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Challenges to Traditional Sector Boundaries

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Relaunching Collective Bargaining Coverage in Outsourced Services

RECOVER POLICY PAPER

Outsourcing in The Netherlands: Challenges to traditional sector boundaries

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POLICY PAPER: NETHERLANDS

INTRODUCTION

Outsourcing in itself does not need to be problematic for collective bargaining coverage. Transportation of goods, for example, is a service that has a long history of being outsourced, but also has a sectoral collective bargaining agreement (CBA) that is habitually extended to cover the entire sector. This means outsourced truck drivers are by definition covered by a CBA, whereas truck drivers employed for example by a chemical processing company without a company CBA are not. This does not mean there are no problems, however. In this study we encountered numerous examples of CBA ‘gaps’ and ‘clashes’, related in differing degrees to the phenomenon of outsourcing.

First of all, we encountered several employer strategies that lead to lower CBA coverage. For a company, coverage by a sectoral CBA is determined by the activity that accounts for the largest share of profits. One strategy we encountered is for companies to split up their activities into several legal entities, e.g. into transport and logistical services, which removes the logistical workers from the scope of the transport CBA. Another example is ‘CBA shopping’, in which a company self-identifies with a sector with low CBA standards, or identifies new groups of workers as falling in a category with lower CBA standards. Finally, hiring workers through temporary work agencies (TWAs) or subcontracting self-employed workers allows employers to avoid coverage of CBAs. These strategies, however, are not restricted to situations of outsourcing.

A problem more closely related to the outsourcing phenomenon arises from the fact that outsourcing is not seldom motivated by costs. In non-organised sectors in which only minimum wage applies, there is very little incentive for employers to negotiate anything above it, which would harm their ability to compete. Cost pressures are intensified by the temporary nature of outsourcing contracts, providers having to tender or renegotiate contracts periodically. Not

only are they competing against their competitors in these situations, but also against their clients' ability to insource more cheaply.

The pressure on costs only exacerbates more institutional barriers to collective bargaining in relatively 'new' sectors that have been developing partially as a result of outsourcing. Trade unions lag behind in organisational structure and resources being targeted at these sectors. Also, social partners are often reluctant to identify a new sector for collective bargaining as it might impinge on already existing sectors, putting at risk their ability to extend sectoral CBAs.

This policy paper elaborates on and gives examples of these problems as they were encountered for the activities studied in the Netherlands: logistical services, employment services, and services provided by a facility management company. It furthermore expounds on social partner efforts to address these issues, and offers some policy recommendations.

INDUSTRIAL RELATIONS RECKONING WITH OUTSOURCING

1. COLLECTIVE BARGAINING COVERAGE

Collective bargaining coverage among the overall Dutch working population remains high, consistently hovering around 80% of employees. The dominant level of collective bargaining is the sectoral level and coverage follows employer organisation. If employer association's party to a sectoral CBA can prove that they cover at least 55% of the workforce in that sector, it may be extended to cover the entire sector by ministerial decree. Extension is common in many sectors and an important incentive for employers to negotiate a CBA: a CBA without extension opens the way for competition on labour costs.

Extended sectoral CBAs are also found in sectors of commonly outsourced services such as transport and cleaning. Outsourcing therefore does not necessarily lead to less coverage. Problems arise where 'new' sectors develop that lack the tradition and institutions for collective bargaining and where employers are doubtful about the prospect of a CBA's extension. In all three activities investigated for this study, we may indeed speak of such a new sector: logistical services (which used to be more integrated with transport or with the producers or sellers of goods), employment services (which used to be a public service), and facility management (which is a hybrid of multiple traditional sectors plus some grey areas).

2. THE EXTENSION, REGULATION AND FORMS OF OUTSOURCING

Outsourcing now occurs both ‘first generation’, i.e. an activity is placed outside of an organisation which used to do it itself, and ‘second generation’, i.e. an organisation seeks a new contractor for an already outsourced activity. In first generation outsourcing, Transfer of Undertaking legislation generally applies, although trade unions have encountered cases in which this was successfully challenged by the employer. When it is applied, workers have the right to choose between continuing coverage under whatever CBA used to apply, but *without* the improvements negotiated after outsourcing, or falling under the newly applicable CBA (if there is one). In all outsourcing, the Combating Fraudulent Employment Act (WAS in Dutch) applies, which holds contracting parties responsible for the correct payment of labour when contractors and subcontractors fail to do so. This applies to wages and social contributions as well as redundancy payments and payments following bankruptcy.

In more ‘micro’ forms of outsourcing such as hiring workers through TWAs and subcontracting self-employed workers, things are somewhat different. TWA workers are covered by a TWA sectoral CBA, which stipulates that wages must be equal to what direct employees in the client company earn. They do not, however, benefit from other conditions negotiated for that company such as a pension plan. Also, many rights only kick in after a certain period of time in the company. As for self-employed subcontractors, CBAs cannot apply because they are entrepreneurs.

