

## Annex: Update Vos Transport

This update is added to the report published on 4 July 2016 as consequence of developments regarding the case of Vos Transport, which has been the subject of a summary process brought by the Dutch trade union FNV, the decision of which was published on 17 May 2016. SOMO research on all case studies lasted from May 2015 until March 2016, during which Vos Transport was also subject to a number of labour inspection visits, and the Inspection imposed fines on the company and its two directors, which the company appealed against, according to media reports. The public prosecution lodged a proceeding against Vos Transport BV with the district court on the basis of the Inspection report, demanding a fine against the company, which the judge confirmed on 22 August 2016. Furthermore, Vos Transport has responded to the SOMO/ETUC report on 4 August 2016 with a number of comments and on 25 August with additional materials. These developments are all outlined in this update.

### Decision in the summary process in the Vos Transport case

As described in the report,<sup>1</sup> in 2015, the Dutch union FNV lodged a complaint in a summary process against Vos Transport with the district court Overijssel in Zwolle. In its complaint, the FNV argued that Vos Transport's Romanian and Lithuanian drivers should fall under the Dutch Transport Collective Labour Agreement (CLA)<sup>2</sup>. Three relevant parts of article 73 of the Dutch Transport CLA were discussed in the case:

- There has to be a contract with a subcontractor
- The contract should be "executed in or from" the employer's company located in the Netherlands
- The EU Posting of Workers Directive should be applicable

### Summary process

The summary process (*kort geding* in Dutch) is a legal action that allows the parties in a conflict to achieve a swift resolution of the relevant conflict in a civil court. A decision in a summary process is strictly speaking a preliminary judgment in which the judge assesses, taking into account the interests of the conflicting parties and the likelihood of the decision being upheld in full proceedings (*bodemprocedure*), whether a temporary measure is called for. In a summary process, the normal rules relating to the provision of evidence do not apply and there are far less possibilities to present evidence. A case decided in a summary process can be tested again in full proceedings and the court will not be bound by the decision made in the summary process.

The Zwolle court ruled that the case could not be decided in summary proceedings and required further evidence.<sup>3</sup> The trade union subsequently decided to lodge a complaint in the second instance at the Court of Appeal in Arnhem-Leeuwarden in order to challenge the Zwolle court's ruling, rather than pursuing full proceedings. In the appeal process, Vos Transport argued that its Eastern European subsidiaries had substantial operations in Romania and Lithuania, and the drivers were not managed from the Netherlands. According to FNV, a precondition for the applicability of the Dutch CLA is where the work was organised, rather than whether the Eastern European subsidiaries had a material presence in Romania and Lithuania as laid down in the Posting of Workers Directive and its Enforcement Directive.

<sup>1</sup> Section 4.5, page 29 and sq.

<sup>2</sup> [https://www.fnv.nl/site/alle-sectoren/sectoren/transport-en-logistiek/890969/890979/cao\\_bgv\\_engels](https://www.fnv.nl/site/alle-sectoren/sectoren/transport-en-logistiek/890969/890979/cao_bgv_engels)

<sup>3</sup> See the decision of the Zwolle court, ECLI:NL:RBOVE:2015:3865, 24 August 2015, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBOVE:2015:3865>

The Court of Appeal ruled on 17 May 2016 that there was insufficient evidence presented in the proceedings that the contract was executed in or from The Netherlands or that the Posting of Workers Directive and its Enforcement Directive should be applied to the case: FNV, in the view of the Court of Appeal, had not provided sufficient evidence that the foreign subsidiaries were not operating independently from the Dutch office, so that the allegation of posting has not been adequately substantiated.<sup>4</sup>

### **Vos Transport's response to the report**

On 4 August 2016, Vos Transport sent SOMO a reaction to the report dated 4 July and an update regarding the decision dated 17 May. In its reaction, Vos Transport argues that the Dutch Collective Labour Agreement does not apply to their Romanian and Lithuanian drivers and maintains that work done by those drivers is being managed by staff at the local subsidiaries. It also disputes the relevance of the evidence presented in the report that the Eastern European subsidiaries had little or no material operations, such as the evidence that planners officially working for the Eastern European subsidiaries SC Vosescu Srl (Romania) and UAB Vosas (Lithuania) lived in the Netherlands at the time in question (2014).

