is important to mention that (pseudo) solo self-employed and freelance workers are not registered as 'employees' while the proportion of these workers has increased substantially, from 8% in 2003 to 12% of all workers in 2019.[24] Solo-self-employed workers are by definition not covered by collective agreements Collective bargaining coverage is strongly supported by the fact that many industrial agreements are extended quasi-automatically to the entire industry by the government (see section 1). Around 17 percent of the employment under sector bargaining is covered as a result of this legal extension mechanism (SZW, 2020).

Although the number of company agreements is around three times higher than the number of sector agreements, many more workers are covered by sectoral collective bargaining. In 2019, it is estimated that there were 507 company agreements, covering around 627,000 employees. In the same year there were 183 sector agreements, covering around 5,026,900 employees, including those in the public sectors. In each sector, the company agreements covered just a small minority of employees in the sector (see table 1). The sectors of Transport & communication and Business services had the highest share of employees under company level bargaining.

There are only a few examples of companies that have withdrawn from the coverage of sector agreements by agreeing their own collective agreement with trade unions.[25] An

[24] Ontwikkelingen zzp (cbs.nl)

[25] In the recent years, the large company of ASML wish for a company agreement, but the largest trade unions do not want ASML out of the sector agreement in the Metal and electro-technical industry (ASML-medewerkers willen bij sector-cao blijven - FNV)

example was in 2000 when the large banks agreed company agreements, leaving the sector agreements for the smaller banks.[26]

Table 1. Numbers of employees under company and sector agreements and shares of employees under collective bargaining, by sector, 2019

Sector	Employees under company agreements	Employees under sector agreements	Employees under company level bargaining (in %)
Agriculture, fishery	1,400	115,600	1.2
Manufacturing	92,500	612,100	13.1
Construction	4,500	265,400	1.70
Trade, hospitality	40,300	1,219,400	3.2
Transport, communication	122,600	237,000	34.1
Business services	165,300	556,900	22.9
Other services	200,400	2,020,500	9.0
Total	627,000	5,026,900	11.1

Source: Ministry of Social Affairs and Employment (SZW), 2020

Figure 1. Numbers of employees under company and sector level bargaining, 2001-2019

Source: yearly reports from Ministry of Social Affairs and Employment

Figure 1 shows that there has been no structural shift from sector towards company bargaining in the Netherlands since 2001.[27] Remarkable, however, are the gradually declining numbers of employees under direct sector bargaining in the last decade: from 5 million in 2011 to 4.2 million in 2019. This can be explained partly by employees who have

[26] In this sector, there are large company agreements at Rabobank, ING, ABN AMRO, and De Volksbank.
[27] These are some fluctuations but these seem to be more explained by the method of measuring: e.g. company agreements are not always send to the Ministry. And by incidental situations: e.g. in 2006 collective bargaining parties postponed renewing of the sector agreements because of the time they needed in implementing the social pacts in 2004 and 2005 (Ministry of Social Affairs and Employment (2007).

become solo self-employed workers in the Netherlands and partly by declining memberships of employers' associations.[28] In sum, looking to the structure and employees' coverage in collective bargaining at the sector and company levels, there is little evidence of more decentralisation in the 21st century.

3.3 Sector agreements become more frameworks for decentralised bargaining

Beyond analysing the shares of employees under sector and company agreements, there is more evidence for (organised/regulated) decentralisation when one looks to the character of sector agreements. A study in 2014 concluded that around the half of the sector agreements in the Netherlands could be characterised as minimum agreements, which allow deviations for the benefit of workers at the company level (Van den Ameele & Schaeps, 2014). Only 12% of agreements were standard agreements (type 1 above), whereas in 34% no specific characterisation was included. Generally speaking, for a long time, employers' associations strove for greater flexibility and less rigidity in sector agreements. In the 1990s, employers were quite successful in agreeing on variable and flexible working hours, such as the introduction of the annualised hours model and making sector agreements available for deviating regulations in maximum working hours by day, week and months in the companies (Tros, 2002). In sectors like the metal and electro-technical industry, trade unions were strong enough to make compromises with employers not to agree with more flexibility before agreeing new bargaining rights at the company level within a regulated framework in the sector agreement (regulated decentralisation). There are some other examples of layered systems with more bargaining/co-determination right for trade unions at the company levels within a regulated framework in the sector agreement. Examples can be found in the Publishing industry[29] and the metal and electro-technical industry (see 3.1). Important to write here, is that wages are never part of new decentralised bargaining. Formally, individual employers are free to unilaterally increase collective wages in the company in case of minimum agreements: unions and works council have no bargaining rights at this level.

In other sectors, not the trade unions but *works councils* are given co-determination rights at the company level to implement certain stipulations in the sector agreement or to agree on certain deviations from the collective agreements (Jansen et al, 2019). For example in the printing industry, where works councils even can deviate negatively from sector regulations in many issues, including salary systems and payments (idem). Some years ago, the sector agreement in the construction sector also introduced deviation opportunities for construction firms in the area of working hours, after receiving approval from the works councils together with approval from 70% of the workers involved. An investigation of 46 sector agreements in nine sectors of industry concluded that collective agreements seldom gave the works councils extra co-determination rights (which can technically be done) but that the collective bargaining parties actually validate the existing co-determination rights already regulated in the 'Works Councils Act' (Jansen, Poelstra &

[28] The numbers of employees covered through the legal extension mechanism of the ministry increased 340,000 in the period 2011-2019.

[29] De cao voor het Uitgeverijbedrijf kent een gelaagde opbouw. Wat houdt dat in? | Nederlandse Vereniging van Journalisten (nvj.nl)

Zaal, 2019). And, as has already been mentioned, some rights to agree to deviations from standard stipulations. But overall not that much and in not that many cases (Jansen et al, 2019). These limited practices in delegating bargaining and co-determination tasks from trade unions to works councils reflect the Dutch labour legislation that does not foresee and does not properly regulate the possibility that works councils might become part of collective bargaining (see section 1).

A specific example of organised decentralisation is the collective agreement in the IT sector. IT companies can voluntarily join the sector agreements through flexible memberships of the employers' association *NLdigital Werkgeversvereniging* and are free to opt out from the association and its agreement with the trade unions. Furthermore, this agreement is 'a champion' in giving works councils a broad framework for derogating from and detailing the standards and provisions.

2.4 Strategies and positions of the bargaining parties and works councils

Employers and trade unions have different views about decentralisation. Generally speaking, employers in the Netherlands want tailor-made solutions at company levels as a response to what they regard as 'excessively rigid regulations' in collective agreements. Employers' associations are confronted with a variety of interests among their members, dependent on, for instance, the size of the company, firm strategies (on costs of quality), financial performances, and inter-firm competition and collaboration in the sector (Tros et al. 2019). Trade unions however, want greater equality in terms and conditions of employment. The same pay for the same work in different companies can be more readily organised in sectoral agreements. Furthermore, trade unions have limited resources for providing negotiators in companies and trade union representation is weak at the decentralised level (see next paragraph).

The powers of trade unions in the Netherlands are traditionally strong at the national and sectoral levels and weak at the levels of individual companies and workplaces. This can be explained from a historical perspective ('institution path dependency'). After WWII, Dutch trade unions focused on social dialogue and influence in matters of the welfare state[30] and accepted (as a kind of trade-off) the employers' 'management prerogative' to organise their organisations in a capitalist social-economic system without direct co-determination rights for the trade unions in the organisation of work. During the 1960s and 1970s, in response of demands for more democracy in trade union organisations, trade unions in the manufacturing, construction, transportation and public sectors initiated trade unions networks within companies ('bedrijfsledengroepen') for better communication among the trade union members in the companies and greater influence from trade union members on their representative union leaders in collective bargaining (Kösters, 2020). In practice, these networks had a complicating and conflicting relationship with the trade union practices at more central levels as well as with works councils in the companies. In some companies, trade union networks have endeavoured to secure influence through elections to the works councils, while in other companies

[30] Trade unions federations have seats in the Labour Foundation (since 1945) and Social-Economic Council (since 1950).

trade union activities within the company remained independent from the works councils. Trade unions have been always ambivalent to works councils because of the compromise in legislation on works councils between harmony in dialogue and representation of workers' interests. Since the 1980s, unions networks within companies have declined substantially, while works councils have developed further in the companies (Van het Kaar & Looise, 1999). In some cases, works councils operate in coalition with trade unions in issues such as quality of work, pressure at work and workload, employment and technology, because these issues are related to terms and conditions of employment (Pot, 2020). In sum, trade unions in the Netherlands focus their action on more centralised levels where they have traditionally been strong (national, sectoral, and only where there are company agreements, also at the company level) and still focus their actions on influencing collective bargaining with employers and less through the channels of works councils with*in* companies. Recently, more discussion has started as to whether these actions at centralised levels are still effective in the new context of more powerful employers and employer-friendly governments and whether trade unions should reconsider more action at the company and workplace levels, more or less through the channels of works councils (Bouwmans & Eshuis, 2018; Kösters & Eshuis, 2020).

Works council as bargaining party?

The general employers' association AWVN[31] sees collective agreements with trade unions as the most obvious and efficient method to regulate terms and conditions of employment. In their view, collective bargaining with trade unions at sector as well as at company level is serving better industrial peace, prevention of competition in terms and conditions of employment and sustainable relationships in social dialogue and employment relations.[32] Nevertheless, the AWVN sees regulation of terms and conditions of employment in so called 'AVR'[33] in cooperation with works councils (and without trade unions) as *also* being a good method. Most important criterion, in the AWVN's view, should be the level of support among the workers in the companies for trade unions or works councils as the representative body for the workers. FNV is strongly against this 'alternative' of agreeing company regulations about primary terms and conditions of employment with the works council. In contrast to trade unions, works councils have less bargaining power because they are directly dependent on their employer (so they would avoid conflicts) and they do not have the weapon of strike action. Furthermore, works councils in the Netherlands have far less expertise and negotiation skills in collective bargaining compared to the unions. There are some exceptions, where works councils do have strong positions and more expertise and skills, but also here, the trade unions continue to be the bargaining party for terms and conditions of employment (Tata Steel, KLM, companies in the harbour).

There is no empirical research about the numbers of AVR's in the Netherlands. It can be assumed that the proportion of workers under AVR's is at least lower than the share of employment not covered by collective agreements (so less than 20%).

