

Een juridisch onderzoek naar de representativiteit van vakbonden in het arbeidsvoorwaardenoverleg

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Summary

Dialogue on CLAs (Collective Labour Agreements) appears to be a reasonably peaceful area in the Netherlands, but if one takes a closer look at the CLA landscape, one quickly encounters all manner of developments (in society) that are disrupting this relative calm and already exerting pressure on the system (or might start to do so). Doubts are increasingly being expressed on the role of trade unions in representing employees for discussions on terms of employment, due to the diminishing degree of organisation among workforces. A trade union is primarily a members' organisation that champions the interests of its members, and if the membership does not adequately reflect the workforce for which the CLAs are concluded, the question arises as to why the trade union remains the appointed body to enter into CLAs. A further development that is posing increasing challenges for CLA parties and CLA negotiations is the increase in the number of self-employed individuals in the labour market. The number of one-person businesses has risen by nearly 50% over the last decade. An increase in the number of self-employed in the labour market entails that the regulatory scope of CLAs is diminishing and that CLAs (and those employees who are covered by their ambit) are at the same time being exposed to competition on terms of employment from the self-employed. A third relevant development is the political need to be able to influence the substance of how terms of employment are formulated, through the fact that CLAs are declared to be binding. In 2011, the majority in the Lower House of the Dutch parliament was in favour of direct intervention in CLA negotiations, by only allowing those CLA provisions that elaborated specific policy proposals to qualify for binding status. The fact that a majority of the Lower House was in favour of such hands-on management cannot, in my view, be dissociated from an increasing lack of consensus among social partners, at the central level, about how the labour market should be overhauled. A fourth development that is having an essential impact on current CLA consultations, the CLA itself and its legal formulation, is increasing individualisation and the need for decentralisation and tailored solutions when it comes to formulating terms of employment. The need for more tailored solutions in CLAs poses a challenge to trade unions, not just to reflect on what topics are delegated to discussions with the works councils, but also, for instance, the options for dispensations in (sectoral) CLAs. At the same time, the legislature is forcing reflection on the current legal division of tasks between the trade unions and works councils, in the field of formulating collective terms of employment and the current policy on dispensations, as an element of the policy on declaring CLAs to be binding.

Generally speaking, research into these developments is justified by the potential usefulness of the CLA as a tool. CLAs can be useful for positive socio-economic development in the Netherlands and for the satisfactory operation of the Dutch labour market. The CLA offers the business world the option of self-regulation, taking advantage of market developments more quickly and effectively than could be done by the legislature. Legislation and regulations can be kept to a minimum by sectoral CLAs in particular. CLAs contribute to reductions in costs for the employers, reduce uncertainty around the cost of wages and rule out competition on terms of employment. For employees, apart from the option for self-regulation and ruling out competition on terms of employment, they offer certainty regarding incomes and the legal position. CLAs also make a contribution towards justice by balancing inequalities in power. CLAs thus engender industrial peace and stable labour relationships. Finally, CLAs are important mechanisms for implementing government policy. The CLA system *may* therefore have considerable value. But the CLA system and its usefulness are also subject to criticism, due to a range of developments in society, such as increases in social legislation and a greater need for decentralisation and tailored solutions, partly stemming from individualisation. The useful effect of the CLA system is not a given and depends among other matters on the scope (for personnel) of collective schemes (whether affecting employers or employees) and – to some extent connected to this – the degree to which those schemes are positively appreciated by all of those involved. A scheme that only applies to part of the sector or labour market for which it is intended (again affecting either employers or employees) will make less of a contribution towards stable labour relationships, industrial peace, reductions in costs, certainty about wage costs, the exclusion of competition on terms of employment, social justice and an effective promulgation of policy proposals than if that scope (as far as personnel are concerned) were greater. The tendency of employers and employees to pull out of a CLA will grow if the CLA in question has less support from those involved in it, as opposed to a widely supported CLA. Broad support is therefore, in some sense, a precondition for broad applicability. Employers and employees actually still value the CLA, but that appreciation is directly related to how far trade unions can succeed in championing the interests of all workers for whom the CLA is concluded, and therefore to how far a trade union can be regarded as representative. This research focuses on how representative trade unions are. This issue (the representative capacity of trade unions) has long been regarded as a pressing issue in legal literature in relation to the tenability of the legal system. It is also a recurrent topic in political debate and in 2013 resulted in a SEC (Dutch Socio-Economic Council) opinion on widening the support base for CLA arrangements. The SEC concluded in its

opinion that increasing the direct involvement of employees and employers in the CLA was an important task for CLA parties if they wanted to retain the value of the CLA system.

