European Foundation for the Improvement of Living and Working Conditions

Liability in subcontracting processes in the European construction sector: Netherlands

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Introduction

This country report identifies and outlines the regulation on liability in subcontracting processes in the Netherlands. It is based on an analysis of secondary sources of information and interviews with key players in the field (see references and Annex 1 listing persons interviewed). The introduction describes the broad political, legal and economic context within which the national laws on joint and several liability in subcontracting have been developed. Joint and several liability refers to cases where two or more people enter into an obligation together, and where the claimant can recover the full obligation from any one of them; the cooperating parties are then left to decide their respective contributions between themselves.

The remainder of the report focuses on liability arrangements concerning wages, social security contributions and wage taxes. Chapters 1 and 2 present a detailed review of the current relevant legislation. Chapter 1 pays particular attention to the origin and main objectives of the law. Chapter 2 describes the instruments and provisions of the legislation, including the scope of liability, preventive and regulatory measures, obligations and sanctions, and the role of the actors involved. A tabular overview of the liability arrangements is provided in Annex 3. Chapter 3 gives insight into the interpretation, implementation and enforcement of the relevant national laws. The report ends with some concluding remarks.

Chain liability

The Wages and Salaries Tax and Social Security Contributions Act (Liability of Subcontractors – *Wet Ketenaansprakelijkheid*, WKA) provides for the liability of the user company or principal contractor for social security contributions and wage tax. More specifically, the liability relates to wage tax, national insurance contributions, the income-related contribution towards the healthcare insurance scheme and employee insurance contributions from the wages of the employees concerned.

No regulations concerning chain liability for wages exist in the Netherlands. However, the generally applicable Collective Labour Agreement (CLA) for the construction industry (*Collectieve arbeidsovereenkomst voor de bouwnijverheid*) – hereafter referred to as CLA Construction Industry – provides that:

> '*The employer is obliged to monitor the compliance of the provisions of this collective bargaining agreement in all individual employment contracts covered by the agreement. When dealing with independent entrepreneurs, the employer should agree on this in the subcontracting arrangement.*' (unofficial translation of Article 96)

In some other CLAs, similar kinds of obligations may be found for employers in their role as principal contractors.

With regard to health and safety matters, Article 7, Paragraph 658 (4) and Article 6, Paragraphs 162–170 of the Civil Code (*Burgerlijk Wetboek*, BW) provide for possibilities to hold not only the employer but also the user company or principal contractor liable in the event of industrial accidents or work-related illnesses. However, the injured employee or their heirs should take legal action themselves as no automatic procedure applies. They have to prove that the undertaking has failed in its duties to take care of the health and safety of the employee concerned.

Regarding the prevention and reduction of undeclared work by third-country nationals[1] in the Netherlands, the Foreign Nationals Employment Act (*Wet arbeid vreemdelingen*, WAV) – in force since 2005 – makes not only the direct employer but also the user company or principal contractor liable for employing a foreigner without a working permit. The fine is

[1] In other words, persons from countries outside the European Union.

€4,000 for an illegal worker employed by a private person and €8,000 when the illegal migrant is employed by a company. The term 'employer' in the WAV is defined broadly, encompassing not only the direct employer that has signed an employment contract with the foreign employee, but also the user company, the principal contractor and every other private person or legal entity who factually employs a foreign national in the Netherlands. The only case in which no employer in the meaning of the WAV may exist is if the foreign national has a residence permit labelled with the term 'self-employed' and/or if they only perform work purely on their own account. If an employer in the Netherlands hires a foreigner without a working permit – in other words, illegal labour – it is considered an economic offence. This can be sanctioned with a fine of up to €11,250 per illegal employee and even an unconditional prison sentence up to a maximum term of six months.

As noted above, the rest of this report will concentrate on liability arrangements concerning wages, social security contributions and wage taxes.

Historical background

The WKA came into force in 1982. The main reasons for adoption of this legislation were to combat unreliable temporary work agencies and subcontractors and the abuse of legal persons, as well as unfair competition (Dutch Parliamentary Series, Second Chamber (Kamerstukken II) 1978/79, 15 697, Nos. 1–4; Van den Berg, 2008).

Dutch legislation has provided for liability in subcontracting processes since 1960; at that time, it was limited to user companies and temporary work agencies in the case of hiring out workers – then regulated in the Social Security Coordination Act (*Coördinatiewet Sociale Verzekeringen*, CSV). The practice of temporary work agencies supplying workers started in the 1950s in the construction sector. Legislation proved necessary due to the increasing number of cases in which the agency deliberately failed to pay social security contributions, acting as the labour broker. The user company was jointly and severally liable for the non-deduction of – at that time exclusively – social security contributions regarding the hired employees by the temporary work agency. This liability did not apply when the user company had reported the use of temporary agency workers to the Social Insurance Council (Article 16a, Paragraph 1 of the CSV (old)). However, this regulation was not sufficiently effective. It could easily be evaded by using the concept of contracting for work instead of hiring workers. Therefore, the WKA was introduced in 1982. It introduced a chain liability with regard to contracting for work and extended the liability to the non-deduction of wage tax.

In order to extend compliance with the provisions of the CLA Construction Industry, the principal contractor was – until 1998 – explicitly held liable for non-compliance of the subcontractor with the pay levels and other working conditions stipulated in the CLA (see Annex 2 for the old text of Article 3 of the CLA (in Dutch)). The liability provision was declared generally applicable and was used in practice by employees of defaulting subcontractors (see case law: Court of Maastricht, 6 January 1994, JAR 1994, 44). However, from 2000 onwards, the liability provision became a social clause which was not declared generally applicable any more until 2007. Therefore, in that period, the social clause only covered employers or principal contractors that are members of the employer organisations which are party to the CLA. Since 2007, the social clause is generally applicable again and obliges all principal contractors in construction to contract subcontractors only on the condition that they apply the provisions of the CLA to their employees. However, the repercussions in case of non-compliance with this obligation by the principal contractor are not stated. In some situations, they might be held liable through tort law, according to Article 6, Paragraph 162 of the BW.

Detailed review of relevant national rules on liability 1

Rules

The WKA of 4 June 1981 was published in the law gazette (*Staatsblad*, Stb.) in 1981, No. 370, and came into force on 1 July 1982. The provisions are laid down in Articles 34 and 35 of the Collection of State Taxes Act 1990 (*Invorderingswet*, IW) (Stb. 1990, 222; latest amendment: Stb. 2007, 577).

The CLA Construction Industry 2007–2009 was declared generally binding on 6 September 2007 by the Minister of Social Affairs and Employment, Jan Piet Hein Donner. It was published in the annex to the government gazette (*Bijvoegsel Staatscourant*, Stcrt) on 10 September 2007, No. 174 (*Uitvoeringstaken Arbeidsvoorwaardenwetgeving* (UAW) No. 10686), Article 96.

Objectives

The main reasons for adoption of the WKA (Liability of Subcontractors) were as follows:

- to tackle unreliable temporary work agencies and subcontractors;
- to combat the abuse of legal persons;
- to diminish unfair competition;
- to advance the collection of tax and social contributions.

The legislator stipulated several reasons to combat fraudulent (*mala fide*) subcontracting. Such malpractice had a bad influence on industrial relations, because the employees of fraudulent subcontractors often earned a higher wage than those of the contractor. Therefore, the bona fide employers lost part of their competent employees, as it was more lucrative to work for the fraudulent employers. Furthermore, the fraudulent contractors could work below the normal price because of their non-deduction of social security contributions and wage tax; this resulted in a distortion of the competitive conditions. Dutch legislation explains why the contractor is held liable: few other effective measures may guarantee the collection of contributions of the subcontractor (Kamerstukken II 1978/79, 15 697, Nos. 1–4; Raaijmakers, 2007).