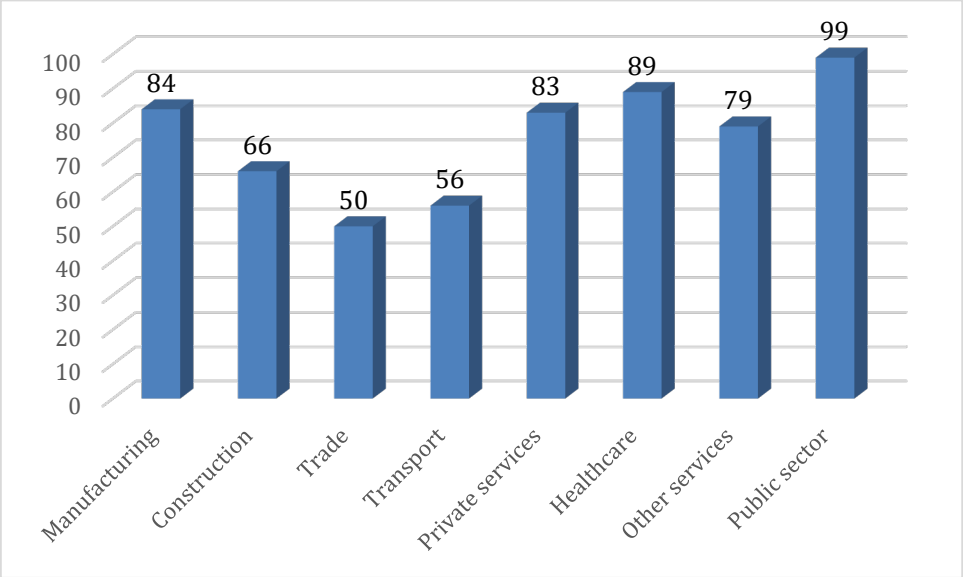
[31] AWVN was founded in 1919. Today, more than 750 companies are affiliated to AWVN. It is involved in the making of over 450 Collective Labour Agreements and over 300 fringe benefit arrangements.
[32] Standpunten - AWVN
[33] AVR = *arbeidsvoorwaardenregeling* ('terms and conditions of employment arrangement').

Trade unions do not want to be replaced by works councils as the bargaining party for the employer(s), which is quite logical in the dual channel system in the Netherlands. Giving up their positions in bargaining with the employer would lead to 'disorganised' decentralisation (Traxler, 1995; Visser, 2016). In single channel systems such as in Denmark, where workplace representatives are elected and/or delegated by trade unions, the relationships between sector and local pay negotiators are generally strong and unions have substantial control over such decentralisation processes (Ibsen & Keune, 2009). In dual channel systems, such as in the Netherlands, where employees are represented by works councils, the relationships between negotiators from the trade union and works council members are weaker and more fragile, reducing the control that unions have over decentralisation (Nergaard et al. 2009). Nevertheless, there is also variety among dual channel systems, because of different extents to which union candidates are works council members. There is no representative research about the proportions of trade union members in works councils in the Netherlands.[34] According to the FNV (2020: 17) six thousand FNV-members are works council members and one quarter of all trade union officials are active in works councils. A comparative study from WSI/Hans-Böckler-Stiftung about works councils in Germany and The Netherlands estimates that almost 60% of the works councils in the Netherlands never/hardly receives advice from trade unions, compared with 28% of the works councils in Germany (Van den Berg et al, 2019). They receive relatively more advice from consultants. 42% of the Dutch councils never use the unions at all.[35] Compared to Germany, Dutch works council members have poorer relationships with the union and relatively better relationships with management (Van den Berg et al., 2019). These strong ties with management may also explain why trade unions in the Netherlands are hesitant about decentralisation towards works councils.

Apart from the relatively low autonomous bargaining power of works councils, there is also another reason why trade unions and also employers' associations would be hesitant in giving decentralised consultation and bargaining powers to works councils. Not all companies have established such councils in their organisations, despite being legally obliged to do so.[36] Table 2 shows considerable sectoral variation in this: from just 50% in the trade sector to 83% in the sector of private services (and 99% in the public sector). Table 3 shows differences between size categories as well.

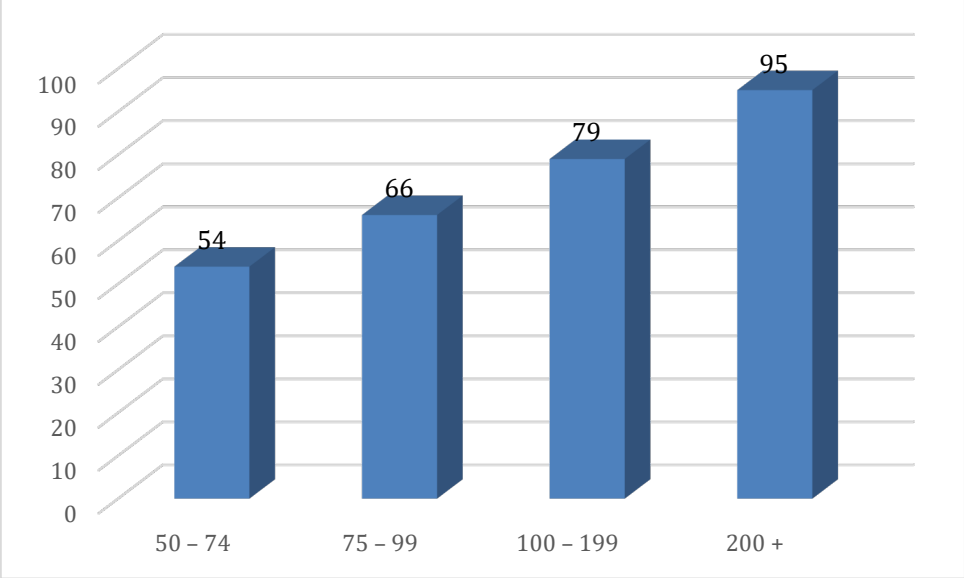
[34] In 2015, a survey among 436 works council members counted 64% of trade union memberships among the respondents (Snel et al., 2016). Van den Berg et al. (2019) counted 39% of organised works council members.
[35] 480 councils answered this question. The sample is not representative, but the researchers used weighted data for company size and sector.
[36] Although companies are not sanctioned if they not have established works councils. When employees do not ask the employer to do this, then the employer does not have to establish a works council.

Table 2. Establishments of works councils by sector, only companies with more than 50 employees (2017, The Netherlands)



Source: Wajon et al., 2017

Table 3. Establishments of works councils by company size, in numbers of employees (2017, The Netherlands)



Source: Wajon et al., 2017

Do works councils themselves want decentralised bargaining on terms and conditions of employment? Several studies assume that, generally speaking, works councils in the Netherlands do not want to act against the (legal) primacy of trade unions as the collective bargaining party in this issue (Smit, 2010; Tros & Smit, 2019). In the context of not being covered by a sector agreement and with no company bargaining, works councils can *de facto* act as the employees' representative body, but in just a *consulting* role with the employer without any real negotiating powers (Tros & Smit, 2019) and without legal

effects. Chapter 4 will analyse a recent case in the logistics department of a supermarket that had been traditionally covered by collective bargaining, but where the employer started agreeing on company regulations with the works council (with a duration of 5 years) and stopped bargaining with the trade unions. In the last decade, there have also been some 'partnership examples" in the context of collective bargaining at company level, where works councils, alongside trade unions, have played a role in 'co-creating' new company agreements.[37]

2.5 Conclusion

It is not the institutional structures of collective bargaining, but rather its functioning and effects that have led to more decentralised industrial relations in the Netherlands. Sector agreements are still very dominant in the Netherlands, but have nowadays more latitude, giving companies – sometimes in combination with trade unions or works councils – more scope for deviations. Trade unions however are not that strong at the company level, and have low communication and coordination powers with works councils because of the (quite strict) dual channel system in the Netherlands and traditional divisions in the positions of trade unions and works councils in the Netherlands. The discussion about the role of works councils in agreeing company regulations about terms and conditions of employment has appeared in the last decade because of employers' initiatives to see company arrangements with the works council as an alternative to collective agreements with trade unions.

[37] Examples are companies like *Smilde Foods* (manufacturing), *Bijenkorf* (retail) and *Aegon* (finance) (SER, 2013; Van Essen & Van Ulden, 2013).

3. Manufacturing sector and case study 1

3.1 Regulated decentralisation in the manufacturing sector in the Netherlands

The majority of the workforce in the manufacturing sector in the Netherlands is covered by sector agreements. In 2019, 92,500 workers in the manufacturing were covered by company agreements and 612,000 were covered by sector agreements (Ministry of Social Affairs and Employment, 2020). So, around 13% of the employees in the manufacturing sector who are covered by collective bargaining are under company agreements. Chemical and petrol companies in the Netherlands do not have a sector agreement but do have company agreements (e.g. AkzoNobel, Shell, BP, Solvay). The bargaining structure in the food industry is a mix of sector agreements (e.g. for dairy products and the meat industry) and company agreements, such as for Heineken, Unilever and Douwe Egberts.

The two largest sector agreements in manufacturing in the Netherlands are those in the metal and electro-technical industry: firstly, the collective agreement of the 'Metal and electro-technical industry' for larger companies (around 140,000 workers in total); and secondly, the collective agreement for smaller companies in the metal and technical and installation companies (around 320,000 workers in total). Both sector agreements are made generally binding for all companies in the sector. The level of employment conditions in both agreements are not that different, also because of tight coordination by the trade unions (interviews with the FME, Metaalunie). Because the metal and electro-technical industry is quite a representative example of sector bargaining in the Netherlands, we will go on to give an analysis here.[38] Wage increases and other changes in the terms and conditions of employment, such as working hours, education and training, pensions etc. in the metal industry are the result of periodic bargaining rounds between the employers' associations and the trade unions FNV, CNV39 and De Unie40. More than other sectors in the Netherlands, workers in the metal and electro-technical industry are quite well-organised by trade unions and in recent years there have been strikes during the negotiations rounds for new collective agreements.

