

Employee consultation in the Netherlands in case of mergers and acquisitions

As in many other European countries, M&A transactions in the Netherlands are subject to notification and consultation requirements towards employee representative bodies in the form of works councils and trade unions. The requirement that these procedures must normally be completed before the acquisition agreements are signed can have a significant impact on an M&A process in the Netherlands.

The relevant requirements are based on the Dutch Merger Code (*Fusiegedragsregels 2000 ter bescherming van de belangen van werknemer*) ("Merger Code") and the Dutch Works Council Act (*Wet op de Ondernemingsraden*) ("WCA"). Applicable collective labour agreements (*collectieve arbeidsovereenkomsten*) ("CLA") may contain additional consultation requirements in change of control scenarios.

Employee consultation in the Netherlands is an essential aspect of each transaction that should be prepared and planned for carefully to avoid adverse impact on the negotiation dynamics and unexpected delays of the contemplated transaction.

Works council consultation

Consultation requirement

In the Netherlands, a works council is a non-corporate body consisting of and elected by employees of a company.

A works council should be established if a company in the Netherlands employs 50 or more employees.

Employees can enforce the establishment of a works council through a court decision.

Relevant decisions

The WCA requires action of a works council in relation to certain intended management decisions, such as the decision to transfer control over a company or to take control over another company or over assets, a closure or downsizing of a (part of a)

company or to attract loans or to grant security. As a consequence of these rules, it may be necessary to consult the works councils, if established, of the seller, the purchaser and/or the target company.

The rules may also make it necessary to consult the works council of a Dutch company in respect of the acquisition financing even if this target company is not a party to the transaction agreements. Whilst the sale of the company would be a decision taken by the shareholder, rather than the management of the target company, the Dutch rules provide that the relevant decision by the parent company can be attributed to the target company's management.

The consultation requirement would normally also apply in the event of a recommended offer for the shares in a publicly listed Dutch company. There will be no such requirement in the event of a "hostile offer", but the hostile bidder may still need to show willingness to meet with the target's

works council and display its good intentions.

If and when the initial unfriendly offer becomes 'friendly', the regular consultation procedures apply.

Timing

The consultation of the works council should take place at a stage of the transaction process at which the works council's opinion can still influence the intended transaction. Typically, this must be done before a sale and purchase agreement is signed.

This can have a significant impact where the seller has set up a "controlled auction process", in which it may be negotiating simultaneously with multiple parties and obtain binding commitments from the "winner" before it terminates discussions with the other bidders.

The request for advice should contain the following information:

- An outline of the intended transaction.
- The reasons for the transaction.
- Possible consequences of the transaction for the employees.
- The measures that are intended to mitigate these consequences.

In the context of public offers, where confidentiality may be key, the full consultation process typically starts only after a public announcement of the offer discussions or the intention to make a public offer has been made.

Consultation process

When consulting a works council on an issue at least one consultative meeting should be held between the management and the works council before the works council renders its advice.

There is no maximum period within which the works council must render its advice. Depending on the complexity and urgency of the subject matter the timing may vary from between five days to four months from the time when the works council is informed of the intended transaction. In general given the usual long preparation process a transaction requires it is prudent to count on at least one to two months.

The scope of information to be provided to a works council in the consultation process will in practice depend on the different elements that require prior works council consultation.

The consultation of the works council with respect to an intended transaction is in principle the responsibility of the company in respect of which the works council is established. It is important for a purchaser to monitor the consultation process and get involved in certain parts of the process. For example, it can be important that the works council is properly informed of the buyer's plans for the target company. Furthermore, the purchaser will wish to create a good relationship with the works council, as it will have to deal with this works council after the transaction. Usually therefore, the purchaser and the seller or target will coordinate the involvement and information provided in the consultation process.

The advice from the works council and possible sanctions

The works council can:

- (a) support the intended transaction
- (b) support the intended transaction subject to certain conditions or
- (c) reject the intended transaction.

If the works council supports the intended transaction, it can be implemented as proposed. If certain conditions are imposed by the works council, the intended transaction may be pursued provided that the conditions set by the works council are met. If the company and/or the purchaser are not prepared to (fully) meet the conditions set by the works council the company can in principle still carry out its intentions. However, it may only do so after a waiting period of one month is observed from the moment that the works council has been informed in writing of the fact that the company will implement the intended transaction whilst disregarding the works council's views or conditions. During this one month waiting period, the works council can present the case to the Enterprise Chamber of the Court of Appeal of Amsterdam (*Ondernemingskamer*) (the "Enterprise Chamber"). The court procedure may take four to eight weeks from the date of submission of the writ by the works council.