The objective of Article 96 of the CLA Construction Industry is to promote compliance with the correct wage levels and other working conditions as set out in the CLA.

2 Instruments and provisions

Definition of liability

Articles 34 and 35 of the IW stipulate a joint and several liability for the user company or client, as well as for the principal contractor. This liability pertains to the whole chain of temporary work agencies or subcontractors that follow in line and are at work on the same project at the building site, and concerns their obligations regarding social security contributions and wage tax.

Article 96 of the CLA Construction Industry does not formulate a real liability but only lays down a social clause. This is an obligation for the principal contractor (here, defined as 'employer') to monitor the compliance of the provisions of the CLA in all individual employment contracts covered by the CLA. When dealing with independent entrepreneurs, the principal contractor should agree on this in the subcontracting arrangement.

Personal and substantive scope

The substantive scope of the liability is as follows. Article 35 of the IW stipulates that the principal contractor can be deemed liable for the deduction of social security contributions and wage tax owed by the subcontractors and their subcontractors. This means that the principal contractor, and every other contractor in the chain, is not only liable for the first subcontractor but for the whole chain of subcontractors that follow in line and are at work on the same project at the building site. However, according to Article 49, Paragraph 1 of the IW, the (principal) contractors upward in the chain can only be held liable if the subcontractor – which, as employer, is primarily responsible for the payment of wages to its employees – fails to meet its financial obligations in relation to the Inland Revenue. The employer, fiscally known as the withholding agent, is obliged to withhold wage tax and social security contributions (together also known as payroll tax) from the wages, and pay them to the Inland Revenue. As stated above, the principal contractor is liable for the whole chain of subcontractors at work on the same project at the building site. However, when foreign subcontractors are at work with posted workers, no Dutch wage taxes are due for those personnel if the work is finished within 183 calendar days.

In terms of personal scope of liability, the principal contractor has no employment relationship with the contracting party or client; rather they contract to do work of a material nature on behalf of the client, according to Article 35, Paragraph 2(a) of the IW. The subcontractor contracts to do (part of the) work on behalf of the principal contractor without an employment relationship, pursuant to Article 35, Paragraph 2(b) of the IW. It follows that the only difference between a principal contractor and a subcontractor is the party with whom the contract is made, that is, the client or the contractor (Raaijmakers, 2007). A subcontractor that calls in another subcontractor is in turn regarded as a contractor in relation to that subcontractor, according to Article 35, Paragraph 3(a) of the IW. The liability provisions do not include the client. However, one exception arises: a specific client is considered equivalent to a principal contractor – the 'self-constructor' (*eigen-bouwer*), pursuant to Article 35, Paragraph 3(b) of the IW. A characteristic feature of the self-constructor is that the completion of the work belongs to its ordinary course of business, so it could have carried out the work itself. A self-constructor is, for instance, a manufacturer which subcontracts a part of the manufacturing process to another company. In that case, the manufacturer is considered to be both the client and the principal contractor, and the contracted company is automatically a subcontractor.

The personal scope with regard to the workers is as follows. Article 35 of the IW only applies to workers employed by the subcontractor and employed on the job concerned. The rules apply to those workers who are employees according to the Dutch legislation. If the person concerned is not an employee of the subcontractor, but works as a self-employed person, no social security contributions or wage taxes are due. An increasing number of people therefore work as a 'self-employed person without staff' (*zelfstandige zonder personeel*, 'ZZP'er') in the construction sector. In 2008, some

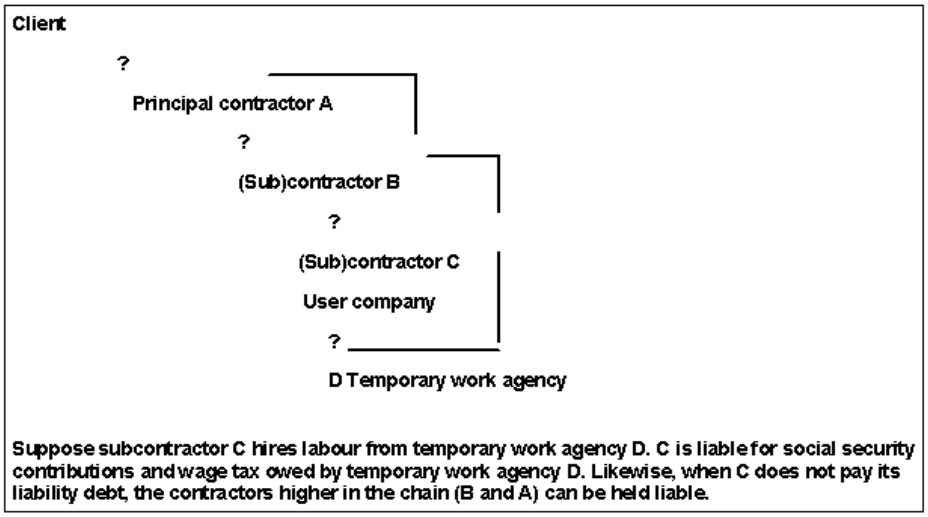
69,050 ZZP'ers worked in the construction sector; in the last two years their number has increased sharply by 31%.[2] Consequently, this is an important distinction with regard to the chain liability rules, which can give rise to evasion of the rules. If part of the work is given to such a self-employed person without staff, two kinds of risks arise. Firstly, the Inland Revenue can consider the relationship between the contractor and the self-employed person as an employment relationship – with all its consequences, such as the liability for industrial accidents. Secondly, the self-employed person without staff may contract part of the job to another subcontractor. In both cases, the contractor risks being held liable under the chain liability rules (Raaijmakers, 2007).

Specific rules regarding temporary work agencies

Article 34 of the IW stipulates that user companies that hire labour from temporary work agencies are in principle liable for the non-deduction of social security contributions and wage tax by the agencies. As a result of the introduction of the Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs*, WAADI) on 1 July 1998, the liability provision has been amended. The liability is extended to companies that supply an agency worker whom they themselves hired from a temporary work agency to another user company. Every user company in the chain may be held liable. However, according to Article 49, Paragraph 1 of the IW, user companies can only be held liable if the formal employer, being the first agency, which is primarily responsible for the payment of wages to the agency worker, fails to meet its financial obligations regarding the Inland Revenue. The formal employer, fiscally known as the withholding agent, is obliged to withhold wage tax and social security contributions from the wages, and pay them to the Inland Revenue. Article 34 of the IW only applies when the user company hires labour from temporary work agencies. The agency worker has an employment relationship with the agency, not with the user company, but is assigned to the user company and works under the direction or supervision of the latter, pursuant to Article 34, Paragraph 1 of the IW.

As stated above, the liability is of a joint and several nature and the liability applies to the entire subcontracting chain, from the principal contractor down to the final party at the end of the chain. This series is illustrated in the following figure.

Subcontracting chain



Source: *Mainly drawn from website of the* **Dutch Inland Revenue** [3]

[2] Data taken from the website of the Building Contractors' Federation Netherlands: **http://www.aannemersfederatie.nl/index.php?option=com_content&view=article&id=134:stijging-aantal-zzpers&catid=1:Laatste% 20nieuws&Itemid=62**

[3] **http://www.belastingdienst.nl, http://download.belastingdienst.nl/belastingdienst/docs/aansprak_belastingen_en_premies_bij_onderaanneming_al5291z15fd.pdf**

The personal scope of Article 96 of the CLA Construction Industry covers every associated employer that is bound by membership to the CLA. Article 88 defines the term 'employer'. During the period that Article 96 is declared generally binding, the CLA is universally applicable, which means that it must be observed by all undertakings employing workers in the geographical area of the Netherlands and in the profession or industry concerned – in this case, the construction industry. In the Dutch construction sector, the CLA Construction Industry is by far the main CLA that covers all skilled and unskilled workers engaged in house, office and industrial building, as well as civil, road and maritime construction engineering. Since 2004, site management, technical and administrative personnel in construction companies are also covered by the CLA Construction Industry. However, not all subsectors and professions are included in this collective agreement. Occupations such as painter, plasterer, installation engineer and electrician are subject to other CLAs. Some of these agreements contain a similar social clause as Article 96.