There are several options for decentralisation in the institutional context of the sector agreement for the larger sized companies in the metal and electro-technical industry. Firstly, the salary levels that are agreed in this collective agreement are *minimum* standards, meaning that higher salaries are allowed at the company or individual level. Downward flexibility in wage reviews or in salary levels, however, is not permitted. Secondly, the sector agreement for the medium and large companies regulates that companies can deviate from a certain number of stipulations in the sector agreement after consent/approval from the *works council*, such as about tailor-made regulations on working hours, working time schedules (and notifications of new timetables to the workers), on-call duties, collective holidays and rostered days off. More than 70% of the companies use these decentralised flexibility options regarding collective holidays and

[38] Although during recent years, negotiations on this sector agreement have not been straightforward, and also in 2021 there were a number of local strikes in some of the companies during the collective bargaining rounds in the metal sector. Other manufacturing sectors in the Netherlands have fewer actions and strikes.
[39] CNV is the second largest trade union in the Netherlands, with a Christian pillar background (usually more modest in their demands on employers).
[40] De Unie is a small trade union for medium and higher paid employees with a more individualistic and liberal ideology than the FNV and CNV.

more than 40% make own regulations with the works councils about on-call duties (interview with FME).[41] This quite high activity in social dialogue with works councils can be understood in higher rates of penetration by the councils in the whole manufacturing sector: around 88% (see table 2 in chapter 2). And also the relatively large size of the companies in the sector; the bigger the company, the higher the chance that the company has established a works council (table 3). Thirdly, the sector agreement points to a limited number of issues where *trade unions* have a position at the company level. Such as in cases where the employer wants to lower wages – although still above the minimum-level of the collective agreement – trade unions have consultation rights at the company level. If the company wants to introduce a (new) arrangement in shift work or working time schedules that deviates from legal standards or wants to elaborate the duration of working days above 8.5 hours, it is not the works council but the trade unions that have a bargaining position. Finally, there is the option of being excluded from coverage or having dispensation from the sector agreement. Metalektro companies like Philips or Océ, who for long time have had their own company agreement negotiated with the same trade unions as those that are part of the sector agreement do not have to apply to the sector agreement.[42] In 2020, a new discussion was started at ASML – the largest company under the sector agreement in the metalektro industry with around 15,000 workers, to establish its own company agreement. Trade unions, but also the employers' association FME are not in favour of that because of the risks of (the start of) an exodus out of the sector agreement and the related financial support for the sectoral funds for education and development. In addition to that, FNV is quite fearful that this kind of decentralisation will lead to lower labour standards and weakening of their position because companies can make agreements with other (even yellow) unions. In response of that, in July 2021, all bargaining parties at sector level agreed to clarify the older regulations on dispensation from the coverage under the sector agreement by regulating three conditions:

i) the company agreement has to be signed by the same negotiation parties as those part of the sector agreement;
ii) the company agreement has to be of equal value to the sector agreement;
iii) the company with its own collective agreement is obliged to continue the financial contributions to sector funds for pensions, labour market and developmental policies and social affairs.[43]

In the view of the FNV, large (multinational) companies also benefit from investments in vocational education training (VET) and sector policies for supporting the employability of older workers. These investments are paid from sector funds for labour market and developmental policies and joint public-private investments in sustainable employability to prevent early retirement among older workers (coordinated by the social partners at sector level).

The collective agreement for smaller companies in the metal and technical and installation companies has a decentralised structure at the level of branches. Largely, the agreement regulates joint terms and conditions of employment for the smaller companies in 5 branches: the metal industry, installation companies, insulation companies, bodywork companies, and goldsmiths and silversmiths. To a smaller extent, each branch has its own regulations that can be more 'tailored' to the needs and conditions of companies in the branches. Just as in the other sector agreement for larger companies, the sector agreements for SMEs allow for better terms and conditions for workers, but not for poorer conditions. Nevertheless, this sector agreement for SMEs sets out fewer opportunities for making deviations in consultation with works councils or trade unions,

[42] Collective Agreement (caometalektro.nl), p. 113.
[43] Principeakoord 2020-2022.pdf (fme.nl)

compared to the sector agreement for larger companies in the metal and electro-technical industry. SME employers have less time and capacity for extra negotiations with workers' representatives and appreciate the sector agreements as an instrument for them to take away the worry and effort of making regulations themselves (interview with Metaalunie). In practice, sector agreements are even seen as 'crib books' in practice within SME companies (interview with Metaalunie). The social partners in the sector do not receive requests for dispensation from the coverage of the sector agreement, nor from specific stipulations. Sometimes companies ask for dispensation from the pension arrangements in the sector (which is not given).

3.2 Case study 1: DSM

3.2.1 Intro

From century-old roots as the Dutch State Mines, DSM has evolved into a purpose-led science company numbering 23,000 people worldwide and around 3,800 people in the Netherlands, specialising in activities for Nutrition, Health & Sustainability. At the end of the 20th century, DSM entered biotechnology with the acquisition of Gist-brocades, also based in the Netherlands. This marked the start of a major period of transformation and was followed by the sale of its petrochemical activities to Sabic in 2002 and the acquisition of Roche Vitamins & Fine Chemicals in 2003. In the following years, DSM further focused and streamlined its portfolio with, for example, the acquisition of the waterborne resins business of NeoResins, followed by further acquisitions in human nutrition (Martek, Fortitech), animal nutrition (Tortuga) and biomedical (Kensey Nash). Acquisitions are an integral part of DSM nowadays.

FNV describes DSM's labour management as highly professional and consensus-oriented towards works councils and trade unions. DSM's high performances, good financial results and growth strategy are important conditions for these cooperative labour relations at the company level.

3.2.2 Collective bargaining at DSM

DSM has its own company agreement, negotiated with four trade unions – the FNV, CNV, De Unie and VHP. There is no sector agreement in DSM related sectors in the Netherlands, such as for chemical or pharmaceutical industries. As far we know, there have never been any such sector agreements at all in the history of Dutch industrial relations. DSM never considered initiating a sector agreement with other companies in the sector in recent decades (int1).[44] Nevertheless, DSM is quite active in employers' networks at a local level with other smaller chemical companies. These companies in the '*chemelot*' were in the past related to DSM, and many of them have their own collective agreements that are not that different from the DSM agreement.[45] Communications among the different companies in the same region and sector aim to prevent competition on wage levels and to promote learning from 'best practices' (int1). DSM is also part of

[44] int1 = interview with the employer's negotiator in DSM's collective agreement/Director Total Rewards at DSM NL.
int2 = interview with the FNV's negotiator in DSM's collective agreement.
int3 = interview with the chair of DSM's Central Works Council (*centrale ondernemingsraad*)
[45] Chemelot, the chemical innovation community

the employers' networks at the national level, such as within the main peak business organisation in the Netherlands VNO-NCW and the general employers' association AWVN, '*although coordination is too heavy a word*', according to DSM's negotiator. DSM's advantage of having a company agreement is to be able to control its labour cost developments and to follow its own policies in e.g. sustainable employability and variable pay (int1).

In 2014, seven collective agreements for several DSM units were harmonised into one agreement for all of DSM Netherlands. It began with a proposal from DSM of a collective agreement text of just 15 pages, which however met firm resistance from trade unions because of its 'undressed' character (int1, int3). As a response, a co-creation process started with the DSM management, trade unions and unionised and non-unionised employees (int1, int3). Works councils were not involved in this modernisation process because of the long-existing and still respected division of tasks and responsibilities between the two institutions of trade unions and works councils (see later). At the end, the final collective agreement consisted of around 30 pages of quite centralised regulations with no formal involvement from the works councils in DSM's business units (other than on matters such as work rosters).

The trade union FNV is by far the largest union in DSM and has a traditionally strong position in DSM's production units as well as in the country's southern region, where the old DSM – Dutch State Mines – started. As a preparation for the regular negotiation rounds to renew DSM's collective agreement, the FNV organises visits at the several workplaces to take the pulse of the rank and file of the trade union organisation (*achterbanraadplegingen*). Mostly, as a rule, the consultations are limited to those who are members, because those are the ones who pay subscriptions fees and who have a formal say in reviewing the negotiation results (int2). Also VHP for higher paid personnel has quite a lot of members, which is related to the fact that salaries up to €150,000 gross are regulated collectively (many other collective agreements in the Netherlands do not include payments for higher personnel in their salary scales). Estimates of membership of trade union organisations among the DSM staff vary from 900 (int1) to 40% of the staff (int2). Works councils in business units with higher union memberships are more oriented towards the unions' agendas and policies than works councils in less organised business units. The four trade unions co-operate together and also with works councils and the works councils' topics at central and business unit levels (int2). This is not to say that the four unions represent the same workers' interests: VHP for example does not support the FNV's policy regarding a levelling of wages.

3.2.3 DSM's works councils and their demarcation with trade unions

At plant and business unit level, DSM has 6 works councils, all under the umbrella of one works council at the central level (*centrale ondernemingsraad*, Central Works Council). Codetermination and consultation structures, procedures and dialogue practices regarding the DSM's works councils are described as 'very professional' by all three interviewees. According to the chair of the Central Works Council, DSM is very sympathetic towards codetermination and workers' participation, although real effective

works councils' power and influences '*must not be overrated*' (int3). In 2014, the model of workers' participation in DSM was modernised through limiting the number of seats in the works councils, traded-off by works council members' yearly rights on a 3 day training event together with DSM's director. At the same time, what is described as a 'participation model' was introduced with temporary involvement of employees (not elected and not having a formal seat in works councils) in thematic projects, under coordination of the works councils.[46] Modernisation of workers' participation was not seen as the trade unions' business, but they were critical about the reduction in the number of works council seats at DSM, at a lower level than regulated in the Works Councils Act (*Wet op de ondernemingsraden*) (int3).

The three respondents have basically the same views about the fundamental demarcation between the roles and tasks of trade unions and those of works councils. Everything to do with DSM's strategies, management and organisation is the task of works councils. DSM has a company rule book [*bedrijfsregelingenboek*] with stipulations about the competences of the works councils and the Central Works Council of DSM (int3). Everything to do with the collective agreement and money-related terms and conditions of employment is the task of the trade unions and not the works council. The chair of the Central Works Council is clear in saying '*as long as I am the chair of the works council, it will not happen that the works council will act in the area of terms and conditions of employment*' (int3). Also, according to the FNV leader, there is no fundamental discussion about or needed for a new division of responsibilities between trade unions and works councils. Some years ago, there was a discussion among the 'triangle' of DSM's Supervisory board, DSM's Company board and DSM's Central Works Council, questioning a larger role for works councils in consultation and codetermination on terms and conditions of employment (int3). This discussion led to three conclusions, according to the chair of the Central Works Council. Firstly, works councils have less knowledge about wages, other payments and collective bargaining processes than trade unions. Secondly, works council members are more dependent on DSM as their employer than professional negotiators paid by trade union organisations. Thirdly, a rhetorical question: what would be the difference in practice if trade unions actually were consulted by the works councils in this area?

The status quo of DSM's approach in respecting the primacy of trade unions in collective bargaining can be illustrated by a recent acquisition of a firm in the dairy industry (int2). The works council of this company was accustomed to negotiating about extra payments and tried to continue this practice with DSM during the transfer. After a first attempt by DSM to do so, finally DSM together with the trade unions agreed to pick up together the negotiations and regulation of the terms and conditions of the workers in this newly acquired firm, following DSM's company culture and tradition (int2).

[46] This model is not unique at DSM. Other large companies in the Netherlands also initiated hybrid forms of direct and representative workers' participation in the 2010s (Tros, 2020).

3.2.4 Consultations and bargaining about reorganisations

All three respondents see that there is a 'grey area' with some overlap in activities and responsibilities of the two separate bodies of workers' representation (works councils and trade unions). To begin with, DSM's works councils see a role in keeping close control over the fulfilment of the DSM's collective agreement and for example the detailed implementation of working hours schedules within the standards given in the collective agreement. Also the recent consultations regarding a home-working/teleworking arrangement during the Covid 19 pandemic is an example of overlap in trade unions' and works councils' activities (see later).