Together with its reply dated 25 August, Vos Transport has provided a cover page from a report relating to an inspection visit in October 2015 to the offices of the company's Romanian subsidiary in which the authorities confirm that the Romanian subsidiary complies with the regulations on access to the transport sector. Vos Transport also points out that all its subsidiaries have obtained permits to perform transport activities as laid down in the Road Transport Regulation (1071/2009) and the International Carriage and Cabotage Regulation (1072/2009). According to Vos, this shows that those subsidiaries "effectively and continuously" conduct transport operations from Romania and Lithuania, as the existence of such effective and continuous operations is a precondition for obtaining the relevant permits.<sup>5</sup>

Vos Transport considers that the section of the report dedicated to the employment of Romanian and Lithuanian drivers is based on assumptions and posits that SOMO made one-sided use of information provided from FNV. Furthermore, the company criticises that SOMO did not test the applicability of cited legislation - specifically the Rome I Regulation (593/2008), the Posting of Workers Directive (96/71/EC), the Road Transport Regulation (1071/2009), and the International Carriage and Cabotage Regulation (1072/2009) - to Vos Transport's contracting arrangements with its Eastern European subsidiaries.

The research is indeed not intended to test the applicability of various legal frameworks to the presented case studies, but provides an overview of the regulatory framework for all cited case studies. SOMO applied its regular research procedures to test the reliability of the information provided by the FNV, such as wage slips, transcripts of interviews with drivers and screenshots of websites to verify claims of the FNV. Vos Transport has not provided evidence relating to the relevant period of 2014 that would show the evidence presented by the FNV to be incorrect. The company has, however, provided names of transport managers and additional planners of the Lithuanian and Romanian subsidiaries and pictures of one unidentified office displaying folders dating back from 2008. Whether managers or other office staff were working from these two

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<sup>4</sup> See the decision of the Court of Appeal Arnhem-Leeuwarden, ECLI:NL:GHARL:2016:3792, 17 May 2016, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2016:3792>

<sup>5</sup> Concerning Romania, the document from the Romanian authorities provided by Vos Transport states that the entry requirements for the transport activity have been met concerning Vosescu Srl. It is dated 8 October 2015 and therefore does not address the issue regarding year 2014. Concerning Lithuania, Vos Transport stated that the Lithuanian subsidiary holds a transport license but did not provide any document to SOMO.

countries in 2014 is not detailed in the company's reply and no evidence has been provided proving material operations in Lithuania and Romania regarding 2014 specifically, so that SOMO could not verify whether they actually managed the work of the Eastern European drivers subcontracted to Vos Transport. In its reply dated 25 August, the company says it is difficult to provide materials proving activities at the offices of the company's Eastern European subsidiaries and has invited SOMO to visit those offices itself. As indicated in the methodology to the report, SOMO applied desk research and interviews to research the case studies, rather than field visits. There are limitations to the ability to verify claims of material operations at foreign subsidiaries by way of prearranged field visits, especially if the case relates to a past period.

Vos Transport insists that its Eastern European subsidiaries have material presence in Romania and Lithuania and that those subsidiaries cannot be labelled as letterbox companies. By claiming that the conclusions of the Court of Appeal are "incontrovertible", Vos Transport also seems to interpret the decision dated 17 May 2016 as a substantive decision on the materiality of its Eastern European operations. This interpretation is contested by Dutch union FNV, which points out that the summary process did not allow for substantive presentation of evidence and emphasises the preliminary nature of the judgment.<sup>6</sup>

### **Dutch Labour inspection report and resulting public prosecution**

At the same time as the above legal proceedings were taking place, the Dutch Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*) carried out a parallel review of Vos Transport's use of Romanian and Lithuanian drivers. The Inspectorate's report relating to the review has not been published and is currently subject to a Freedom of Information request by the trade union. Dutch media have published a number of details contained in the report in May 2016.<sup>7</sup> The Inspectorate confirmed that it was planning to impose civil penalties onto the company and its directors<sup>8</sup>. The results of the inspection report were handed over to the Public Prosecution Service, which instituted proceedings against the company with the district court of Overijssel in Zwolle. On 22 August, the Zwolle magistrate in commercial matters ruled in favour of the public prosecution and imposed a reduced fine (from the EUR 4.300 demanded by the prosecution to EUR 3.500) on Vos Transport BV. The Public Prosecutor had accused Vos Transport of using much cheaper, often foreign drivers enabling them to operate at a much lower cost. Since Vos refused to make a statement to the police, the prosecutor found that there were no circumstances which needed to be taken into account. He demanded a fine of 4,300 euro, the same amount as the penalty order of the Inspection, which Vos Transport had opposed. The judge found Vos Transport BV guilty of using drivers who were not officially employed by the company, but reduced the fine for procedural mistakes by the Public Prosecutions Service that could have damaged the company.<sup>9</sup>

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<sup>6</sup> Interview FNV lawyer, 8 August 2016.