With regard to the workers, the obligation laid down in Article 96 concerns all workers, as defined in Article 88, who have an employment contract with the subcontractor of the employer or principal contractor. The substantive scope of Article 96 of the CLA Construction Industry concerns all material obligations deriving from the CLA, such as wages and paid holidays.

Article 91 of the CLA Construction Industry sets outs a specific social clause for the user company that hires workers. Like Article 96, this provision gives the temporary agency worker no practical tools to claim for unpaid wages. Nevertheless, in a recent judgement, a cantonal judge in the northeast of the Netherlands rejected the argument of the temporary work agency that a worker would have no right to claim unpaid wages on the basis of Article 91 (see Magistrate's court (*Kantonrechter*, Ktr) in the city of Emmen, 25 April 2007, JAR 2007, 199).

Territorial scope

The chain liability rules may partly apply to (sub)contractors and temporary work agencies established in another Member State providing services in the Netherlands. However, the rules will only apply when Dutch tax law or social security law applies to the foreign or Dutch employees involved. See explanation below, under A. Furthermore, the Dutch chain liability rules may be applicable when the work is carried out abroad by Dutch subcontractors. See explanation below, under B.

Because two different types of rules are involved, it is possible that wage tax should be paid in the Netherlands under a tax treaty, while the same employee is insured and liable for social security contributions in another country – usually the country of residence. This situation may arise pursuant to a bilateral or multilateral social security treaty or to Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

In view of this liability, it is important for the user company or principal contractor to know whether they and the temporary work agency or subcontractor are liable for wage tax or social security contributions in the Netherlands. Whether this is the case in international situations will depend on provisions stipulated in the following regulations: Dutch tax legislation, including the 1964 Wage Tax Act; Dutch social security legislation; Regulation (EEC) No. 1408/71 of 14 June 1971; tax treaties and social security treaties; and the European Convention on Social Security.

A. Application of rules for non-resident employees of foreign agencies or subcontractors

Chain liability for wage tax

In principle, Dutch tax law provides that wage tax is owed in the Netherlands. However, if the Netherlands has concluded a tax treaty with the employee's country of residence, this tax treaty will provide whether the right to impose tax belongs to the Netherlands or to the employee's country of residence.

The main rule of a tax treaty is that the revenue from employment is subject to wage and income tax in the country where the employment is exercised. In this context, it is irrelevant whether the wages are paid into a Dutch or a foreign account. This main rule will not apply if the following three conditions are fulfilled:

1. the employee's stay in the Netherlands is of a short duration – no more than 183 days;
2. the remuneration is not charged to a permanent establishment in the Netherlands;
3. the remuneration is not charged to an employer in the Netherlands.

In these cases, the revenue will be subject to taxation in the country of residence. These conditions are accumulative: if any of the above conditions are not fulfilled, the country where the employment is exercised will have the right to tax the revenue.

Since 1 January 2004, the user company is in principle presumed to be the material employer of non-resident employees of foreign temporary work agencies with regard to the application of the 183-day regulation of tax treaties. This is according to the Decree on applying tax conventions to employees not resident in the Netherlands who carry out temporary work in the Netherlands through a Foreign Employment Agency (IFZ2004/113M). The foreign agency, as the formal employer, remains the withholding agent for wage tax and will have to pay this tax to the Dutch Inland Revenue. For this purpose, the agency should register with the Inland Revenue's Department of International Issues in the city of Heerlen in the southeastern province of Limburg, which will assign the withholding agent a payroll tax number and indicate how the tax owed should be declared and paid. This does not apply to contracting for work. When foreign subcontractors have posted non-resident employees on the job, no wage taxes are due if the work is finished within 183 calendar days. If the worker stays in the Netherlands for more than 183 days, Dutch taxes will be due from the first day of work on Dutch territory.

Thus, as regards the question of whether the foreign agency has a withholding obligation in the Netherlands, the distinction between supplying labour and subcontracting for work is of major importance. This distinction depends on the factual situation. Because of this difference, the supply of labour is sometimes presented as though contracting for work were involved. This is done to create the impression that no withholding agent applies. User companies have to be alert for such practices, because this increases the risk of being held liable for the tax and social security contributions owed. Obviously, the companies and persons involved – temporary work agency, employee and/or user company – can argue in a particular case that the foreign temporary work agency is fulfilling more substantial employer functions than presumed by the Inland Revenue. When in doubt, a competent tax inspector can advise on the exact situation.

Chain liability for social security contributions

With regard to social security legislation, the main rule is to pay insurance in the country of employment. However, in the event of, for example, posting an employee within the EU, they will remain insured in their country of origin. No difference is made between posting or secondment by a temporary work agency or other suppliers of staff, on the one hand, and posting of workers by subcontractors, on the other hand. In both situations, the laws of the country of residence

of the posted employee – where they habitually carry out their work – will remain applicable under the following two main conditions:

1. the expected duration of the posting does not exceed 12 months. This period may be extended for another 12 months;
2. the employee is not posted in substitution for another person whose posting has come to an end.

To avoid compulsory social insurance in the country of employment, the employee should demonstrate that they fulfil the nationality, residence and employment requirements and the above two conditions. Residents and nationals of the EU Member States – and of Iceland, Liechtenstein and Norway – can ask the social security authorities of their original country of insurance for an E101 form, showing that the social security laws of that country will remain applicable to them. The certificate should be requested immediately prior to the start of activities in the other country. If a foreign employee possesses an E101 form, they will not be insured in the Netherlands. In that case, the foreign work agency need not withhold and pay social security contributions in the Netherlands.

Thus, usually, Dutch social security legislation will not apply to non-resident employees of foreign temporary work agencies or subcontractors who carry out work in the Netherlands. This means that the rules for chain liability do not apply either.

B. Application of rules when work is carried out abroad through Dutch temporary employment agencies or subcontractors

Chain liability for wage tax

In relation to liability for wage tax, the above explanation for non-resident employees of foreign agencies or subcontractors is also relevant here. The same concept of employer for tax treaties is the point of departure in the situation of a resident of the Netherlands who carries out work abroad for a foreign user company through a Dutch temporary work agency. The Dutch tax payer (the worker) will then have to plausibly demonstrate that the temporary work agency does not fulfil material employer functions and that the foreign user company should therefore be considered as the material employer.

Chain liability for social security contributions

When a Dutch subcontractor carries out work abroad, the principal contractor established abroad could probably not be deemed liable for Dutch social security contributions not deducted by Dutch subcontractors. This has been concluded from the ruling by the European Court of Justice (ECJ) in the case of Rheinhold and Mahla (ECJ 18 May 1995, case C-327/92), in which the Court decided that the old Article 16 of the CSV – now replaced by Articles 34 and 35 of the IW – did not fall within the scope of Regulation (EEC) No. 1408/71. However, in this judgement, the facts were about presumed liability of a third company not belonging to the subcontracting chain. The ECJ stated that the situation could be different when it is established indisputably that fraud is committed by the principal contractor which should factually be regarded as the real employer (Rheinhold and Mahla, Paragraph 31). Therefore, where the chain of contractors includes a foreign contractor, and this foreign contractor fails to meet its obligations to deduct Dutch social security contributions, only then may the principal contractor be deemed liable in the Netherlands.