Nevertheless, a specific issue in this 'grey area' with some friction between the three stakeholders is reorganisation, including DSM's activities in transfers and acquisitions. The FNV wants to be involved earlier in reorganisation and transfer plans to have more influence in earlier stages of the plans themselves and their effects on DSM's personnel and loss of employment in the region (int2). DSM's management and the works councils have a different view than the FNV. According to DSM and its Central Works Council, information and consultation about reorganisation are tasks for the works councils, as they are regulated in the national Works Councils Act. Consultation about all transfers and acquisitions by DSM are within the competence of the Central Works Councils (int3). As regulated by national law, announcements of collective dismissals have to be made to the trade unions, but they only can negotiate about the terms and conditions of those involved in collective dismissals or those threatened by job losses and not about the (reasons behind the) reorganisation itself. These terms and conditions are negotiated between DSM and the trade unions and are regulated in a Social Plan or a redundancy scheme (*Sociaal Plan*). The current Social Plan of DSM has a duration of 5 years. DSM prefers to have a long-term Social Plan because DSM has a lot of reorganisations and expects that social unrest would be higher if new negotiations with the trade unions about a new Social Plan had to be started every time there was a new reorganisation (int1). The chair of the Central Works Council points to the negative side effects when trade unions want to be involved too early in consultation rounds: '*fighting' can lead to less willingness by DSM's management to give information about reorganisations* (int3).

Mostly works councils and trade unions are on the same wavelength regarding transfers, but a recent experience is illustrative for independence and possible tensions between the two bodies. In the process of selling a small company, the works council gave its approval on condition of agreeing a good 'transfer collective agreement' with the trade unions (*transfer-cao).* When DSM could not come to an agreement with trade unions, the works councils still did not withdraw their approval of the transfer (int1).

The respondents do not have the same observations about the question whether the FNV nowadays has closer or more distant relations with DSM's management about the company's strategies and organisational developments than in the past (int1, int2, int3).

3.2.5 Cooperation between trade unions and works councils

Because of the grey area between the fields of trade unions and works councils, it is important to maintain good communications and relationships between the two workers; representative bodies. The FNV leader points to several favourable conditions underlying cooperative attitudes and practices between trade unions and works councils in the DSM case (int2). Firstly, the relatively high proportions of DSM employees who are trade union members and, related to that, works council members who are FNV members. Secondly, the good and personal relationships between union leaders and works council members. The FNV membership of the chair of the Central Works Council is an extra favourable factor (although he has an independent position from the FNV in his role as a works council member, as described earlier). A third condition for cooperation is the existence of reciprocal respect for the different roles and positions of trade unions and works councils, without wanting to take the other's place. Fourthly, DSM's professional and consensus-oriented attitude towards collective bargaining and trade unions, as well as codetermination and works councils, also helps both trade unions and work councils to have good relationships with each other. DSM's growth strategy – instead of following a low-cost strategy – helps in this consensus politics. Last but not least, bargaining about a company agreement instead of a company's coverage under-sector bargaining helps the trade unions to have more information about the company, which is also a favourable position for connecting with the works council.

3.2.6 Prospects for DSM

The interviews teach us that there are several challenges for the future. Firstly, there is the issue of a declining number of trade union memberships at DSM, especially regarding younger and higher educated generations of employees in new business activities at DSM (less production of materials, more knowledge of nutrition, more corporate functions in the Dutch part of the multinational). Also DSM's younger and new workers are covered by the collective agreement, so their involvement in representation and in collective bargaining processes are important for the continuity of DSM's collective agreement (int1). Secondly, related to that, the current good relationships between trade unions and works councils are partly based on the unions' having members on the works councils but this is no guarantee for the future (int2). Thirdly, although this case-study is illustrative for good cooperation between trade unions and works councils, it has also shed light on some frictions, tensions and limits that require the right responses from all stakeholders in terms of their respect for the different roles and positions of the two bodies of workers' representation.

4. Retail sector and case studies 2 and 3

4.1 Two main sector agreements with few company agreements

Being much less prevalent than in the manufacturing sector, there are just a few examples of company agreements in the retail sector in the Netherlands, such as IKEA, Action, HEMA, Bijenkorf, and distribution centres of Ahold-Delhaize. Trade union membership in retail is far lower than in the manufacturing sector, although workers in the supermarket distribution centres have a relatively strong strike weapon.

Retail employers in the Netherlands are organised around the binary divide of 'food' versus 'non-food'. On the one side, we have the employers' organisation *VGL* for large supermarkets in cooperation with *Vakcentrum* for corner shops and groceries. On the other side, there is the employers' organisation *INretail* for retail non-food for shops in fashion, sports, shoes, paint, garden-centres, furniture, furnishing (of homes, schools, offices etc.), kitchens, bathrooms, floors, perfumery, jewellery (around 170,000 workers). Labour relations in the whole retail sector in the Netherlands have been polarised since 2013. After many years with no sector agreements or agreements without the imprimatur of the largest trade union FNV, finally a new sector agreement was agreed with FNV and CNV for supermarkets in 2020. This agreement covers 14 supermarket chains, including the mega stores of Albert Heijn, Jumbo, Lidl and Aldi. Supermarket distribution centres can have their own collective agreements (such as for Albert Heijn) or have agreed regulations in consultation with the works council (case study 2). Since 2013, the FNV has found the quality of the sector agreements in retail too low to agree and has supported public campaigns to combat the business models in the whole retail sector that are based on low youth wages, on-call work and other extreme, flexible labour contracts and poor working conditions. From the workers' side, only the CNV has agreed to the sector agreements in the supermarket sector in the last 8 years. The FNV has not signed the sector agreement for non-food (with employers' association *INretail*) in the last years either, because of the excessively low bonuses for inconvenient working hours and excessively low wage increases. This sector agreement for retail non-food has been signed by four other trade unions: AVV, De Unie, CNV-vakmensen.nl, and RMU Werknemers. In general, one can say that employers in the retail sector have become more powerful and relations with trade unions have become more conflicted (int4).[47] The employers' association in the retail non-food sector assumes that the more conflicted position and actions of the FNV in some cases in retail food have pushed for decentralisation of the setting of terms and conditions of employment (see case 4.2). In retail non-food, employers experience fewer actions by the FNV. Also works councils in the retail non-food sector seem to be less polarised because of more equal and informal labour relations between employers and employees (int3).

[47] Int4: INretail, employers' associations in retail
Int5: FNV, supermarket sector
Int6: works council member in supermarket with AVR.

High flexibility in sector agreement in retail non-food

The employers' association *INretai*l is not experiencing much pressure towards decentralisation in the retail non-food sector. *INretail*'s members are aware of the benefits of sector bargaining and sector agreements, such as the creation of a level playing field where all employers are equal, with minimum labour standards, and where the sector agreement 'gives a foothold' regarding wages and other terms and conditions of employment (int3). At the same time however, employers in retail are asking for a certain autonomy for individual retail companies or sub-branches in HR and social policies. The relatively low levels of wages and other labour standards in combination with the high flexibility options in the sector agreement are a reason why there are almost no company agreements, nor any employers' need for 'disorganised decentralisation'. The sector agreement in many ways allows for flexibility in its implementation at the workplace level. Firstly, the sector agreement regulates that the employer can agree 'all-in' agreements with individual workers to compensate lower terms and conditions of employment with higher standards in other terms and conditions of employment (art. 4.1). Secondly, the sector agreement allows for paying higher wages than those that are regulated in the sector agreement; not lower, but it has to be said that the salary levels in this sector level are already quite low. Thirdly, in contrast to the normal practice in the Netherlands, collective wage increases are lower for those (mostly older) workers who have already reached the maximum salary level in their job (art. 6.2). Fourthly, there is the tailor-made option in the sector agreement that retail non-food companies can make individual salary increases dependent on individual performance appraisals, after consultation with the works councils. A fifth flexibility option is the rule that the employer can oblige the employee(s) to work plus or minus 35% of the basic/average number of working hours.[48] The sector agreement also points to consultation rights for the works councils in relation to rostered days off, sickness absence regulation and shift and night work for older workers of 55 years and above. In contrast to, for instance, the metal sector (see section 3), these rights are less used in practice because of far lower establishment of works councils in the trade sector; just 50% of the 50+ companies in trade have established a works council (see table 3 in chapter 2). The sector agreements in retail for both food and non-food do not regulate bargaining rights for trade unions at the company level; these agreements merely regulate some facilities and leave hours for trade union officials in companies. This is different from the sector agreement in the metal industry, and can be understood because of the low membership levels of trade unions in the trade sector and the higher membership levels and related powers of the trade unions. The sector agreement in retail non-food regulates that the companies *HEMA* and *Bijenkorf* are excluded from the sector agreement because, although they are active in the same sector, they have their own company agreements with higher labour standards. But most companies in retail like the fact that bargaining by employers' representatives at sector level provides for being 'out of the wind' of trade unions (int3). From a broader perspective, one could even state that there is maybe more centralisation than decentralisation in the retail sector because of integration of sub-branches (such as jewellery and perfumeries) in the same non-food sector agreement and scaling-up of the business and employers' association INretail (int3).

[48] This option was used by the company 'Wibra': workers had to work less during the closing of the shop in the COVID 19 pandemic but more after the lockdown.

4.2 Case study 2: supermarket

4.2.1 From collective agreement to AVR for distribution centres

This case study is about the collapse of collective bargaining in the distribution centres ('supply chain') of a large (anonymous) supermarket in the Netherlands. This supermarket used to have its own company agreements with trade unions for its personnel in distribution centres, including the drivers, but has been striving for lower costs in its competition with other supermarkets in the Netherlands.[49] Other departments of the supermarket – like the shops and the offices – were and are still covered by sector bargaining in the supermarket sector in the Netherlands (VGL CLA). This case is an example of 'disorganised' decentralisation, where the workers' representation changed from trade unions to the works council. It is not the only case in the retail sector: the employers at the Ahold subsidiary *Gall&Gall* (liquor stores) and *Action* (low price department store) also seriously considered changing from collective bargaining with trade unions to using company regulations, consulted only with their works councils.[50]

In 2017, the response by the management to strikes and conflicts with the trade unions in collective bargaining in the logistics department of this supermarket was an extreme one and entirely unexpected by the trade unions. Namely, they stopped the negotiations with the trade unions – which were asking for a wage increase of 2.5% and fewer temporary jobs and more standard employment contracts – and instead suggested regulation in consultation with the works councils (this regulation is called '*arbeidsvoorwaardenregeling*' or "AVR"). Remarkably, the works councils of the supermarket did not ask the employer to restart the collective bargaining with the trade unions, because the majority of the council members did not have jobs in the distribution centres (int5)[51], while the works councils were not experienced at all in negotiating about terms and conditions of employment because this was always done by the trade unions, which had around 700-800 members in the logistics departments. In February 2018, the works council gave its consent to the AVR proposed by the management, for a period of 5 years. The management gave every individual worker in the logistics departments a choice: to sign the AVR including wage increases that followed the sector agreement over the next 5 years or not to sign and be covered by the *former* collective agreement, but then without a wage increase. This was done in a context of social unrest with pressure from the management to sign the AVR and with resistance from trade union officials (int5; int6). The trade unions won a court action in January 2019, with a finding that the

[49] Distribution centres at Albert Heijn (Ahold-Delhaize) kept their own collective agreement and after some years of no signature by the FNV (because of the reduced levels of labour standards), in 2021 the FNV signed a new collective agreement with Albert Heijn's distribution centres.
[50] Gall&Gall agreed again a collective agreement with trade unions in November 2021 (after having company regulations with the works council).
https://www.fnv.nl/nieuwsbericht/sectornieuws/handel/2021/11/weer-cao-bij-gall-gall-avr-van-tafel; https://www.ornet.nl/blog/2021/11/02/or-gall-gall-superblij-met-nieuwe-cao/
[51] int5 = interview with the FNV's negotiator in the supermarket's distribution centres.
Int6 = interview with a works council member on the central works council of the supermarket and on the works council of the supermarket's distribution centres.

employer stopped complying with its former collective agreement too early, but the judge did not prevent the existence of the new AVR as such (ORnet). A month later, 200 workers from the logistics departments signed a petition in which they declared no confidence in the works councils that had given consent to the AVR (ORnet). In July 2019, the supermarket signed an agreement with the trade unions to the effect that those individuals who did not sign their agreement with the AVR would also receive the collective wage increase as had initially only been guaranteed for those who did sign the AVR. Nevertheless, neither the AVR as such, the lower labour standards nor the 5 year duration could be discussed by either the trade unions or the works councils.