3. FACILITY MANAGEMENT COMPANIES

Three sectoral CBAs apply to sections of facility management (FM): those for cleaning, catering, and security¹. Employees who do not fall in one of these three categories are not covered. The CBAs include employment protection clauses for situations of changes of contract, ensuring that employees meeting certain criteria will be taken over by the new contractor. Besides the CBAs, the social partners in these sectors plus the moving sector have formulated the Responsible Market Behaviour Code, which will be elaborated on later.

¹ The first two have been extended, the third likely will.

OUTSOURCED ACTIVITIES AND FACILITY MANAGEMENT COMPANY CASE

1. LOGISTICAL SERVICES

Logistical services as studied in this project comprise services such as warehousing and distribution. Important clients are companies in manufacturing, wholesale and retail. Employment in logistics comprised about 5% of employment (478.000 persons) in the Netherlands in 2014, of whom roughly 20% were outsourced and 80% performed these activities in-house. Outsourcing of these services started some thirty years ago and has steadily increased, though it is unclear whether this trend is continuing.

The majority of in-house logistical workers are covered by the numerous sectoral and company CBAs in manufacturing, wholesale and retail. On the contrary, only a small share of outsourced workers is covered by either a company-level agreement or the sectoral transport and logistics CBA, which only covers logistics workers when they are employed by a transport company which *also* offers logistical services. This CBA reflects the earlier situation in which transport and logistics were integrated in the larger transport companies, but employers' splitting up these activities into different legal entities has reduced logistical workers' coverage. Despite attempts by social partners to organise logistical services as a new sector, the difficulty to come up with a comprehensive definition of the sector without impinging on existing sectors has made the prospect of extension of a logistical services CBA too unlikely for employers to be willing to organise.

Trade unions also face several challenges. The high share of temporary and TWA workers, periodic expiration of contracts between suppliers and contractors, and fragmentation of workers along a service chain make it difficult to organise workers. Cost pressures furthermore pose the risk that if working conditions are improved in one company along the chain, these will be offset in another part of the chain or the contract will not be renewed in favour of a cheaper competitor. Where workers are organised out of companies that fall in traditional sectors, either through splitting off activities or through outsourcing, workers end up in a 'no man's land' from the unions' perspective because there are no organisational structures targeting this 'new' sector.

Underlining that outsourcing itself is not always the problem, we found several examples of 'CBA shopping' by companies which conduct their own logistics. A relatively new online retailer applies the sectoral retail CBA to both its drivers and logistical workers, whereas drivers would be better off under the transport CBA. A large supermarket chain which has a separate (and more

favourable) CBA for its logistics workers does not apply it to its logistical workers in the distribution centres for online order fulfilment, claiming that it is a new and different activity from the one the logistics CBA was bargained for.

2. EMPLOYMENT SERVICES

In the Netherlands, employment services, defined in this study as labour market (re)integration support, are provided by the Public Employment Agency (UWV), municipalities, and private companies. An estimated 11,000 persons provide these services within the public providers (UWV and municipalities) and are covered by the applicable CBAs. An estimated 37,000 persons work for private companies, which are nearly always contracted by UWV, municipalities and employers, and are therefore outsourced. There is no CBA in the private part of this sector. The only persons covered are those working for the several large TWAs with company-level CBAs which have devoted departments to such services.

The private part of the sector originated after employment services were privatised in the 1990s and public providers were required to purchase these services from private providers. Purchasing was later limited when public bodies were again allowed to provide services themselves and restrictions were placed on situations in which purchasing services were allowed, related to severe budget cuts for employment services in 2005 and 2011. Such developments severely impact both employment levels and coverage dynamics for this activity: the more public bodies provide the services, the more people in this activity are covered by a CBA. However, the increased use of public-private initiatives, regional cooperation for social service provision, and the use of payrolling by municipalities pose challenges to coverage in the public part of the sector too.

On the employer side, a branch association exists which was originally established to support the new private employers in tendering procedures and later added a hallmark to raise quality standards in the new 'wild west'-like sector. It now provides certification for its members and functions as a lobby association for employers in employment services more broadly (including for example health and safety). So far, it has not engaged in collective bargaining for a sectoral CBA. The diversity of members (from large TWAs to specialised SMEs), the existence of company CBAs for TWAs, and the coverage of a handful of companies by the sectoral care CBA are likely inhibiting factors.

For trade unions, the high number of SMEs and self-employed persons poses a challenge to organising the private part of this sector. Companies also make much use of temporary and self-employed workers to match the fluctuations in

work following from tendering. The fragmented distribution of workers across public, private, and semi-public segments of the economy further limit trade unions' overview over the sector.