Article 96 of the CLA Construction Industry refers to the definitions of ‘employer’ and ‘worker’ in general. These definitions also include employers not established in the Netherlands that, with their own employees, carry out a task in the Netherlands within the framework of the cross-border provision of services within the EU.

Specific rules in public procurement

In the Netherlands, no specific rules apply regarding liability for tax on wages and social security contributions in public procurement procedures.

With regard to liability for wages, it is perhaps worth noting that the Netherlands has signed Convention No. 94 of the International Labour Organization (ILO) on labour clauses in public contracts, dating from 1949. Article 2 of this Convention provides that public contracts must include clauses on wages, including allowances, working hours and other working conditions which must not be less favourable than the conditions established by the CLA that applies to similar work in the trade or industry concerned in the district where the public work is carried out. Nevertheless, it is not customary for the authorities to put a social clause in public procurement contracts. [4]

Preventive measures

No legal obligations for principal contractors exist to prevent the non-payment of wages, social security and fiscal charges by subcontractors – in other words, measures to guarantee payment. No legal requirement demands a proper investigation or reliability check as to whether the chosen subcontractor conforms with labour law, social security legislation or fiscal law.

Nevertheless, several self-regulatory instruments exist that the user companies and contractors can apply to check their reliability and to guarantee payment by subcontractors. In order to limit the risk of liability for social security contributions and wage tax, according to the WKA, user companies or contractors can take the following measures: screen the temporary work agency or subcontractor; choose an accredited temporary work agency; use a guarantee account; or pay directly into an account of the Inland Revenue.

Screening the (sub)contractor or agency

Before the user company decides to hire workers, or before the principal contractor decides to contract the subcontractor, they should check the temporary work agency's or subcontractor's references, request proof that the agency or subcontractor possesses a (Dutch) payroll tax number and request proof that the agency or subcontractor actually files a tax return. This is necessary because the liability clause will be waived only in the event that no-one in the chain can be blamed for the tax and contribution debt. The Inland Revenue issues leaflets with guidance on how to screen the temporary work agency or subcontractor, and offers the possibility of asking for declarations of good behaviour concerning payment of tax and social security contributions by the relevant agency or subcontractor in the past. The Inland Revenue recommends including a clause in the contract with the temporary work agency or subcontractor that they may not outsource the work without prior acceptance of the user company or principal contractor.

Choosing accredited temporary work agency

In recent years, temporary work agencies have developed a quality label. This is meant to distinguish trustworthy agencies from their unreliable colleagues. It enables user companies to choose a qualified agency that adheres to the rules. Since 1 January 2007, temporary work agencies established in the Netherlands can acquire this quality label – known as NEN-norm 4400 Part 1 – from the National Standardisation Institute (*Nederlands centrum van normalisatie*, NEN) when they have been shown to fulfil requirements concerning the payment of taxes and social insurance and the

[4] On 12 March 2008, the ILO issued a report on the application of Convention No. 94 in which this was confirmed (ILO, 2008).

legitimacy of employment in the Netherlands. The assessment is made by private certifying companies. After certification, the temporary work agency will be registered by the Foundation for Employment Standards (*Stichting Normering Arbeid*, SNA).[5] Regular monitoring of the registered agencies on compliance with the applicable law and regulations and on their payment record ensures that the agencies stay on the right track. Otherwise, a non-compliant agency will be removed from the register.

Only a few CLAs oblige the employer to contract a qualified temporary work agency. The CLA Construction Industry does not contain such an obligation.

Warranty scheme (guarantee account system)

Employers, being either the first temporary work agency or the first subcontractor, have the option but are not obliged to open a special blocked account, know as a Guarantee account or G-account. This is a blocked bank account in the agency's or subcontractor's name. Any Dutch or foreign entrepreneur can apply for a G-account. This account may only be used for paying social security contributions and wage taxes to the Inland Revenue. Transfers to a G-account can be made by the user companies or (principal) contractors. In that case, they pay the temporary work agency or subcontractor for the services of their employees exclusive of the wage tax and social security contributions owed. The latter are transferred directly to the G-account. The user company or (principal) contractor is then protected against liability for the portion paid, provided that they observe the rules pertaining to such transfers.

Paying directly to Inland Revenue

A direct transfer in this case is a transfer to an account of the Inland Revenue Central Office (*Belastingdienst/CA*) located in the central city of Apeldoorn. As in the case of the G-account, the user company or (principal) contractor can pay a part of the amount owed to the subcontractor into this account. The Inland Revenue at Apeldoorn credits the amount to the deposit of the subcontractor concerned and will inform them of all transactions with regard to their deposit. The subcontractor can use the balance of the direct transfers only for paying wage tax and social security contributions owed to the Inland Revenue. If the user company or (principal) contractor makes a direct transfer, they may – under certain conditions – derive a presumption of payment from that transfer. This means that they will not be held liable for that amount insofar as wage tax and social security contributions are concerned. One condition in this respect is that the transfer should be sufficiently specified.

Account numbers for direct transfers are available at the website of the Inland Revenue Central Office.[6] If the balance of the amounts transferred directly exceeds the amount which the temporary work agency or subcontractor owes in wage tax and social security contributions, a request can be submitted to the Inland Revenue to refund the difference to the agency or subcontractor.

Effect on liability

Compliance with some of the above preventive measures limits the liability of the (principal) contractor or user company. User companies and (principal) contractors that use the G-account for the payment of social security contributions and wage taxes are protected against liability for the portion paid, provided that they observe the rules pertaining to G-account transfers: Article 34, Paragraph 3 and Article 35, Paragraph 1 (5) of the IW. The same applies in the case of direct transfers to an account of the Inland Revenue.

[5] The register is accessible for clients of the temporary work agencies at: **http://www.normeringarbeid.nl**

[6] See **http://www.belastingdienst.nl**

The prior screening of the subcontractor or temporary work agency, and the choice of an accredited agency, will obviously limit the risk of liability but do not legally limit the liability of the (principal) contractor or user company.

These preventive measures are not mandatory; therefore, failure to comply with them does not entail any penalties.

Other measures

It is worth noting that other obligations indirectly have a preventive impact on the liability of principal contractors and user companies. An important provision is the so-called 'first day notification' obligation (*Eerste dagsmelding*, EDM), introduced on 1 July 2006. In an effort to tackle suspect temporary work agencies – but also undeclared work in general – employers are obliged to report a new employee on the first day of work to the relevant tax and social security organisations. However, according to a report of Regioplan[7] in 2005, 52% of the building contractors surveyed admit that they do not always check the identity papers of workers engaged through private employment agencies, service supply agencies or subcontractors. Recently, the idea has been proposed to partly abolish these obligations because the administrative burden for employers would be too high.[8]

Sanctions

The law does not provide for any fines in relation to liability in subcontracting. However, it does provide for other repressive measures. In case of a transfer from one G-account to another which is not based on any subcontracting or hiring of labour, the receiving G-account holder is obliged to refund the amount, in accordance with Article 9 of the G-account Agreement, Annex to the Implementing Regulation Chain Liability (*Uitvoeringsregeling inleners-, keten- en opdrachtgeversaansprakelijkheid* 2004, Stcrt. 2005, 251). Non-compliance will lead to removal of both G-accounts. Furthermore, in case of any other abuse, the G-account or deposit of the subcontractor or temporary work agency can be withdrawn by the Inland Revenue, according to Article 11, Paragraph 1(a) of Implementing Regulation Chain Liability.