The initiative of the management to introduce the AVR was motivated, according to the FNV, by two reasons. Firstly, is was an "emotional response of this family-owned business after the strikes in 2017 by the trade unions". Secondly and more important, the initiative was a rational decision by the employer to economise on the labour costs. Only the workers who were already employed kept the previous levels of terms and conditions of employment. The AVR was much cheaper than the collective agreement in the past because of the far lower labour standards for *new* workers, such as lower wages for both employees in standard labour contracts as well as in those who only work weekends and evenings, and lower compensation for inconvenient working hours for everyone. According to the works council member we spoke to, the new workers are paid 4 euros less per hour in many functions; a new 'team leader', for instance, earns 600-900 euros less than before (int5). The FNV negotiator in this case is not only highly critical of the way the employer bypassed and overruled the trade unions in collective bargaining with the works council, but is also fundamentally against the AVR as a way of regulating terms and conditions of employment. Workers' interests in primary conditions such as wages and bonuses for inconvenient working hours etc. cannot be represented by works council members who have no expertise in bargaining, who are too dependent on their employers and who cannot use the strike weapon (int5). 'In fact an AVR is a one-sided regulation by the employer' (int4). The FNV also points to the article in the AVR that stipulates that the works councils first have to share with the employers the communication that the councils want to use when consulting their rank and file in the company (AVR 66).

According to the works council member we spoke to (with considerable seniority in the logistics department of the supermarket and a member of the FNV), the 'Old Guard' works council members in 2017-19 were 'passive' and had little contact with the rank and file at the workplace. From the beginning, the AVR was mostly discussed with Central Works Council members who had no links with logistics (because they were working in other supermarket departments) and 'they were even friends with the management' (int 6). They were assisted by consultants paid for by the employers, whose independency was questioned by the FNV and the works council member we interviewed (int5, int6). After the last works council elections in the supermarket, when the FNV encouraged their members to be candidates in a separate 'FNV list' in 2020, six council members are currently active trade union members: two on the Central Works Council and four in supply chain. There is no trust in the relationships between the supermarket management and the new, organised council members who are more independent, critical and active

than in the former councils (int5). However, the more critical and independent works council members also cannot ask to stop the AVR in the supermarket's logistic departments; their resistance can only be channelled through the trade unions (which in turn cannot discuss this either, because of the employer's resistance to negotiations with them). The interviewee sees the value of collecting opinions and experiences from the workplace level regarding the terms and conditions of employment, but cannot confirm that the works councils are (already) doing this.

4.2.2 Effects of disorganised decentralisation

This case of disorganised decentralisation had three main effects. Firstly, the lower labour standards that are regulated in the AVR, compared to the former collective agreement, are bringing about actually lower earnings for new logistic workers in standard employment, as well as on flexible labour contracts – including many temp agency workers. There is now a divide between the older 'expensive' workers (still below the level of the higher standards in the former collective agreement) and the new 'cheaper' workers (automatically covered the new AVR). This divide also creates a financial incentive to replace older employees by younger (often migrant) workers (interview with the FNV). The second effect is a further polarisation between the employer and the trade unions. Trade unions felt overruled by their replacement by workers councils and met a closed door and a reproach from the supermarket's management for not being modern. The FNV speaks about aggressive behaviour from the company in pressing the employees to sign the new AVR in 2018 and excluding workers who did not want to sign from a collective wage increase. As already mentioned, this was harmonised later in 2019, but is still an ingredient of low levels of trust by the trade unions in the employer. A third effect can be found in the functioning of the supermarket's works councils. The whole experience around the replacement of the collective agreement by AVR has led to the election of new, more unionised works council members in the company's distribution centres, as well as in the supermarket's central works council. According to the works council member we interviewed, the new works councils are adopting a more proactive approach. More unionisation of the councils has also led to lower trust relationships between the management and the works councils in the logistic departments, as well in the central works council, compared to the old situation with more passive works councils. Trade unions' memberships in this supermarket have not grown significantly and the new works councils have not established better relations nor cooperation structures with trade unions as their advisors or trainers (interview 5). The FNV is aiming for closer cooperative relations with the supermarket's works councils and nowadays maintains contacts, communications and visits with these works councils to support them in providing information, consultations and expertise (interview 5). The FNV wants to support the supermarket's works councils more and also wants the councils to recognise that trade unions and works councils have separate roles in labour relations (i.e. unions are for collective bargaining in terms and condition of employment and councils are for consultation in organisational issues).

Nowadays, it is difficult to foresee whether trade unions will come back as main negotiators for a collective agreement for the supermarket's distribution centres when the AVR come to an end in two years. The FNV is not sure about this and is trying to stay in contact with the supermarket's management. The FNV sees the employer at other bargaining tables, such as for the sector agreement for supermarkets and its pension fund. The respondent from the works council expects that the works council of the supermarket's distribution centres is likely to prefer to hand this role back to the trade unions in two years.[52]

4.3 case study 3: Picnic (e-commerce)

4.3.1 from sector to enterprise to a new sector for e-commerce

Picnic BV operates an online supermarket in the Netherlands. Picnic's customers can shop online in Picnic's supermarket using an application (or "app"). Customers are granted access to the online supermarket if and when they have entered their data and been authorised by Picnic. After customers have ordered, Picnic delivers the products to their homes. Picnic does not have a physical store. The Picnic group employs, in addition to a small staff, approximately 2,500 temporary workers. The majority of them work at Picnic Fulfilment and Picnic Hubs. Picnic Fulfilment is engaged in the processing, storage and packing of goods. Picnic Hubs is a company engaged in the shipment of goods and their delivery. Picnic BV – a sister company of these companies – takes care of running the online supermarket. In 2019, the Picnic Group consisted of 10 companies including the three said Picnic companies. The Picnic Group does not see itself as a supermarket, but rather as a tech company, although the group does profile itself as an online supermarket through its website (see https://picnic.app/nl/) under the name Picnic.

Picnic was founded in 2015 and initially only served locally. Nowadays, Picnic is active throughout the Netherlands. In 2019, Picnic was named the fastest growing company in the Netherlands.

4.3.2 Dispute over application of the Supermarket Collective Agreement

In 2019, a dispute arose between the Picnic group and the trade union FNV regarding the application of the Supermarket CLA. On 8 January 2019, FNV sent a letter to Picnic requesting that the Supermarket CLA would be applied because Picnic operated an online supermarket. In response to this letter, the FNV and Picnic held discussions and Picnic took the position that it was not obliged to apply the Supermarket CLA because Picnic did not fall within its scope because it was a tech company. In response, the FNV sued all companies in the Picnic group and claimed application of the Supermarket CLA by all individual companies in the group. According to the FNV, all companies in the Picnic group contributed to the operation of the online supermarket. According to the FNV, the fact that Picnic's various activities had been accommodated in separate companies was not of decisive importance for the applicability of the CLA, because all these activities were

[52] As happened in another case in the retail sector (Ahold's *Gall&Gall* reintroduced collective bargaining with the unions, after having a 3 year AVR, in November 2021)

dedicated to the operation of the online supermarket. In the proceedings, Picnic acknowledged that one of its companies, Picnic BV, ran a store and that only this company was obliged to apply the Supermarket CLA. FNV contested this position, referring to the said argument that all companies contributed to the operation of the store.

In a judgment of 3 December 2019,[53] the Amsterdam District Court found in favour of Picnic and dismissed the claims of the FNV. According to the District Court, the text of the scope of the Supermarket CLA implied that there had to be an assessment for each separate legal entity of Picnic whether its activities were covered by the Supermarket CLA and therefore whether a supermarket was being operated. According to the court, only Picnic BV ran a supermarket and therefore only this company was obliged to apply the CLA. FNV did not appeal against this judgment.

In response to this ruling, the parties to the CLA in the supermarket sector entered into consultations about amending the scope of the Supermarket CLA, in the sense that the CLA would also apply to companies that carry out activities that serve the operation of a supermarket and are connected within a group.[54]

4.3.3 Change in scope and Picnic's own collective agreement with union De Unie

The change in the scope of the Supermarket CLA has taken shape in the collective agreement that applies from 2020. "Employer", as defined in the CLA, is not only the company that actually operates the store, but also the company that – in short – contributes to this operation. As a result of this change, all individual Picnic companies are covered by the new Supermarket CLA. Since none of the Picnic companies are members of the employers' association that entered into the Supermarket CLA, Picnic is only obliged to apply the new Supermarket CLA if it is declared generally binding by the Minister. To date, this has not happened, because collective bargaining parties have not yet submitted the appropriate request.

Following the ruling by the Amsterdam District Court, and the changes made in the Supermarket CLA, Picnic entered into consultations with the trade union De Unie to obtain a company CLA for a number of Picnic's companies. The Picnic CLA commenced on 20 April 2020 and initially had a term until 24 April 2022. On Picnic's part, the Picnic CLA was entered into by Picnic Hubs and Picnic Fulfilment and is called the Picnic e-Commerce CLA. The FNV did not support this development.[55]

The trade union De Unie is not a party to the Supermarket CLA. It follows from our interview with De Unie that De Unie has no fundamental preference for collective agreements based on sector or company level. De Unie explained that the choice to enter into a collective agreement is determined first and foremost by members' interests and offering tailor-made solutions. If members' interests require collective bargaining at the company level, that will be preferred to a sectoral collective bargaining agreement and vice versa. In addition, De Unie has never been centrally organised. In the case of Picnic, according to De Unie, member interests and Picnic's specific needs called for entering into a CLA at the company level.