The appeal process does not automatically suspend the company's decision. However, if the company were to start implementing the transaction during the court procedure, the works council may initiate summary proceedings to obtain a suspension order.

Court assessment

The Enterprise Chamber will not conduct a full review of the company's decision to reject the advice from the works council; instead it will only award the works council's claim if the company's decision is manifestly unreasonable. If the Enterprise Chamber agrees with the works council that the decision is manifestly unreasonable, it may order the company to wholly or partly withdraw the decision and to reverse the consequences of an already implemented decision and/or to prohibit the company from implementing the decision or part thereof.

Following the procedural requirements is key

The Enterprise Chamber's case law demonstrates that it is unlikely that proposed company decisions will be sanctioned on substantive grounds. However, the Enterprise Chamber pays significant attention to the procedural steps; over the years works councils have been successful in procedures where the legal requirement to consult was ignored, material information was withheld from a works council, the consultation took place too late, or a works council was not given sufficient time to properly consider the matter. It is therefore key that the parties follow the procedural requirements of the WCA carefully.

Consultation of trade unions and notification of the SER

The Merger Code

The Merger Code is a code of conduct establishing rules and procedures for the protection of the interests of employees during negotiations resulting in a merge. It should not be confused with competition and merger control rules.

The Merger Code applies to mergers where a transaction meets each of the following tests:

- A change of control over a company or over assets.
- At least one of the companies involved in the transaction is located in the Netherlands.
- Such company employs at least 50 employees or forms part of a group of companies employing at least 50 employees in the Netherlands.

If all of these conditions are met, the SER and the trade unions need to be notified of such transaction and the relevant trade unions need to be given the opportunity to establish their views on the transaction. At least one consultative meeting with trade unions should take place. Exceptions to the notification obligations apply if:

- All parties involved in the transaction form part of a group of companies.
- The target company employs fewer than 10 employees.
- The transaction falls "outside the scope of the Dutch jurisdiction", which may be the case,

depending on the circumstances, in the following two situations:

- (i) where a Dutch company is acquiring a non-Dutch target, or
- (ii) where an acquisition of a Dutch target involves a non-Dutch seller and a non-Dutch purchaser.

Timing

As is the case with the works council consultation, the parties must notify the SER and the relevant trade unions (if any) of the intended transaction at such point of the transaction that the trade unions can still influence the transaction. In other words, this must be done before a definitive agreement has been reached by the parties to the transaction. This is usually done simultaneously with the consultation of the works council, but should in any event be done prior to any public announcement of the intended transaction being made by the parties.

The requirement to notify the trade unions of the intended bid prior to the relevant announcement is not compatible with the rules of insider trading. Accordingly, in connection with public offers, the parties will normally inform the trade unions simultaneously with the public announcement being made. In relation to public bids that are considered 'unfriendly' or 'hostile', the bidder should consult the trade unions (if any) at the time of announcing its intended bid for the target's shares.

Notification procedure

The trade unions and the SER should be informed of the reasons for the intended transaction, the possible social, economic and financial consequences of the transaction and any measures that are being

considered in order to mitigate these consequences.

There is no obligation to reach agreement with the trade unions, however, trade unions do sometimes try to get highly involved in the process by setting conditions to the transaction and team up with a works council. The trade unions should be provided with sufficient information on the envisaged transaction to enable them to form an opinion on it from the perspective of employee protection.

Sanctions

The sanctions for failing to comply with the Merger Code are twofold; the Merger Commission (*Geschillencommissie*) can either issue a public statement concerning non-observance of the Merger Code or a public statement of censure. An infringement of the Merger Code may give rise to claims based on tort (injunctive relief and/or compensatory damages).

Collective Labour Agreements

If a CLA is applicable to one of the companies involved in the transaction, this may contain additional consultation obligations that are usually very similar to the above described processes.

Practice

In practice there is often the desire for the parties to a transaction to record the initial negotiations results and to start the required consultation processes only as the transaction progresses. In practice the parties to a transaction often conclude variations of 'agreements to agree' before the consultation process is finalised. This practice appears sensitive in view of the statutory requirement of timely consultation that seeks to allow the employee representative bodies to influence the intended transaction and its conditions.

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