No real joint liability for wages is established in the CLA Construction Industry and no sanctions are stated in case of non-compliance by the principal contractor. However, the employee of the subcontractor may start judicial proceedings against the principal contractor, but it is uncertain if the claim against them can be based on the provision in the CLA. In some situations, the principal contractor may be held liable through tort law.

Actors involved

The Inland Revenue as a public actor is involved in the application and practical implementation of the rules in force. The Inland Revenue pursues an active liability policy and is assisted in this task by the Ministry of Social Affairs and Employment, acting as Directorate for the Labour Market, according to the Ministry of Finance, which acts as Directorate for Taxes. The (principal) contractor is made liable by means of a liability decision issued by the Inland

[7] Regioplan is a nationwide independent agency that specialises in social scientific policy research and advice. See Mosselman, M., and Rij, van, C., 2005.

[8] This was announced by the secretary of state of the Ministry of Finance in a television programme. See press release of 28 April 2008 of the Confederation of Netherlands Industry and Employers (*Vereniging van Nederlandse Ondernemingen-Nederlands Christelijk Werkgeversverbond*, VNO-NCW) giving a positive appraisal of the Ministry of Finance's idea to abolish the EDM obligation: **http://www.vno-ncw.nl/web/show/id=159028/dbcode=1718**

Revenue, pursuant to Article 49, Paragraph 1 of the IW. The (principal) contractor can lodge a complaint against the liability decision. If the Inland Revenue considers the objection unfounded, the (principal) contractor can lodge an appeal to the tax division of the district court; appeal proceedings can be brought to the Court of Appeal and subsequently to the Supreme Court.

In applying Article 96 of the CLA Construction Industry, no supervising authorities are involved. It is up to the employee involved to start judicial proceedings and, as mentioned before, it is not clear if the employee of the subcontractor may base the claim against the principal contractor on Article 96 since no real liability is established in this provision. The trade unions may defend the individual rights of the employees of the subcontractors, and they are also entitled to start judicial proceedings on the basis of their own capacity as parties to the CLA. In this capacity, they have an own interest in enforcement of the CLA.

Interpretation, implementation and enforcement of law

3

Effectiveness of rules and problems identified

G-account or deposit system

According to the Ministry of Finance, acting as the Directorate for Taxes, some of the measures taken are effective, while others are less so.

- The G-account or deposit system has mainly a preventive effect and is rather effective particularly with regard to contracting for work in the construction sector. The ministry also points to the results in the clothing industry, to which specific and strict chain liability rules apply. Since the entry into force of the Liability of Subcontractors clothing industry Act (*Wet ketenaansprakelijkheid confectiesector*, Stb. 1993, 734), practically all illegal sewing workshops – which had mushroomed – in the Netherlands have disappeared.
- The repressive measure of withdrawing the G-account or deposit of the subcontractor or temporary work agency in case of abuse is also effective. Clients and contractors do not want to do business with subcontractors not in possession of a G-account or deposit because then they lack the possibility of limiting their liability.
- With regard to temporary work agencies, the rules are considerably less effective: the Directorate for Taxes estimates that, in this field of activity, about €150 to €160 million in wage tax is left unpaid on an annual basis. Furthermore, the ministry estimates that about two-thirds of the temporary work agencies which operate in the Netherlands are unreliable and fraudulent. Therefore, the certification of these agencies (NEN-norm 4400) – established by the agencies themselves – is important. The trade unions and employer organisations of the temporary work agencies have urged the government to require this certification by law, and this strategy is currently being proposed by members of the Lower House of Parliament (Kamerstukken II 2006/07, 17 050, No. 335 (motion)).

The main trade unions in construction are FNV Construction (*FNV Bouw*), affiliated to the Dutch Trade Union Federation (*Federatie Nederlandse Vakbeweging*, FNV), and CNV Wood and Construction (*CNV Hout en Bouw*), affiliated to the Christian Trade Union Federation (*Christelijk Nationaal Vakverbond*, CNV). Meanwhile, the main association of building contractors, Constructing Netherlands (*Bouwend Nederland*), primarily represents principal contractors and the Building Contractors' Federation Netherlands (*Aannemersfederatie Nederland Bouw en Infra*) represents small and medium-sized building contractors. In the opinion of these social partners, the G-account and deposit system functions well in practice. However, they also point to the same problem as stated above regarding dubious temporary work agencies.

Costs

The Ministry of Finance, acting as the Directorate for Taxes, explains that an outstanding amount of about €3.5 to €4 billion is lodged in G-accounts, which is a substantial, blocked sum. Enterprises cannot invest this money, for example, which means a loss of working capital.

The Building Contractors' Federation Netherlands, points out that – especially for small and medium-sized enterprises (SMEs) – the administrative and financial burden of the WKA is considerable. The principal contractors try to pay a large part of the invoice on the G-account of the subcontractor, because for this sum they are indemnified against liability. This paid portion is often higher than the tax and contributions due by the subcontractor, which means that the subcontractors cannot freely make use of a considerable part of their earnings. Unblocking the deposit takes time and administrative effort. From recent investigations, it appears that the annual costs resulting from the WKA for specialised building contractors are about €22.5 million, including €18 million for administration and €4.5 million on lost capital proceeds. This sum corresponds to an average annual cost of €410 per employee (Economic Institute for the Building Industry

(EIB), 2008). However, a spokesperson from Bouwend Nederland stated that its members are satisfied with the current G-account system because their main interest is in preventing liability.

Awareness of rules

The majority of contractors operating in the construction industry belong to the category of SMEs; the risk arises that small companies in particular may not realise their responsibilities. However, according to the Building Contractors' Federation Netherlands, SMEs are well aware of the chain liability rules laid down in the WKA. Furthermore, the principal contractor in a large-scale enterprise will demand all necessary data from the subcontractor, which is usually an SME. If the subcontractor's information is incomplete, it will not get paid by the principal contractor.

Cross-border effectiveness

The WKA only works in a cross-border context if foreign service providers are covered by the Dutch Tax Law and social security laws. This is the case for a small group of service providers in specific situations, as explained in more detail in the previous chapter. The interviewees for this study all agree that the system is in general not effective regarding subcontractors from abroad which are only temporarily carrying out services in the Netherlands and are not established on Dutch territory.

There is no reason why Article 96 could not be effective in practice in a cross-border context. Directive 96/71/EC concerning the posting of workers in the framework of the provision of services is implemented by Dutch law, and also further specified in Article 92 CLA Construction Industry as far as labour terms and conditions in the construction industry are concerned. Pursuant to this legislation, posted workers are entitled to minimum wages and paid holidays in the country where they are posted. However, since this provision is regarded by all interviewees more or less as a toothless social clause in internal situations, the effectiveness of Article 96 in cross-border situations may be questioned.

Possible solutions and alternative instruments

Suggestions of Ministry of Finance

An expert on subcontracting liability – acting as a policy officer at the Ministry of Finance, as the Directorate for Taxes – suggested an alternative to the present system of the WKA. Under the existing system, it is difficult to calculate which part of the additional tax assessment – imposed because the subcontractor has not paid wage tax and contributions – must be allocated to which specific contractor. This problem could be tackled by using a kind of tax penalty system. In such a system, the penalty could be directly related to the additional tax assessment: it could be prescribed that a certain proportion of the total amount of the assessment, for instance 50%, is due by every contractor concerned.