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[53] Amsterdam District Court, 3 December 2019, ECLI:NL:RBAMS:2019:8968.
[54] See C. Schrijver, 'Medewerkers Picnic straks onder de cao Supermarkten', 2 March 2020 (fnv.nl/nieuwsbericht/sectornieuws/flex/2020/03/fnv-medewerkers-picnic-straks-onder-cao-supermarkt) [in Dutch]
[55] M. Keswiel, 'Picnic sluit cao af met De Unie, FNV is woedend, 10 April 2020 (mtsprout.nl/startups-scaleups/picnic-sluit-cao-af-met-de-unie-fnv-woendend) [in Dutch].

If there is already a sectoral collective agreement, as in the supermarket sector, and a company wishes to negotiate a collective agreement at that level – as in the case of Picnic - then De Unie will take into account whether the specific business characteristics of the company differ in essential elements from the companies that fall within the scope of the CLA. In this way, De Unie wants to prevent the company from using the company CLA merely to compete on employment conditions. There must therefore be a genuine need for customisation. A sector CLA creates a level playing field with regard to employment conditions and that idea is embraced by De Unie as a major advantage of a sector CLA. In addition, when a sector CLA is declared universally binding, it is not easy for a company to obtain dispensation based on the current legal framework. If the parties to the CLA do not grant dispensation, a request for dispensation can be submitted to the Minister, who will then assess whether there are compelling arguments why application of the sectoral CLA cannot reasonably be required (see also section 1). According to De Unie, this legal framework forces a certain restraint when negotiations are already taking place at the sectoral level and requires a realistic examination of a company's customary needs. It should also be borne in mind that many collective bargaining negotiations at the company level are intensive and costly, which is also an interest that De Unie takes into account when discussing the level at which collective bargaining should be conducted.

De Unie is not in favour of a working conditions arrangement with a works council, but is open to working with a works council. At Picnic, however, this has not been a topic of discussion. It is precisely the need for customisation that can lead to involving the works council in the collective bargaining process as a consultation partner.

De Unie recently started working with what it calls a Digi-C model, which it uses to involve non-members in the collective bargaining process in order to make the collective bargaining agreement a meaningful instrument for as many parties as possible. In practice, Digi-C works more easily in collective bargaining at the company level.

4.3.4 Renewal and differences

At the end of 2021, an agreement was reached in the supermarket sector between the FNV and CNV on the one hand, and Vakcentrum and VGL on the other, concerning aspects that included a 9% wage increase over three years. Picnic and De Unie responded by agreeing to a wage increase of 10% over three years.

Picnic's reaction to the wage developments in the Supermarket CLA, its refusal to apply the Supermarket CLA, as well as Picnic's remark that its company mainly employs young people, led to a comparison of the content of the CLAs. From this comparison it follows that the Picnic CLA, compared to the Supermarket CLA, has better primary remuneration for young people in lower positions (entry-level wages) but lower wages for higher positions and workers with more experience (final wages). In addition, the Picnic collective agreement offers more opportunities for the use of flexible labour. Also, the Picnic collective agreement does not have a supplements scheme and has a less favourable sickness scheme than the supermarket collective agreement. Based on the comparison of both collective agreements, it can be said that it pays for Picnic to apply its own CLA.[56]

[56] P. Garstenveld, 'Voor Picnic loont het de cao niet te hoeven volgen', Distriefood 5 February 2022 [in Dutch].

The extent to which the Picnic CLA qualifies for dispensation from the Supermarket CLA, if a request is filed to have the Supermarket CLA declared universally binding, is the question. At the moment, the Minister of Social Affairs and Employment has not yet been asked to declare the Supermarket CLA generally binding. If that request is made, Picnic will unquestionably request dispensation as well. The question would then be whether Picnic can make sufficiently plausible arguments that its specific business characteristics differ in essential elements from the companies that are included in the scope of the Supermarket CLA.

4.3.5 A new sector, a new phase

Picnic has taken the initiative to establish an employers' association in e-commerce for companies engaged in e-commerce. Picnic is also a member of this employers' association, and this association has concluded the e-commerce CLA with the trade union De Unie. This CLA shows strong similarities to the Picnic CLA in terms of content. The collective agreement applies to food and non-food e-commerce. E-commerce refers to the sale of goods through one or more in-house Virtual Sales Channels and/or e-fulfilment (receiving, packing, sorting and/or delivery) for goods sold through Virtual Sales Channels. CLA parties have asked the Minister of Social Affairs and Employment to declare this CLA generally binding. E-commerce companies seem to welcome the arrival of the e-commerce collective agreement, but also see objections. In particular, the lack of support from the major trade unions is seen as problematic, as it means that support for the CLA is not solid. Moreover, the scope of the current e-commerce CLA is not considered broad enough. According to non-food e-commerce companies, their particular interests are not sufficiently represented by the e-commerce CLA because it is mainly oriented towards e-commerce in food.[57] Besides that, the sector agreement for non-food retail also includes retailing through the internet to private parties or to end-users as being under the scope of its agreement. [58]

If the e-commerce collective bargaining agreement is declared universally binding, the Minister of Social Affairs and Employment will not be able to proceed straightforwardly to declare the Supermarket CLA as binding, since the scope of the two collective bargaining agreements overlaps. This means that the Minister of Social Affairs and Employment will ask the parties to both collective agreements to resolve the overlap in scope. Whether the parties are prepared to do so remains to be seen. To date, this does not appear to be the case.

[57] J. Kempe, 'Een e-commerce cao, nu pas?', 24 February 2022 (twinklemagazine.nl/2022/02/een e-commerce-cao-nu-pas).
[58] CLA Retail Non-Food, 1 January 2021, clause 1 operational ambit.

5. Case study 4: PostNL

5.1 Introduction

PostNL is the national postal company of the Netherlands. The 2009 Dutch Postal Act regulates that sending and receiving mail is and remains accessible to everyone in the Netherlands, and the Dutch government has designated PostNL to carry out this universal postal service. PostNL evolved from PTT Post, which was engaged in telephony and telegraphy in addition to mail delivery. PTT Post is an abbreviation for Staatsbedrijf der Posterijen, Telegrafie en Telefonie. PTT Post was started in 1928. In 1998 the name was changed to TPG Post and in 2006 changed to the name TNT Post. TNT Post was split into PostNL and TNT Express in 2011. Both companies have been listed on the stock exchange since 2011. PostNL's two main business units are currently mail delivery, dealt with by PostNL BV, and parcel delivery, dealt with by PostNL Parcels Benelux BV.

PostNL directly and indirectly employs approximately 50,000 people. The majority of these workers are engaged in the delivery and/or sorting of mail and parcels. PostNL delivers approximately 8 million letters and 1.2 million parcels every day. PostNL has three of its own company collective agreements: the PostNL CLA, CLA for Postal Delivery Workers and CLA for Saturday Delivery Workers. With regard to the delivery of parcels, PostNL often uses self-employed persons with staff, or subcontractors. Much attention has been paid in recent years to improving the terms and conditions of employment of these self-employed workers. The idea of PostNL to outsource work to subcontractors was not limited to the delivery of parcels. Outsourcing has also been used in sorting centres. PostNL stopped this after strong criticism from trade unions, media and politicians. Moreover this outsourcing turned out to be sham structures, according to the labour inspectorate.

In this case study, we cover three topics. Firstly, we discuss the PostNL collective agreement in general and its relationship to other collective agreements in particular. Secondly, we discuss the situation of the parcel delivery workers and the situation around the sorting centres in relation to the PostNL CLA and finally we discuss the role of the Works Council in the formation of employment conditions at PostNL. This case study is based mainly on desk research because PostNL was unable to cooperate with an interview. The trade union FNV was however willing to be interviewed and the results of this interview have been incorporated into this case study.

5.2 PostNL and the collective agreement

PostNL CLA

The most important collective agreement at PostNL is the PostNL CLA. The current PostNL CLA runs from 1 April 2020 to 31 March 2022 and was entered into on the employee side by the trade unions FNV, CNV and BvPP. On the employers' side, the CLA was entered into by PostNL, representing ten individual PostNL companies. The PostNL CLA applies to employees who are employed by one of these ten PostNL companies, which are incidentally divided into two groups. In short, the companies involved in delivery and parcels belong to the B group and the other companies to the A group. The collective agreement has a general part that applies to all employees and an A part for employees of the A group and a B part for the B group. In addition to this distinction, it is also relevant

to note that the PostNL CLA does not apply if the collective agreement for postal workers or the collective agreement for Saturday delivery workers applies. The subdivision into an A section and a B section is not preferred by the trade union FNV. This union would prefer to see a package of employment conditions that was as uniform as possible for all PostNL employees and at the highest possible level.

The PostNL CLA is a minimum CLA that can be deviated from in favour of the employees. In addition, the PostNL CLA contains what is termed an a la carte scheme (Chapter 9) which allows employees at an individual level to use certain employment conditions (sources) for a specific purpose. It is not known whether this scheme is used or used much. The purposes mentioned in the CLA are: pension, special long-term leave and parental leave. The hours that can be used for this purpose are additional hours and vacation hours in excess of the statutory entitlement.

Because of its history, PostNL and its workers chose a company CLA. PostNL has traditionally been a state-owned company that was primarily and solely engaged in the delivery of mail in the Netherlands. After the privatisation of PostNL, it was therefore obvious that the collective bargaining would take place at the company level. Meanwhile, the parcel branch of PostNL has grown enormously and several companies are now active in that market. In the Netherlands, the delivery of parcels falls within the scope of the CLA for commercial freight transport and this CLA has been declared universally binding. The PostNL CLA has been disassociated from the CLA and so have the company CLAs of other parcel delivery companies such as DHL and FedEx. Due to increasing competition in the parcels market, as well as the dispensation for many company CLAs of parcel delivery companies from the CLA for commercial freight transport, the question may arise whether it is reasonable to enter into a separate sector CLA for the parcels market. FNV points to the CLA for commercial freight transport and that a separate CLA for the parcel market is not a priority at the moment. The FNV believes it is more important to keep an overview of the employment conditions within PostNL and to make sure they are as equal as possible for all PostNL employees. Due to the shrinkage at PostNL, it is advantageous in terms of employment if it remains one company. Staff can switch to parcels if they wish. Following on from this, it should be noted that the FNV is also, in principle, not in favour of the Collective Labour Agreement for postal workers and the Collective Labour Agreement for Saturday delivery workers, which will be discussed below.

Unions push for minimum wage increase and a reduction of temporary workers.

Collective agreement for postal workers

The most recent collective agreement for postal workers had a term from 1 October 2019 to 30 September 2021. Parties to the CLA were Koninklijke PostNL on the one hand and the trade unions CNV and BvPP on the other. The FNV was not a party to this CLA because its members did not agree to the negotiation result. The CLA for postal workers applied to employees working as postal workers for PostNL. The CLA for postal workers was a standard CLA, which means that it was not possible to deviate from the CLA in an individual case. Nor did the CLA for postal workers have an a la carte arrangement like the PostNL CLA. A new CLA for postal workers is currently being negotiated. At the end of last year and the beginning of this year, a number of PostNL postal workers took action for a better CLA.[59] The aims of the action were an increase in the minimum hourly wage to 14 euros per hour and an improvement in working conditions. According to the FNV, the

[59] C. Schrijver, Postbezorgers PostNL voeren actie op de Dam voor goede cao, 18 February 2022 (FNV.nl/nieuwsbericht/sectornieuws/vervoer/2020/02/postbezorgers-postnl-voeren-actie-op-de-dam-voor-g) [in Dutch].

terms of employment and working conditions are not proportionate to the profits PostNL has made in recent years and the increased workload due to the corona pandemic. The FNV's efforts include bringing postal workers under the PostNL CLA and equalising working conditions as far as possible.