3. FACILITY MANAGEMENT COMPANY

The largest FM companies offering multi-services have become important employers, together employing nearly 30,000 persons in the Netherlands. The majority of their employees are covered by two extended sectoral CBAs: the cleaning CBA and contract catering CBA. The security services CBA could apply to some of their activities as well, but only if it is extended.

In order to deal with the administrative burden of multiple applicable CBAs, the company in our case study has organised its activities subject to different CBAs under different legal entities, so that each legal entity is covered by one CBA (i.e. either cleaning or catering; it does not offer security services itself), which is common practice among the large FM companies. Activities that do not fall under any of these CBAs such as reception services, 'hybrid' activities, and higher management positions are again organised in separate legal entities.

This means that within the same FM company and on a single work site, employees are working under different employment conditions. Although the differences in wages are small, even for those not covered by a CBA, workers without coverage do not benefit from the employment protection clauses in the CBAs that protect workers when the FM company loses a contract. The separation into multiple legal entities also poses a challenge for potential job upgrading: if a cleaner performs tasks beyond the scope of cleaning, the company may have to enter into an additional contract with the worker under a different legal entity, complicating the employment relationship and calculation of wages and other payments, which makes them reluctant to do so.

A potential solution for differentiated working conditions is a single employer CBA. This was rejected by the employer in our case study because it is complicated to apply for an exemption from the sectoral CBAs and the company CBA would have to improve on conditions in both CBAs, making it difficult to remain cost-competitive. The alternative, a sectoral CBA for the 'new' FM sector, was rejected because they are reluctant to share too much information with the handful of large FM companies that constitute the sector, and because of the fear of impinging on the existing sectors. The existence of extended sectoral CBAs therefore on the one hand forms a powerful tool for protection of outsourced workers, but at the same time inhibits the inclusion of workers outside the scope of these sectors.

POLICY RECOMMENDATIONS

One promising strategy employed by the largest Dutch trade union is for union officials to cooperate along supply or service chains. This helps to identify the most powerful party in a chain to negotiate with, which is usually the end user of the services, as they ultimately set the prices and are generally more sensitive to public pressure. In some cases it has also allowed for coalition-forming between unions and employers in the chain to jointly put pressure on end users. One way to do this is calling out the end user on the WAS: large client companies have proven to be responsive because they are weary of negative media attention and they wish to avoid costs they would incur if a contractor or subcontractor goes bankrupt. Legislating such responsibility therefore has significant potential to affect tariff-setting and improving working conditions.

A more collaborative approach was found in the formulation of a Code for Responsible Market Behaviour. It is a voluntary code of conduct initiated by the social partners in the cleaning sector, together with a number of large public and semi-public clients, to counter the pressure on costs. It sets out guidelines for both contractors and contracting parties to stimulate socially responsible tendering and contracting practices. In its first 7.5 years of existence, it has been signed by nearly 1400 signatories, including companies in FM and its constituting sectors, client companies, trade unions, and advisors and brokers in FM. Its strengths are its comprehensive reach, addressing the entire service chain, and the collaborative effort across sectoral boundaries. Its main weaknesses are the lack of a legal status, the only available sanctions for breaking the code being public shaming, and the limited availability of control mechanisms.

This study has shown how sectoral CBAs, especially habitually extended ones, have a strong path-dependency effect as they consolidate sectoral boundaries in their own definition of the sector: trade unions organise their organisational structure around them and the extension requirements make social partners reluctant to redraw the borders of a sector for fear of no longer meeting the requirements. This inhibits both redrawing existing sectoral lines and defining new sectors, which means that newly emerging sectors in the economy are vulnerable to CBA-lessness. This was seen in logistical services, employment services, and the integrated FM services. In order to address the rigidity of these sectoral lines, it may be useful to reconsider the requirements for extension, making it easier, for example, to apply for extension, or allowing for exemptions for subsectors without affecting the representativeness of existing CBAs. This may also remove some of the reluctance of employers to organise

new sectors for fear of not achieving an extension.

What the above examples have in common is that in order to improve CBA coverage in a setting in which the sectoral level of collective bargaining is dominant, it is necessary for social dialogue institutions to mirror the emerging structures in the economy. When new sectors emerge out of privatisation, outsourcing, specialisation (splitting up activities into different legal entities), or new economic activities (e.g. e-commerce), social partners can more effectively approach them if their own organisational structures and instruments (such as the Code for Responsible Market Behaviour, hallmarks, and any other instruments) address the actual structures and employment relationship as they exist in the market, rather than adhering to traditional sectors. Finally, CBAs in frequently outsourced sectors would be well-advised to address the temporary nature of most contracts, for example by including employment protection clauses, or include stipulations for temporary and TWA workers who are frequently hired as the employers' response to the temporary nature of contracts.