Suggestions of social partners

The trade unions favour the introduction of a legislative system of liability for wages in the Netherlands. This system should include the mandatory minimum wage level by law and by generally applicable CLAs. The unions suggest a system similar to that in Germany. This idea must be seen in the context of signals that many workers from the new EU Member States who are working in the Netherlands either on a foreign or Dutch employment contract may be subject to abuse: they work either too many hours for the wages paid, or get paid below the level to which they are entitled, or both. Because their direct employers may be insolvent or simply non-existent once a claim is made for outstanding wages, it would help greatly if a more reliable party, which has a reputation to lose, could be held liable instead.

However, the employer organisations are not in favour of a legislative liability arrangement for wages. Neither do they support a transformation of the present social clause in Article 96 of the CLA Construction Industry into a real liability arrangement. In the view of *Bouwend Nederland*, the old provision was abolished almost 10 years ago not only because employers disliked the liability clause, but also because employees of subcontractors that comply with the CLA

provisions resented the intrusion on their privacy caused by this provision. To be sure of correct payment, the principal contractor could ask the subcontractor to supply details regarding wage slips, employment contracts and identity cards of the employees.

The Building Contractors' Federation Netherlands supports an arrangement of one central registration office – similar to the former scheme in Belgium – connected to an indemnity system. Due to the central registration, employers gain a clear insight into the numbers and status of foreign workers in the workplace. In the employer organisation's view, it is particularly important for the (sub)contractor to have legal certainty in advance about the status – employee or self-employed person without staff (ZZP'er) – of all workers, not only with regard to chain liability rules, but also in respect of all relevant labour and social security rules, such as liability for industrial accidents and working conditions. In the Netherlands, a declaration of the status can be obtained, known as a Declaration of the Working Relationship (*Verklaring Arbeidsrelatie*, VAR), but this does not apply to all relevant labour and social security regulations.

Future developments

In relation to the liability arrangements in the Netherlands concerning wage tax, social security contributions and wages, certain developments are noteworthy.

Firstly, the introduction of self-regulatory measures – the so-called NEN-norm – helps in preventing liability of user companies that hire labour from NEN-certified temporary work agencies. In 2008, another NEN-norm will be issued specifically aimed at cross-border temporary work agencies; the current standard only applies to agencies established in the Netherlands. However, trade unions would favour a supplement to the NEN-norm. Currently, temporary work agencies can obtain this quality label if they abide by the laws on social security and wage tax. The trade unions have suggested extending the checks to the level of compliance with the mandatory statutory minimum wage and the wages in generally applicable CLAs.

Secondly, some changes to the applicable rules on liability in subcontracting chains are expected in the near future. At the time of writing, a legislative proposal was before the Lower House of Parliament, entitled 'Amendment of the Collection of State Taxes Act 1990 (replacement of the G-account system by a deposit system)' (Kamerstukken II 2007/08, 31 301). The proposal includes replacing the G-account system by a deposit system. The deposit system is to a considerable extent comparable with the 'direct transfer system' described in the previous chapter. The user company or (principal) contractor pays the tax and contribution component of the invoice directly to the so-called indemnity account (*vrijwaringsrekening*) of the Inland Revenue, on behalf of the deposit of the temporary work agency or subcontractor. The Inland Revenue credits the amount to the deposit of the agency or subcontractor concerned. The Ministry of Finance, acting as the Directorate for Taxes, expects that some 50,000 active deposits will be in operation. The legislative proposal outlines the following reasons for the choice of this system:

- lower implementation costs for the Inland Revenue;
- a reduction in the administrative burden on the business community;
- a budgetary advantage for the government.

According to the Ministry of Finance, as the Directorate for Taxes, the new system could be beneficial for the holders of a blocked account – mainly subcontractors and temporary work agencies. The Inland Revenue will, contrary to the present situation, pay interest on the credit balance; in 2008, this was set at 0.88%. Moreover the release of the deposit will be much quicker: this will be possible within one week – instead of six weeks at present – of the request, which is beneficial for the subcontractor.

On the other hand, the payment of interest is not advantageous for all – especially large-scale – employers, as some have currently stipulated an interest payment of about 3% on their G-account. Furthermore, the Dutch Federation of Small and Medium-Sized Enterprises (*MKB Nederland*), the Confederation of Netherlands Industry and Employers (*Vereniging van Nederlandse Ondernemingen-Nederlands Christelijk Werkgeversverbond*, VNO-NCW) and the Netherlands Association of Tax Advisors (*Nederlandse Orde van Belastingadviseurs*)[9] have identified serious disadvantages for the business community. Both employer organisations strongly reject the proposed deposit system. Their most fundamental objection is the following. In the new system, it is no longer possible for user companies or (principal) contractors to limit their liability – by means of a direct transfer to the account of the Inland Revenue – in case the temporary work agency or subcontractor does not hold a deposit with the Dutch Inland Revenue. That is exactly the reason why, alongside the current G-account system, the direct transfer system still exists.

Most foreign temporary work agencies and subcontractors do not hold – and sometimes cannot hold – a G-account or, in the new system, a deposit. MKB Nederland and VNO-NCW argue for a single system in which the user companies or (principal) contractors can limit their liability without being dependent on the holding of a G-account or deposit by the temporary work agency or subcontractor.[10] Nevertheless, the Building Contractors' Federation Netherlands supports the proposed deposit system, because it expects less administration and quicker unblocking than under the current system.

Finally, a general legislative chain liability arrangement for wages has been the subject of political debate but has so far been rejected by the Ministry of Social Affairs and Employment (see letter of 14 August to the Lower House, Kamerstukken II, 2006/07, 29407, No. 62). However, in a press release of 19 June 2008, Minister Donner announced the preparation of a bill on liability for the wages of temporary agency workers in user companies which make use of non-certified temporary work agencies. The liability will be limited to the statutory minimum wage level. This legislative proposal is meant to encourage the use of NEN-certified temporary work agencies.

[9] **http://www.nob.net/files/NOB%20commentaar%20g%20rekening%20en%20depotstel.pdf**

[10] **http://www.vno-ncw.nl/web/show/id=94403/dbcode=930/filetype=letters**

Conclusions 4

Since 1982, the WKA provides for liability of the principal contractor or user company for social security contributions and wage tax owed by their subcontractor or temporary work agency – and their subcontractors. This is an unconditional chain liability: the principal contractor is not only liable for the first subcontractor but for the whole chain of subcontractors which follow in line and are at work on the same project at the building site. The main aims of this act are to tackle unreliable subcontractors and agencies as well as unfair competition.

The chain liability rules do not apply if no social security contributions or wage taxes are due, which mainly occurs when foreign subcontractors carry out work in the Netherlands with posted workers. For instance, no wage tax is due if the work is finished within 183 calendar days and usually Dutch social security legislation will not apply to non-resident employees of foreign temporary work agencies or subcontractors who carry out work in the Netherlands.

With regard to labour law, the user company or principal contractor is not liable for compliance with statutory employment conditions such as minimum wages and paid holidays. However, Article 96 of the CLA Construction Industry stipulates that:

> '*The employer is obliged to monitor the compliance of the provisions of this collective bargaining agreement in all individual employment contracts covered by the agreement. When dealing with independent entrepreneurs, the employer should agree on this in the subcontracting arrangement.*'

This provision does not establish a real liability for wages in the construction industry, but merely lays down a social clause. Both the trade unions and the employers organisations regard this provision as a rather toothless one. So far, it has not been invoked in practice.

In general, all relevant stakeholders are satisfied with the current liability arrangement for social security contributions and wage tax at national level, apart from the situation with regard to temporary work agencies. To enhance regulatory compliance by these agencies, the industry itself introduced a self-regulatory measure: the NEN-norm for preventing liability of user companies that hire labour from NEN-certified temporary work agencies. The first NEN-norm only applies to agencies established in the Netherlands, but a second norm regarding temporary work agencies established abroad will also be issued in 2008.