CLA for Saturday Delivery Workers

The CLA for Saturday Delivery Workers ran from 1 April 2020 to 31 March 2022 and was therefore parallel to the PostNL CLA. The FNV, CNV and BvPP were parties to this CLA. The CLA for Saturday Delivery Workers applied to employees who worked on Saturdays. The CLA for Saturday Deliverers did not have an a la carte arrangement and it was not clear from the CLA what the nature of the CLA was.

5.3 Outsourcing and subcontractors and the role of the collective agreement

Outsourcing

According to PostNL, it chose several years ago to outsource a number of work processes. Outsourcing means that company activities are no longer performed in-house by its own employees, but that the activities are performed by third parties. These third parties can be self-employed, but also companies that perform the activities with their own staff. The fact that the employer, in this case PostNL, does not manage or supervise the employees carrying out the business activities means that, in a legal sense, there is no question of temporary employment and the employees do not have to be paid in accordance with the PostNL CLA. According to PostNL, it has been forced to outsource due to a combination of high wage costs and increasing competition in the parcels market. This is evident from a Vimeo video from 2012 circulating on the internet in the past, in which the then director of Sourcing & Sustainability at PostNL explains the advantages of outsourcing work processes in relation to personnel costs and why PostNL has chosen to do this. In this video, the then director spoke of the collective agreement as 'ballast'. It should be noted that in the case law on outsourcing by PostNL, this video was referred to by various courts and worked against PostNL.

Parcel delivery workers

One of the work processes that PostNL has outsourced to a large extent is parcel delivery. Within the PostNL group, the parcel delivery has been assigned to PostNL Pakketten Benelux BV. Subcontractors are often used for parcel delivery. The subcontractors are either self-employed workers without personnel, or self-employed workers with personnel, or main contractors who work with self-employed workers. For several years, there has been criticism of the outsourcing of parcel delivery to self-employed workers.[60] These criticisms relate to the working relationships of the workers, non-compliance with working hours and the lack of concern for safe and healthy working conditions. Even in Parliament, concerns were raised in 2016 about the situation at PostNL and the work with pseudo self-employed workers.[61]

A significant proportion of the independent parcel delivery workers at PostNL have organised themselves into the Subco Partners association. In 2015, the FNV took the fate of the subcontractors to heart and entered into talks with PostNL about pay, among other things. These talks led to a draft agreement, but because the draft was not supported by

[60] See: 'De kilosjouwers van PostNL', Zembla 1 June 2018 and 'Baas in eigen bus', Zembla 7 May 2018.
[61] Lower House, questions about self-e3mployed structures for package delivery workers at PostNL, 10 February 2016.

the FNV's supporters, this draft did not receive the status of 'agreement', let alone a collective agreement. The fact that PostNL and FNV failed to reach an agreement increased dissatisfaction among subcontractors, which led to collective actions in 2015.[62] As a result of the discontent and the collective actions, and under pressure from negative press reports and politics, PostNL continued to negotiate with Subco Partners in 2015 and concluded an agreement called the 'Sustainable Delivery Model'. This agreement ultimately did not receive sufficient support from the member drivers, but nevertheless PostNL decided to treat and reward subcontractors in accordance with this agreement. Part of the agreement was that PostNL would offer all subcontractors an employment contract and would remunerate them in accordance with the PostNL CLA. PostNL also stated, in line with this agreement, that it would no longer work with self-employed workers without personnel.[63]

The problems at PostNL and the parcel delivery industry do not seem to have been solved by this change of course, however. In recent years, there has been a lot of litigation between parcel delivery workers and PostNL[64] and there is still a lot of media attention on the situation of parcel delivery workers.[65] The corona crisis and the consequently growing parcel market have undoubtedly contributed to this renewed (or continued) attention.[66] About 70% of the parcel delivery is still done by employees who are not employed by PostNL. PostNL now often works with subcontractors who themselves employ staff who are responsible for parcel delivery. These employees are subject to the CLA for professional goods transport (insofar as they are employed by PostNL). According to the FNV, this CLA is not always applied correctly. PostNL is responsible (and liable) for correct pay in the chain through liability under Articles 7:616 et seq. of the Dutch Civil Code and the FNV regularly calls PostNL to account for this. According to PostNL, there is no structural violation of the CLA Goods Transport by subcontractors and PostNL sees no reason to employ the workers directly. The remuneration of parcel delivery workers and their employment remain topics of discussion between PostNL and the unions.

According to PostNL, it operates a model in which parcels are delivered by a mix of people working for PostNL and a group of committed delivery partners, who employ smaller numbers of delivery workers. It is said that this model is widely used in transport and logistics, as it is a successful way of addressing the flexibility needed to handle the volume peaks and troughs. According to PostNL, this also means that the vast majority of the people delivering parcels for PostNL enjoy job security, with salaries covered by collective labour agreements. According to PostNL, the delivery workers are in most cases employed either directly by PostNL or by one of their delivery partners and these partners are pleased or very pleased with the cooperation they have with PostNL. PostNL states that on occasions there seems to be a gap between public perception of parcel delivery labour practices and the reality. PostNL states that it is keen to close this gap and is committed to staying transparent in its way of working, while continuing to abide by all relevant laws and regulations.[67]

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[62] District Court for Midden-Nederland, 20 July 2015, ECLI:NL:RBMNE:2015:5373.
[63] Trouw, 'Vast contract voor pakketbezorgers PostNL', 15 April 2016.
[64] De rechtspraak, Arbeidscontract pakketbezorgers PostNL, Haarlem 18 December 2015.
[65] D. Bremmer, Pakketbezorgers PostNL eisen hoger uurtarief: 'We draaien bizarre weken', AD 8 april 2020: M. de Ruiter, 'Even plassen? Daarvoor is de pakketbezorger te druk', De Volkskrant 28 April 2020.
[66] E. Demkes, Pakketbezorgers rennen zich rot in een race die ze nooit kunnen winnen', De Correspondent 18 December 2020; M. de Ruiter, 'Pakketbezorger daagt PostNL voor de rechter voor te lage en ondoorzichtige tarieven', De Volkskrant 15 April 2021; M. de Ruiter, 'De prijs van gratis bezorging', De Volkskrant 17 September 2021.
[67] PostNL Annual Report for 2021

Sorting centres

Following the outsourcing of parcel delivery to subcontractors, PostNL has also chosen to outsource parcel sorting. PostNL started to outsource sorting activities to sorting centres in Utrecht as far back as 2009. The outsourcing agreements PostNL has made with third parties stipulate that PostNL does not manage and supervise the work of the workers who perform the outsourced sorting activities and therefore there is no question of temporary employment and/or secondment. The legal consequence of this is that the PostNL CLA does not apply to the workers who perform the work at the sorting centres. In practice, these workers turned out to be paid less than PostNL employees.[68] The FNV started proceedings against PostNL in 2019. According to the FNV, this was a sham structure that circumvented the PostNL CLA and represented an unlawful act against workers in the sorting centres because they were structurally receiving too little pay. The PostNL works council supported this view of the FNV and asked PostNL – at that time – to stop outsourcing sorting centres.[69]

In a court case that FNV raised in 2019 at the Overijssel District Court, the court concluded that PostNL had acted unlawfully towards the temporary workers and ordered PostNL to make back-payments to these workers.[70]

PostNL entered into a partnership with the municipality of Groningen under which people who receive social benefits were employed in PostNL sorting centres. The partnership between PostNL and the municipality was designed as a form of subcontracting, in which PostNL would have no management or supervision, so that the PostNL CLA would not apply. According to the FNV, this too was a sham structure and PostNL should have paid in accordance with the PostNL CLA. In proceedings before the District Court for Noord-Nederland, the court ruled that PostNL had acted unlawfully towards the workers by underpaying them and ordered PostNL to pay in accordance with the PostNL CLA.[71]

In response to the proceedings brought by the FNV, PostNL stated that it would stop contracting in sorting centres because it valued equal pay for parcel sorters. In addition, PostNL wanted to respond to the social fuss that had been created around this issue.[72] PostNL currently works in the sorting centres mostly with temporary workers. According to the FNV, this is undesirable because it involves structural and permanent work for which temporary employment is not intended. According to PostNL, technological developments mean that more and more work in sorting centres is automated, so that the work cannot be described as permanent and structural in the long term. There are no concrete indications for these developments. According to the FNV, the number of sorting centres (along with the demand for personnel) has increased in recent years due to the growing parcels market and there is no question of extensive automation in those centres yet. The FNV urges PostNL to employ the temporary workers directly.

5.4 Works council and employment conditions

The PostNL Group has a central works council. The Group's two main business units are parcel delivery, hosted by PostNL Parcels Benelux BV, and mail delivery, hosted by PostNL

[68] S. Sjouwerman, 'Ter zware pakketten, te weinig loon: sorteerders zetten druk op PostNL, NOS 3 April 2018 (nos.nl/artikel/2225609-te-zware-pakketten-te-weinig-loon-sorteerders-zetten-druk-op-postnl).
[69] I. Weel, Ondernemingsraad PostNL eist einde schijnconstructies pakketsorteerders', Trouw 15 June 2018
[70] Overijssel District Court, 7 May 2019, ECLI:NL:RBOVE:2019:1538.
[71] Midden-Nederland District Court, 15 December 2020, ECLI:NL:RBNNE:2020:4471.
[72] I. Weel, 'PostNL stopt met contracting in sorteercentra', Trouw 19 February 2019.

BV. Both companies have their own works councils. The division of tasks at PostNL between the trade unions and the works council is clear. The trade unions are responsible for determining the primary employment conditions, while the works council is involved as much as possible in developing regulations that are in line with the matters referred to in Section 27 of the WCA. In that sense, you could say that the statutory demarcation of duties between trade union and works council is being followed at PostNL. Incidentally, trade union members are also represented in the works council. The statutory delineation of duties provides certainty and clear tasks. With regard to reorganisations and their consequences, PostNL has concluded a Social Plan with the trade unions that applies over a longer period of time. As a result, trade unions are somewhat at a distance during reorganisations and the works council in particular has an important role in the advisory process. The FNV has asked itself whether a long-term Social Plan is still desirable. For the time being, that seems to be the case, because it provides certainty about the consequences of reorganisations, while PostNL is given the opportunity to move with economic changes and the works council has sufficient confidence in an effective and adequate consultation process.