This all gives rise to the formulation of the following problem:

What part does the representative capacity of trade unions play in the current law on CLAs and does the legal formulation of CLAs need to be adapted with a view to the possibility that this capacity is diminishing? If so, what adaptations should be made?

The Dutch government has traditionally played a minor role in the formulation of terms of employment, in the sense that Dutch labour legislation contains little more than minimum standards regarding, for example, working hours, working conditions, holidays and wages. The terms of employment are frequently formulated in the process of negotiations between employers and employees, either individually or more often collectively. The contractual freedom of CLA parties entails that they are free to negotiate with whomsoever they want (of course this has to be a party who has authority to enter into a CLA), on the subject matter they want and in the manner they want to do it. The definition in section 1.1 of the CLA Act offers scope for regulating matters other than terms of employment in a CLA. The Supreme Court has held that an agreement that simply contains provisions relating to topics associated with terms of employment, but which are not actually terms of employment themselves, can be classified as a CLA. In practice, CLAs thus contain provisions not only regarding wages and terms of employment but all sorts of other subject matter relating to social policy, such as the policy on training, promoting employment opportunities for vulnerable groups, policy on careers and mobility, and ongoing flexibility. One could say that all topics can be regulated in the CLA that are within the areas on which professional organisations can meet up in the context of championing the interests of their members and that are related to terms of employment. The limits of this area are therefore determined by how the CLA parties see their duty of championing interests, which can change over time. In this light, there is a justifiable expectation that a company level CLA will contain different topics than a CLA at a sectoral level.

This CLA structure (by which I mean how CLAs are negotiated and entered into) is determined autonomously in the Netherlands by CLA parties, so that there are (larger and smaller) differences in CLA negotiations from one sector to another. There is virtually no sector with just a single CLA applicable to all employees. There are often multiple CLAs for each sector, applying to specific

categories of employees or specific business units or companies. If different CLAs apply in one sector, this does not mean that all these CLAs are of equal importance for the CLA parties who entered into them. Frenkel, Jacobs and Nieuwstraten-Driessen have described the Dutch CLA structure, where multiple CLAs apply in each sector, as a planetary system with one or two CLAs forming the centre of gravity alongside a number of subordinate satellite CLAs. Another important feature of the Dutch CLA consultation is that the periodical renewal of CLAs is strongly connected with discussions and arrangements at a national level, where the CLA consultation is coordinated on a national basis. CLA parties at the sectoral or company level are significantly influenced by the discussions between employers' and employees' organisations at the national level. Some of the large CLAs (such as the metalwork union's CLA) operate in practice as trendsetters (wage leaders) in CLA discussions. The trend of decentralisation, dating back to the 1990s, has meant that CLAs have become increasingly devolutionary, to provide a more detailed elaboration of all sorts of schemes at a decentralised level. In a number of sectors, CLAs are increasingly offering greater scope for companies, works councils and employees to derogate from CLA provisions, to expand on CLAs or make more detailed arrangements with approval from the works council. Trade union strategy is focused on creating more possibilities for employers and employees to arrive at a package of terms of employment that coincides more closely with what the individual employee and the company want, which can enhance the attraction of the CLA arrangements, albeit retaining control at the central and sectoral levels.