Despite the general agreement that the G-account for social contributions and wage tax works well, the Ministry of Finance is preparing a modification of it.

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Annexes

Annex 1: List of persons interviewed

- Bernet van Leeuwen, FNV Bouw – FNV Construction (FNV Bouw), affiliated to the Dutch Trade Union Federation (*Federatie Nederlandse Vakbeweging*, FNV), is the largest trade union in the construction sector;
- Arjen Slagboom, CNV Hout en Bouw – CNV Wood and Construction (*CNV Hout en Bouw*) is affiliated to the Christian Trade Union Federation (C*hristelijk Nationaal Vakverbond*, CNV);
- Gerard Werkhoven, Bouwend Nederland – Constructing Netherlands (Bouwend Nederland) is an employer organisation, predominantly representing principal contractors;
- Truus Remkes, Aannemersfederatie Nederland Bouw en Infra – The Building Contractors' Federation Netherlands (*Aannemersfederatie Nederland Bouw en Infra*) represents SMEs in the construction industry;
- Peter Koedood and Theo Hagendoorn, Ministry of Finance;
- Laura Spangenberg, Dutch Association of Temporary Work Agencies (*Algemene Bond Uitzendondernemingen*, ABU).

Annex 2: Legal provisions (in Dutch)

Artikel 34 Invorderingwet 1990

1. Ingeval een werknemer met instandhouding van de dienstbetrekking tot zijn inhoudingsplichtige, de uitlener, door deze ter beschikking is gesteld aan een derde, de inlener, om onder diens toezicht of leiding werkzaam te zijn, is de inlener hoofdelijk aansprakelijk voor de loonbelasting welke de uitlener verschuldigd is in verband met het verrichten van die werkzaamheden door die werknemer alsmede voor de omzetbelasting welke de uitlener, dan wel – in geval doorlening plaatsvindt – de in het tweede lid bedoelde doorlener verschuldigd is in verband met dat ter beschikking stellen. In afwijking in zoverre van artikel 32, tweede lid, is de inlener niet aansprakelijk voor de in verband met de heffing van loonbelasting of van omzetbelasting opgelegde bestuurlijke boete.
2. Onder inlener wordt mede verstaan:
   a. de doorlener, zijnde degene aan wie een werknemer ter beschikking is gesteld en die deze werknemer vervolgens ter beschikking stelt aan een derde om onder diens toezicht of leiding werkzaam te zijn;
   b. de in onderdeel a bedoelde derde, aan wie door een doorlener een werknemer ter beschikking is gesteld om onder toezicht of leiding van die derde werkzaam te zijn.
3. Indien een inlener ingevolge een overeenkomst met de uitlener ten behoeve van de voldoening van loonbelasting, omzetbelasting en sociale verzekeringspremies in verband met het verrichten van werkzaamheden door een ter beschikking gestelde werknemer, alsmede met dat ter beschikking stellen, een bedrag heeft overgemaakt op een rekening die door die uitlener ten behoeve van de betaling van loonbelasting, omzetbelasting en sociale verzekeringspremies wordt gehouden bij een financiële onderneming die ingevolge de Wet op het financieel toezicht in Nederland het bedrijf van bank mag uitoefenen, wordt het bedrag waarvoor de aansprakelijkheid van de inlener uit hoofde van het eerste en tweede lid met betrekking tot die werkzaamheden en dat ter beschikking stellen in eerste aanleg bestaat, verminderd met dat overgemaakte bedrag.
4. Het derde lid is niet van toepassing voor zover de inlener wist of redelijkerwijs moest vermoeden dat de uitlener in gebreke zou blijven het op de in dat lid bedoelde rekening gestorte bedrag aan te wenden voor de betaling van loonbelasting, omzetbelasting of sociale verzekeringspremies.
5. De aansprakelijkheid op grond van het eerste lid geldt niet met betrekking tot de loonbelasting en de omzetbelasting verschuldigd door de uitlener, indien aannemelijk is dat het niet betalen door de uitlener noch aan hem noch aan een inlener is te wijten.

6. Bij ministeriële regeling worden nadere regels gesteld met betrekking tot de toepassing van het derde lid.

7. Dit artikel is niet van toepassing indien de werkzaamheden die door de ter beschikking gestelde werknemer zijn verricht, ondergeschikt zijn aan een tussen de uitlener en de inlener, dan wel tussen de doorlener en de inlener, gesloten overeenkomst van koop en verkoop van een bestaande zaak.

Artikel 35 Invorderingswet 1990

1. De aannemer is hoofdelijk aansprakelijk voor de loonbelasting:

   a. die de onderaannemer en, indien een werk geheel of gedeeltelijk door een of meer volgende onderaannemers wordt uitgevoerd, iedere volgende onderaannemer verschuldigd is in verband met het verrichten van werkzaamheden door zijn werknemers ter zake van dat werk;

   b. voor de betaling waarvan de onderaannemer en, indien een werk geheel of gedeeltelijk door een of meer volgende onderaannemers wordt uitgevoerd, iedere volgende onderaannemer ingevolge artikel 34 hoofdelijk aansprakelijk is ter zake van dat werk.

   In afwijking in zoverre van artikel 32, tweede lid, is de aannemer niet aansprakelijk voor de in verband met de heffing van loonbelasting opgelegde bestuurlijke boete.

2. In dit artikel wordt verstaan onder:

   a. aannemer: degene die zich jegens een ander, de opdrachtgever, verbindt om buiten dienstbetrekking een werk van stoffelijke aard uit te voeren tegen een te betalen prijs;

   b. onderaannemer: degene die zich jegens een aannemer verbindt om buiten dienstbetrekking het in onderdeel a bedoelde werk geheel of gedeeltelijk uit te voeren tegen een te betalen prijs.

3. Voor de toepassing van dit artikel wordt:

   a. de onderaannemer ten opzichte van zijn onderaannemer als aannemer beschouwd;

   b. met een aannemer gelijkgesteld degene die zonder daartoe van een opdrachtgever opdracht te hebben gekregen buiten dienstbetrekking in de normale uitoefening van zijn bedrijf een werk van stoffelijke aard uitvoert;

   c. ten opzichte van de aannemer als onderaannemer beschouwd de verkoper van een toekomstige zaak, voor zover de koop en verkoop voortvloeit uit of verband houdt met het in het tweede lid, onderdeel a, bedoelde werk.

4. De voorgaande leden zijn niet van toepassing:

   a. indien een werk tot de uitvoering waarvan een onderaannemer zich jegens een aannemer heeft verbonden, geheel of grotendeels wordt verricht op de plaats waar de onderneming van de onderaannemer is gevestigd met uitzondering van de vervaardiging en elke daarop gerichte handeling van kleding, andere dan schoeisel, of

   b. indien de uitvoering van een werk waartoe een onderaannemer zich jegens een aannemer heeft verbonden, ondergeschikt is aan een tussen hen gesloten overeenkomst van koop en verkoop van een bestaande zaak.

5. Indien een aannemer ingevolge een overeenkomst met een onderaannemer, ten behoeve van de voldoening van loonbelasting en sociale verzekeringspremies met betrekking tot het door die onderaannemer aangenomen werk, een bedrag heeft overgemaakt op een rekening die door die onderaannemer ten behoeve van de betaling van loonbelasting en sociale verzekeringspremies wordt gehouden bij een financiële onderneming die ingevolge de Wet op het financieel toezicht in Nederland het bedrijf van bank mag uitoefenen wordt het bedrag waarvoor de aansprakelijkheid van de aannemer uit hoofde van het eerste lid met betrekking tot dat werk in eerste aanleg bestaat, verminderd met dat overgemaakte bedrag. De vorige volzin is niet van toepassing voor zover de aannemer wist of redelijkerwijs moest vermoeden dat een onderaannemer in gebreke zou blijven het op de in de eerste volzin bedoelde rekening gestorte bedrag aan te wenden voor de betaling van loonbelasting of sociale verzekeringspremies. Bij ministeriële regeling worden nadere regels gesteld met betrekking tot de toepassing van dit lid.