<sup>7</sup> Het Financieele Dagblad, 17.5.2016, Boetes dreigen voor Vos Transport vanwege overtredingen cao, <http://fd.nl/economie-politiek/1151975/boetes-voor-vos-transport-vanwege-overtredingen-cao>; Transport Online, 17.5.2016, Inspectie Leefomgeving en Transport left Vos Transport boetes op, <http://www.transport-online.nl/site/71457/inspectie-leefomgeving-en-transport-legt-vos-transport-boetes-op/>; Logistiek, 18.5.2016, Vos wint rechtszaak, maar boete dreigt, <http://www.logistiek.nl/carriere-mensen/nieuws/2016/5/rechter-stelt-fnv-opnieuw-in-ongelijk-in-zaak-vos-transport-101144103>; De Stentor, 18.5.2016, FNB-VNB: Forse boetes voor Vos Transport, <http://www.destentor.nl/regio/deventer/fnv-vnb-forse-boetes-voor-vos-transport-1.6022934>; Nieuwsblad Transport, 18.5.2016, ILT: boetes dreigen voor Vos Transport, <http://www.nieuwsbladtransport.nl/Nieuws/Article/ArticleID/49408/ArticleName/ILTboetesdreigenvoorVosTransport>

<sup>8</sup> Het Financieele Dagblad, *ibid*.

<sup>9</sup> De Stentor, 23.8.2016, Boete voor Vos na inzet buitenlandse chauffeurs; in a telephone inquiry from 5.9.2016, the district court Overijssel informed SOMO that the case was decided on in oral proceedings for which no written report of a judgment is made.

According to FNV, the Inspectorate found that the company had violated stipulated rest and driving periods in some 200 cases and that the organisation and documentation of the trips of drivers under Eastern European contracts took place from the Dutch offices. Furthermore, the report questioned whether the company's Eastern European subsidiaries were independently operating, as Vos Transport BV structurally used Romanian and Lithuanian drivers under contract with Eastern European subsidiaries. The Dutch authorities sent a request to the Romanian inspection authorities to assess whether the Romanian office possessed adequate administrative and technical capacities to carry out transport activities in accordance with the requirements laid down in Article 5 of the Road Transport Regulation (1071/2009).

## **Conclusion**

Given the developments in the case of Vos Transport discussed above, namely, the assessments made by the Arnhem-Leeuwarden Court of Appeal in the summary process, the actions taken by the Inspectorate, and the successful public prosecution of Vos Deventer BV on the basis of the Inspection report, and given the further evidence provided Vos Transport about its Eastern European subsidiaries, the controversy regarding Vos Transport's possible use of letterbox-type arrangements (as defined in the report<sup>10</sup>) mainly concentrates on the following arguments. On the one hand, there are rather strong indications that in 2014, Vos Transport may have been using letterbox-type arrangements in subcontracting its work to Eastern European drivers, using subsidiaries in Lithuania and Romania. Vos Transport has not provided specific evidence showing that those subsidiaries were supervising, managing and planning drivers from their local offices in 2014 and thereby had material operations at that time. Additionally, the findings of the Dutch Labour Inspectorate reported by FNV cast doubt regarding the way Vos Transport's Eastern European subsidiaries operate. On the other hand, Vos Transport alleges that the Lithuanian and Romanian authorities have provided Vos Transport with permits to engage in transport activities and relies on the fact that the Arnhem-Leeuwarden Court of Appeal has determined that the indications presented by FNV are insufficient to negate Vos Transport's claims about the materiality of its Eastern European operations. Given that this dispute is as yet legally unresolved and potentially subject to further legal or regulatory proceedings, new evidence might emerge that could lead to more distinct conclusions on the case.

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<sup>10</sup> Report, section 1.3., page 10 and sq.