Professional organisations are membership organisations that promote the interests of their members. The CLAs concluded by professional organisations generally apply to a larger group of workers than members alone, raising the question of how this sits with championing the interests of that larger group when trade unions focus (first and foremost) on the interests of their members in CLA discussions. First of all, it is important to note that professional organisations not only champion the interests of their members in discussions on terms of employment, but also look after non-members to a greater or lesser extent. This is a consequence, firstly, of the way in which trade unions are financed. Contributions paid by members form an important base for financing trade union activities, but are not enough to finance the unions completely. The contributions are supplemented by an employer contribution – the 'trade union tenner'. Part of the deal concerning the employer contributions is the trade unions are expected to champion the interests of all employees concerned in the CLA discussions. This broad championing of interests also follows from the trade unions' charters, as a number of trade unions have adopted the charter objective of

championing the interests of all employees in a sector (or company). Other trade unions have confined their charter objectives to championing the interests of members. Finally, championing non-members can also be counted as part of the job, from the fact the trade unions develop all manner of initiatives designed to involve non-members in the formulation of terms of employment. This double or wider job description need not be onerous if a trade union is sufficiently representative.

The representative quality of an organisation expresses the relationship between it and the group it purports to represent. An organisation can be described as representative if it satisfies all the qualities, capacities and features that would turn it into a reliable or authoritative advocate for the group of individuals, not necessarily members, that it says it represents. Based on general membership figures for the trade union movement, one can conclude that the membership is slanted towards older employees with established contracts. These general figures do not however justify the assumption that trade unions are therefore not sufficiently representative. Due to the diversity of CLA negotiations and the wide range of different trade unions, not too much can be said about this on the basis of general membership figures for the entire trade union movement. The over-representation of older employees with established contracts among trade union membership is, however, an indication that trade union membership is not representative of the group of employees involved in CLA negotiations. If the membership is not (or no longer) representative, this also exerts some degree of pressure on the extent to which the trade union itself is representative.

The CLA is classified by the CLA Act as an *agreement* between employer(s) and employees on terms of employment. The legislature's choice to make this CLA a matter of private law has consequences for the legal scope of the CLA. In section 9 of the CLA Act – considered along with sections 12 and 13 of the Act – the legislature has opted for a scope which entails that the effect of the CLA is confined to employment contracts concluded between employers and employees who are both bound by the CLA. Being bound by a CLA can occur through membership of one of the CLA parties, but also – and this facility is only available to employers – through being an actual party to a CLA. Being bound by an agreement to which one is not a party, or towards which one has not otherwise cooperated (via membership), is an excessive breach of individual freedom of contract, or at least this is the starting point of the CLA Act. The legislature regulates the peremptory and supplementary effect of the CLA in sections 12 and 13 of the CLA Act, and this is confined to employment contracts entered into

between employers and employees who are both bound by a CLA. It is a consequence of making the CLA a matter of private law that there are no requirements imposed on trade unions. After all, non-members are not bound by the CLA as a matter of law and the effect of the CLA in terms of the CLA Act is legally confined to members who have joined a trade union as a matter of free will, and can become involved in decisions on the CLA via that membership. In practice, the effect of the CLA appears not to be confined to employment relationships of employees bound by a CLA (who are employed by bound employers), but often extends to all employment relationships falling within the effective ambit of a CLA. Figures from the Ministry of Social Affairs & Employment (SZW) confirm that over 80% of employees are affected by a CLA, whereas only around 20% of employees are trade union members. Whether a CLA will end up governing an employment relationship is determined in practice not so much by membership of a trade union but more often by the effective ambit of the CLA, which is generally not confined to the employment relationships of members. The broad applicability of CLAs in practice originates in part from section 14 of the CLA Act, which obliges employers who are bound by a CLA to comply with the CLA, even for the employment contracts entered into with employees who are not so bound. The legal basis for the broad impact of the CLA is that employers who are bound by the CLA have reached agreement with non-bound employees on the applicability of the CLA, or else that CLA provisions have been declared to be generally binding. In practice, the contractual extension of the CLA often occurs by means of a provision in the employment contract. Case law indicates that the 'incorporation provision' is interpreted broadly, in the sense that a new CLA is readily regarded as falling within the scope of the provision. The text of the provision is not decisive for this. After all, it is often the intention behind an incorporation provision to keep the CLA that applies to the employer from time to time applying to the employment contract as well. There are also limits to the interpretation of the incorporation provision. It is particularly relevant for this research that the representative quality of CLA parties can play a part in the question of whether a new CLA falls within the ambit of the incorporation provision.