6. De aansprakelijkheid op grond van het eerste lid geldt niet met betrekking tot de loonbelasting verschuldigd door een onderaannemer, indien aannemelijk is dat het niet betalen door de onderaannemer noch aan hem noch aan een aannemer is te wijten.

Artikel 96 CAO voor de bouwnijverheid 2007-2009 (generally binding)

Onderaanneming

De werkgever is verplicht erop toe te zien dat de bepalingen uit deze CAO worden nageleefd ten aanzien van alle individuele arbeidsovereenkomsten waarop deze CAO betrekking heeft. De werkgever dient bij inschakeling van zelfstandige ondernemers hierover een afspraak te maken in de onderaannemingsovereenkomst.

Artikel 3 CAO voor de bouwnijverheid 1996 (generally binding)

Onderaanneming

1. De werkgever is verplicht in overeenkomsten van onderaanneming met zelfstandige ondernemers die als werkgever in de zin van deze CAO optreden, te bedingen dat zij de bepalingen van deze CAO zullen naleven. Deze verplichting geldt niet indien op de werknemer een andere CAO van toepassing is.

2. a. De hoofdaannemer kan door of namens een werknemer van een onderaannemer als bedoeld in lid 1 aansprakelijk worden gesteld voor de nakoming door de onderaannemer van zijn CAO verplichtingen tegenover die werknemer, voor wat het loon betreft over de laatst verstreken loonbetalingsperiode waarover geen loon is betaald en wat de overige CAO-verplichtingen betreft over de laatst verstreken periode waarover de werknemer van het Sociaal Fonds Bouwnijverheid een overzicht heeft ontvangen van de door de werkgever te zijnen name betaalde bijdragen en premies, althans voor zover en zolang deze werknemer op de bouwplaats van die hoofdaannemer werkzaam is dan wel is geweest.

10

b. Een dergelijke aansprakelijkstelling dient voor wat het loon betreft binnen 5 x 24 uur per aangetekend schrijven dan wel via post met ontvangstbevestiging bij de hoofdaannemer te worden ingediend (te rekenen vanaf de dag waarop het loon door de werkgever betaald had moeten zijn).

Voor wat betreft de overige CAO-verplichtingen dient de aansprakelijkstelling per aangetekend schrijven dan wel via post met ontvangstbevestiging bij de hoofdaannemer te worden ingediend binnen 5 x 24 uur nadat de werknemer ervan heeft kennis kunnen nemen dat de onderaannemer deze verplichtingen niet is nagekomen.

De hier genoemde perioden van 5 x 24 uur worden verlengd met de in die perioden vallende zaterdag, zon- en feestdagen. De op het afgiftereçu van het aangetekende schrijven vermelde datum wordt beschouwd als de datum waarop de aansprakelijkstelling is ingediend.

c. Wanneer blijkt dat de desbetreffende onderaannemer zijn CAOverplichtingen een volgende keer opnieuw niet nakomt, dient de werknemer de hoofdaannemer daarvoor opnieuw en op dezelfde wijze aansprakelijk te stellen.

d. De werknemer die met betrekking tot hetzelfde werkobject binnen een periode van een jaar de hoofdaannemer aldus 3 x aansprakelijk heeft gesteld voor wat betreft het loon respectievelijk

3 x voor de overige CAO-verplichtingen, is van verdere aansprakelijkstellingen ontslagen. De hoofdaannemer is dan zonder meer aansprakelijk voor al het door de onderaannemer nietbetaalde loon en alle door de onderaannemer niet-nagekomen overige CAO-verplichtingen.

f. Ingeval van aansprakelijkstelling als bedoeld in sub a is de onderaannemer gehouden aan de werknemer en aan de werknemersorganisaties, partij bij deze CAO, desgevraagd de namen en adressen te verstrekken van de hoofdaannemer(s) van de bouwplaatsen waarop een werknemer werkzaam is dan wel is geweest.

3. In geval de hoofdaannemer een combinatie is van twee of meer werkgevers kan de aansprakelijkstelling bij elk van deze werkgevers worden gelegd.

Annex 3: Summary of liability arrangements

Netherlands		
Regulation	**Wages and Salaries Tax and Social Security Contributions Act (WKA)** [11]	**Generally applicable collective labour agreement for the construction industry (CLA)**
Nature of the liability	Joint and several liability, that is, chain liability	No real liability, but only a social clause
Objectives	Combating unreliable temporary work agencies and subcontractors, the abuse of legal persons and unfair competition	Extending compliance to the correct wage levels and other labour conditions as stipulated in the CLA
Scope of liability	• Wage tax • Social security contributions	All material obligations deriving from the CLA, such as wages and paid holidays
Personal scope	• Subcontracting: (principal) contractor • Temporary work: user company	• Subcontracting: principal contractors in construction sector (‘employer’) • Temporary work: user companies in construction sector (‘employer’)
Territorial scope	• Applies partly to foreign (sub)contractors or temporary work agencies when active in the Netherlands, but only when Dutch social security or tax law applies to the foreign or Dutch employees involved • Rules may also apply when the work is carried out abroad by Dutch subcontractors	Generally applicable, which means that it must be observed by all undertakings employing workers in the Netherlands in the construction sector. This includes foreign employers that, with their own employees, carry out work in the Netherlands
Preventive measures	No legal obligations, but several self-regulatory instruments for the user companies and contractors: • screening of the supplier or (sub)contractor • use of a guarantee account (G-account) or direct payment into an account of the Inland Revenue (deposit) • selection of an accredited temporary work agency	• Employer is obliged to monitor compliance of the CLA provisions in all individual employment contracts covered by the agreement • Employer may only contract subcontractors on condition that they apply the CLA provisions to their employees
Sanctions	• No fines • Transfers from one G-account to another which are not based on any subcontracting or hiring of workers must be refunded by the receiving G-account holder • In case of abuse, the Inland Revenue can withdraw the G-account or deposit of the (sub)contractor or temporary work agency	• No sanctions are stated in case of non-compliance by the principal contractor • Employee of the subcontractor may start judicial proceedings; it is uncertain if a claim against the principal contractor can be based on the CLA • In some situations, the user company might be held liable through tort law

[11] The provisions are laid down in Articles 34 and 35 of the Collection of State Taxes Act 1990.

Netherlands (cont'd)		
Regulation	**Wages and Salaries Tax and Social Security Contributions Act (WKA)**	**Generally applicable collective labour agreement for the construction industry (CLA)**
Complaint mechanism for workers	No	• Employee may start judicial proceedings; it is uncertain whether a claim is possible on the basis of the CLA social clause • Trade unions may offer legal aid, represent the employee, and/or start judicial proceedings in their own interest as party to the CLA • Employee may lodge complaint at the Labour Inspectorate
Actors involved	The Inland Revenue, as a public actor, is involved in the application and practical implementation of the rules, assisted by the Ministry of Social Affairs and Employment, acting as the Directorate for the Labour Market	• No supervising authorities involved • Trade unions are entitled to defend the individual rights of the employees of the subcontractors, as well as to start judicial proceedings on the basis of their own capacity as CLA parties

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EF/08/87/EN 7