A conflict recently arose between one of the works councils and PostNL as part of an advisory process. In 2018, PostNL started optimising the logistics process of mail delivery. Part of this process is the introduction of a new delivery structure that involves working with fewer depots and using electronic aids, such as an electric bicycle. As a result, there are fewer locations where postal workers can pick up their mail and from which they can begin their work. The new structure has implications for the travel time of postal delivery workers. In 2021, PostNL asked the works council for advice on the introduction of the new delivery structure. PostNL and the works council discussed the proposed decision, including compensation for the extra travel time. PostNL informed the works council that it was in talks with the trade union on this subject (extension of the CLA for delivery personnel) and did not wish to make any further agreements with the works council. In response, the works council issued negative advice unless PostNL adjusted the current agreements on coffee and break time and commuting, in the sense that the coffee and break time that applies to all PostNL employees would also apply to postal workers and that travel time would be regarded as working time until new CLA agreements were reached on this subject. PostNL did not follow the advice of the works council. PostNL referred to the primacy of the collective agreement and the statutory allocation of powers between the union and the works council. The works council then brought proceedings before the Enterprise Chamber. The Enterprise Chamber found in favour of PostNL, referring to the primacy of the collective agreement as laid down by Dutch law, which means that the works council has no more powers in respect of subjects that are exhaustively regulated in the collective agreement. Due to the standard nature of the CLA for postal workers, PostNL is not at liberty to make additional employment conditions agreements with the works council, nor can the works council impose conditions in an advisory procedure.[73] The FNV remained neutral in the discussion between PostNL and the works council.

[73] Amsterdam Court of Appeal, 26 November 2011, ECLI:NL:GHAMS:2021:3698

6. Comparison between case studies and conclusion

6.1 Comparative findings of the case studies

Table 6.1 shows the comparisons between the case studies along the lines of core issues.

Our first case in the manufacturing sector (DSM) shows strong trade unions at the company level, as well as professional works councils. Both employees' representative bodies cooperate in the fields of reciprocal communication, some coordination, as well as respecting each others separate roles. Recently, a 'tripartite' project group on teleworking under Covid 19 was set up, but in the recent past trade unions have not been involved in the company's projects on modernising workers' participation, and works councils were not involved in the company's projects on modernising the collective agreement. The employer is more satisfied than the largest trade union, the FNV, with this demarcation of roles and tasks between trade unions/collective bargaining on the one hand and works councils/codetermination on the other hand. The FNV wants to be more involved in information, consultation and codetermination on restructuring, but the employer and works councils are sticking to the legal separations of their roles in this (trade unions bargaining on terms and conditions of the 'victims' of collective layoffs and works councils are consulted on the reasons and organisational and employment effects of restructuring).

How representative are the cases for the Dutch model of collective bargaining and for recent developments?

The first case can be seen as representative for the group of large companies in the Dutch manufacturing sector having their own company agreement, with workers (still) being highly organised by trade unions. Examples are the large (multinational) companies in the chemical/process and metal industry in the Netherlands and large companies with a state owned history in telecom or (public) transport. They follow the traditional demarcation of powers and jurisdictions that are anchored in Dutch legislation with its dual channel of trade unions (for collective bargaining on material terms and conditions of employment) and works councils for consultation and codetermination on organisational development and social policies beyond the issues of wage, pension and working hours. The observed 'overlapping' of powers for unions and councils in the DSM case study is also visible in companies in other sectors and companies under sector bargaining.

Table 6.1: comparative main findings of the case studies

	Case 1 DSM	**Case 2 Supermarket**	**Case 3 Picnic / e-commerce**	**Case 4 PostNL**
Characteristics	Decentralised bargaining under clear demarcation unions and works council; Consensual relations	Disorganised decentralisation (unions replaced by council); Conflicted, polarised relations	Decentralised bargaining with another union than in sector agreement; Consensual relations with small union	Decentralised bargaining about couriers; Demarcation unions-council; Moderate/ mixed relations
Regulatory context	Continuing tradition in company bargaining and social dialogue	Collapse of company bargaining into consultation with works council	e-supermarket starts own collective agreement, despite sector agreement	3 company agreements
Employer strategy	Traditional division of roles unions and councils	In search of lower bargaining resistance and lower labour costs (better with works council)	Avoiding coverage by sector agreement for supermarkets	Avoiding collective agreements by labour contracting + cost reduction
Trade unions strategy	Maintaining traditional positions; Trying to influence company's re-structuring as well	'overruled' by employer's strategy to replace unions by councils in regulating terms and conditions of employment	FNV at sector level: dispute to include Picnic in sector agreement for supermarkets. De Unie at company level: tailor made representation	Improving terms and conditions of employment for all workers
Works council strategy	Leaving collective bargaining to the unions (money related, working hours). Professional/ autonomous functioning of workers' participation	Initially passive; more unionised after decentralisation but still relatively weak	Not relevant in this case	*In*sourcing of sorting centre; (co-) bargaining in remuneration
Workers' representation	Communication between unions and works councils and ad-hoc partnerships	Hard replacement of unions by councils, no cooperation between the 2 bodies	Smaller union position itself as representative, no role for works council	Cooperation works council and union in *in*sourcing sorting centre and inclusion in collective agreement

Bargaining processes	Professional on both sides	Conflicted with unions; Cooperative but unbalanced with councils	Cooperative but in conflict with sector bargaining	'Difficult to agree'
Bargaining outcomes	Relative high standards in collective agreement	Lower labour standards for new workers after decentralisation	Compared with sector: better for younger and worse for experienced workers; fewer supplements.	Unsatisfied with standards according to the FNV

The second case is not entirely unique. Some consultants in the field of workers' participation in the Netherlands are in favour of giving works councils a role in setting terms and conditions of employment.[74] They argue that works councils can be more representative than trade unions and have more of an eye for 'tailor-made' regulations, adapted to the needs and situation of specific companies and work places. But as the second case shows, it is not beneficial for workers. The employer incurs fewer costs and more unionists are elected to the works council, but the countervailing power of workers representation is deteriorating. The employers do not bargain with the trade union any more and nor is there an active/competent works council dealing with terms and conditions of employment. Another example is Ahold's *Gall&Gall* (liquor shops): here the employer reintroduced collective bargaining with the unions in 2021 after having a 3 year company arrangement, after consultations with the works council. Here, the works council tried to build up its own competences in the field of terms and condition of employment during the AVR period, 'but got stuck' (interview 7).[75]

The third case illustrates the vulnerability of the collective bargaining regime in the Netherlands. Employers' associations of individual employers are free to bargain with only 1 trade union that does not have to be the largest or most representative one. By doing so, the employer in case study 3 seems to be successful in not being covered by the sector agreements, although at this level other, larger trade unions are involved. This case is specific in the way that the e-commerce sector has an unclear relationship with the scope of the sector agreements in the retail food sector.

The fourth case illustrates the employer's strategies in decentralised bargaining on outsourcing, labour contracting and restructuring with trade unions, as well as works councils. These issues are common issues in employment relations in the Netherlands nowadays. Cooperation as well conflicts between trade unions and works councils in these topics are also evident in other companies in the Netherlands.

6.2 Concluding findings

Workers' representation in the Netherlands follows a dual channel. Labour law gives primacy to trade unions in collective bargaining on terms and conditions of employment. Collective agreements between employers (or their associations) and unions have legal effects on unionised and non-unionised employees. The Minister of Social Affairs and Employment makes sector agreements binding for non-organised employers if so requested by the collective bargaining parties and if more than 60% of the workers in the sector work for an employer that is member of the employers' association(s) that has signed the sector agreement.

Collective bargaining coverage in the Netherlands has been stable for around 80% of the total number of employees over recent decades. In that period, there has been no structural shift from sector to company bargaining. In 2019, (still) around 11% of the

[74] Et tu Gall & Gall? - ORnet
[75] interview FNV, responsible for Gall and Gall.

employees under collective bargaining were covered by company agreements (and not by sector agreements). However, sector agreements have become more in the way of frameworks for decentralised implementation, by giving opportunities for deviations at the company level, after consultation between the individual employers and works councils (and to a lesser extent trade unions). This trend is limited because of the resistance of trade unions, but also because a large proportion of the employers (especially SMEs) no not want to bargain/consult twice about terms and conditions of employment, while they appreciate a level playing field in the sector (limiting competition on labour standards and having practical guideline for HRM in a detailed collective agreement). Therefore, we conclude that, generally speaking, we see a trend of cautious organised and coordinated decentralisation in collective bargaining in the Netherlands.

Trade unions in the Netherlands are relatively weak at company and workplace levels, with the exception of a limited number of companies that have for a long time had their own company agreements. The establishment of works councils in the Netherlands is quite high, although varying among sectors, from less than 50% in trade sectors to 95% in the public sector (for companies with more than 50 employees). High establishment levels do not mean that works councils are powerful. Works councils have relatively strong legal consultation rights compared to workers' representative bodies in other countries, but their legal goal is to operate within the companies' interests and have strong ties with management (Van den Berg et al., 2019). And of course they do not have the strike weapon that trade unions have. Because of the primacy of collective agreements in Dutch labour law and high coverage of collective bargaining, works councils do not operate – and have therefore not built up skills and expertise – in the areas of wages, pensions and to some extent in the areas of working hours and reorganisations.

Theoretically speaking, within the Dutch dual channel of employee representation, trade unions and works councils might work together in their strategies and practices. Partnership initiatives have been established in some sectors in Germany (Haipeter, 2013; Haipeter, 2016; Haipeter & Rosenbohm CODEBAR – Country report Germany). In the Netherlands, trade union members can be elected to works councils, individually or on a joint 'trade union list'. However, trade unions in the Netherlands are less active in consulting works councils, compared to Germany (Van den Berg et al., 2019). Apart from some individual examples from some years ago, we see little evidence of a trend of partnerships in (preparing) collective bargaining with the works councils in the Netherlands or a trend of more trade union involvement in workers' participation (Tros, 2020). The case studies and interviews in this CODEBAR-study confirm this picture of quite distinct roles and activities of trade unions and works councils, in the context of the dual channel system of employee representation.

Despite this divide of collective bargaining versus employee participation in the Dutch dual system, the case studies show some practices that require more coordination between the trade unions and works councils. In the supermarket case, the position of trade unions is undermined by the works council, which has taken over the negotiations in a company agreement regarding (poorer) terms and conditions of employment. Trade unions could re-establish their old positions if the works council were to discontinue their willingness to represent the workers as bargaining party towards the employer. In that case, trade unions are factually dependent on the works council position, although formally speaking the dependency relationship goes in the other direction. In the manufacturing case (DSM) as well, the trade unions could profit from strengthening

strategic partnerships with the works council, especially in 'grey' areas[76] between (or in overlapping jurisdictions regarding) collective bargaining by trade unions and consultation procedures by the works council, such as restructuring.

[76] 'Grey areas' here means those areas where money related terms and conditions of employment (to be regulated in the collective agreement by the trade union) overlap with areas covered by Works Councils Act regarding the works council's rights/powers in employee participation in the area of organisational development.

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