Due to the contractual basis for the broad applicability of the CLA (other than when it is declared to be binding), it was argued when the CLA Act was being introduced that there was no need to impose any further legal requirements on trade unions. An employee who agrees, freely and with proper information, to the applicability of the CLA clearly takes the view that his interests were taken sufficiently into account during the CLA discussions. It would not then be appropriate to unstitch this contractual arrangement, arrived at on the basis of free will, because of a possible lack

of representative capacity on the part of the trade union (which entered into the CLA). If a trade union fails to promote the interests of non-bound employees adequately, the consequence of this will be that non-bound employees do not agree to the applicability of the CLA, so that the CLA's effect will be confined to members who are bound to it by law. Approval by non-bound employees to the applicability of this CLA has an important significance for the broader impact of the CLA. Although a non-bound employee can in theory always reject the applicability of the CLA if his interests have not been sufficiently championed in the CLA discussions, that freedom is in fact very limited. The use of dynamic incorporation provisions restricts that freedom even further, because agreement is given to the applicability of a current CLA and future versions of it at the point when the employment contract is accepted. The legal fiction of employee approval and the large-scale use of incorporation provisions means that the contractual freedom of non-bound employees on its own appears to be insufficient to justify the CLA Act's lack of a test of representative capacity for trade unions, as regards championing the interests of non-members.

As already pointed out, case law imposes constraints on the initial agreement regarding the applicability of the CLA if the representative capacity of the trade union is in any doubt. This sometimes happens by way of the derogative effect of reasonableness and fairness and sometimes by way of interpreting the incorporation provision. It is accepted in case law, however, that a non-bound employee would never have intended to become bound to the CLA that was concluded with a non-representative trade union. While it is understandable and defensible for limits on the broader impact of CLAs to be imposed, if they are finalised with non-representative trade unions, the tenability of the solutions found for this in case law can be doubted. After all, how restrictively should an incorporation provision be interpreted if it expressly states that every CLA will apply, irrespective of how representative a trade union may be? With this in mind, the system needs to be adjusted in the sense that a statutory test of representative capacity should be introduced, in relation to the broader impact of the CLA via an agreement between parties. A number of legislative changes are conceivable to ensure that CLAs are entered into with representative trade unions and that non-bound employees are offered suitable protection against the applicability of CLAs concluded with non-representative trade unions. Firstly, a provision could be included in the CLA Act, setting out rules on the incorporation provision. This could include a provision that new CLAs will not fall under the scope of an incorporation provision if they are concluded by non-representative trade unions. Secondly, Article 7:613, DCC could provide that the full test in that

article would apply to a change in the terms of employment arising from a CLA that is concluded by a non-representative trade union.

A question linked to these factors is what criteria might be relevant for determining the degree of representative capacity. In my view, it would not be recommended to include fixed criteria for such a determination in the law. Established criteria and formal rules are less flexible in their application to changing situations than would be the case for leaving any views on representative capacity to society at large. Using open standards could counteract this objection, in the sense that it is always up to the courts to decide whether a trade union is sufficiently representative, based on all the circumstances of the case. Open standards can always be supplemented on the basis of society's understanding of the position, allowing for a more flexible response to the tides of public opinion. Established criteria might be a benefit to predictability, in the sense that it would be clear in advance which trade unions are representative. That predictability does not however stand or fall on the aspect of fixed criteria, as predictability can also be enhanced if courts provide a better understanding of the thought processes behind their decisions. By clearly describing the significant factors and by clarifying the value associated with the various factors in this type of case, courts could create a certain degree of harmonisation without any need for fixed statutory criteria. It would be worth considering whether it should be possible for trade unions to seek an opinion from a judge on the extent of their representative capacity either prior to or during CLA discussions. When assessing the extent of representative capacity, the judge could consider criteria developed in legislation, regulations and case law and apply these as his or her perspectives. These perspectives are:

- a) having legal personality (for a period of at least two years);
- b) the existence of an association with internal bodies chosen by members' elections and accountable to the members;
- c) having a charter objective of championing the socio-economic interests of members;
- d) independence;
- e) financial support;
- f) counting individuals who work in the company or sector among its/their members;
- g) an adequate spread of members across the group;
- h) a not insignificant number of members;
- i) having a majority of all members organised.

The SEC's opinion on extending the traction of CLA arrangements offers support for the importance of traction as an element when considering the representative capacity of organisations, as it emphasised in its opinion that trade unions derive their legitimacy (i.e. their authority to negotiate terms of employment for and on behalf of employees) from society's acceptance and the trust they enjoy, as well as from membership numbers. Appreciation of CLA arrangements is very important for this. If the result of the CLA discussions can count on large-scale support, the negotiating organisations will clearly have succeeded in taking adequate account of the various interests involved. Support for CLA arrangements is therefore an indication that the negotiating organisations can be regarded as being reliable or representative advocates for the mood among the group of people, not necessarily members, that they purport to represent. Case law sometimes does and sometimes does not say that support for a rule among the employees in question is important.

As well as the changes discussed above, which intervene in the contractual connection to CLAs and indirectly compel employers to enter into CLAs with representative trade unions, it is necessary to take account of the representative capacity of the trade unions when it comes to declaring CLA provisions to be binding. Employee approval plays no part in the aspect of a binding declaration, and a CLA provision may even come into effect against the wishes of non-bound employees, on the basis of the binding declaration. When the Provisions in Collective Labour Agreements (General Binding Nature) Act [*Wet Avv*] was introduced, the Minister considered it was justified to impose rules, which a large majority of a sector considered necessary for the satisfactory operation of commerce or to create proper terms of employment, on the minority as well if the interest of the minority would damage those interests. However, under the current system of declaring CLA provisions to be binding, the position remains that a rule that does not enjoy the support of the majority of employees in a sector can still apply to the entire sector. The declaration of binding effect boils down, after all, to how organised the employees are, and the representative capacity of the professional organisations plays little or no part in this. No major intervention is needed in order to take account of the representative capacity of the trade unions involved as regards the declaration of binding effect. It is sufficient for this, in my view, that a request for a declaration of binding effect under the *Wet Avv* and its Assessment Framework should be assessed in the same way such assessments are now made for peremptory imposition under the Industry-wide Pension Fund Act [*Wet Bpf*] 2000 and its Assessment Framework. This change would entail that a request to

have a declaration of binding effect could only be made by the organised business world representing a majority of the employees working in that particular sector, and that the Assessment Framework for the *Wet Avv* would include a test of representative capacity for employees' organisations equivalent to the test under the *Bpf* 2000 Assessment Framework. What this in turn means is that any request for a declaration of binding effect should be made by employers' and employees' organisations together, that the current requirement for a majority should still be satisfied and that the way this is calculated could stay the same, but that employees' organisations not involved in the CLA could submit their views and that there would have to be an assessment in this context – by the Minister or the Labour Foundation – of the balance between the number of organised employees in the sector and the number of organised employees involved in a particular agreement. As an aside, I would suggest that the declaration of binding effect should in principle not be allowed if the majority of organised employees in a sector objects to it.

In its 2013 opinion on extending the support for CLA arrangements, the SEC stated that increasing employee involvement was an important task facing trade unions and that they must make ongoing efforts to ensure they had sufficient support for the CLA, so that it would remain a relevant mechanism for everyone. It is important, to gain and retain sufficient support for CLA arrangements among employees, that those arrangements should properly reflect what is wanted by the different groups of employees. Increasing employee membership is one way of increasing employee involvement. In principle, this is a job for the trade unions. Simply increasing their membership numbers does not of itself mean, however, that trade unions will become more representative. If these new members do not participate actively, or belong to groups of employees who are already over-represented in the trade unions' membership, increasing member numbers makes little sense. It is a spread of membership that will increase the representative capacity of the trade unions. In my view, the current system offers sufficient scope for trade unions to increase employee involvement. One important way of getting employees more directly involved in the formulation of terms of employment is via the works council. The current system perpetuates a number of legal uncertainties in this area, however, in relation to terms of employment schemes that are finalised with the works council. In this research, I have made some recommendations to resolve these uncertainties, in order to increase the scope for collaboration between trade unions and works councils, and to adjust the law so that employee involvement can be increased in this way.