



Country report: (1) Background Information

The Dutch system of enterprise-level workers' participation

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1. Introduction

This report analyses workers' participation at enterprise level in the Netherlands against the background of developments in corporate governance. Section 2 contains a short sketch of Dutch industrial relations and Dutch company law. In Section 3 I describe current law on workers' participation at company level. Section 4 contains a first 'bridge' to the SE, making clear the extent to which the Dutch system of workers' participation at company level has been integrated into the SE directive. In Section 5 the functioning of the present system is considered. Section 6 covers the trade union attitude to the Dutch system. Finally, in Section 7 the debate on and changes in corporate governance in the Netherlands are discussed, emphasising the effects on the position of works councils and – to a lesser extent – of trade unions.

2. General remarks on Dutch industrial relations and company law

Industrial relations

In the Netherlands, trade unions (trade union federations) have a relatively strong position at the central level, especially through their membership of advisory bodies (Social and Economic Council, Labour Foundation). Their position at the sectoral level is also relatively strong, notwithstanding an overall unionisation rate of 25%. Coverage of collective agreements is 84%. The trade union presence at the company level is very weak, with some exceptions. Since the end of the 1990s the trade unions have been under pressure and their representativeness called into question.

Works councils have a relatively strong position in the Netherlands. They have extensive rights and play a role in employee involvement in company bodies (see below).

Finally, Dutch industrial relations are quite "friendly" in comparison with many other EU countries. The level of industrial conflict is low and trade unions – and also employers' organisations – traditionally take a relatively moderate stance (in general and toward each other).

Since 2003, however, when the new centre-right government was installed, this 'friendly' climate seems to have dissipated, as the government launched an attack on the Dutch 'polder' model. However, in November 2004 government and social partners agreed a new social pact. (For more information, see www.eiro.eurofound.ie.)

Company law

Businesses in the Netherlands are generally incorporated as limited-liability companies. Dutch company law provides for two types of these: the public limited company ("naamloze vennootschap" or "NV") and the private (closed) limited company ("besloten vennootschap" or "BV"). Both NVs and BVs may participate in the formation of an SE.

The standard statutory company model (both NV and BV) provides only for a single (administrative) board ("bestuur"). The general shareholders' meeting appoints and dismisses the board members. The annual accounts are drawn up by the board and adopted by the general meeting.

The company's articles of association may provide for a supervisory board ("raad van commissarissen") and so opt for a two-tier board structure. The supervisory board's statutory (dual) task is to supervise the work of the administrative board and the general affairs of the company and its affairs, as well as to advise the administrative board. The supervisory board

members (“commissarissen”) should act in the best interests of the company, that is, take into account all the stakeholders’ interests. In other words, they are not permitted to represent the interests of only one stakeholder, whether it be shareholders, a banks or employees. This independence of the members of the supervisory board is at the very heart of Dutch company law.

They are appointed and dismissed by the general meeting, unless the articles of association stipulate otherwise (up to a maximum of one third of the members).

For large companies, a two-tier model with a supervisory board is obligatory. These so-called ‘structure companies’ are dealt with in Section 3.

3. Current law on enterprise-level workers’ participation

In the Netherlands, the law on workers’ participation at company level (called the “structure law”) is quite unique. This is true both for the system as it applied from 1971, and for the new system, in force since 1 October 2004.

Large companies have to establish a supervisory board (SB). (Although Dutch company law contains rules only on the two-tier structure, there are no legal barriers to establishing a one-tier system.) A company is considered “large” when the issued capital exceeds 16 million euros, it employs 100 or more employees and a works council has been set up (obligatory for firms with more than 50 employees). When a company fulfils these criteria for an uninterrupted period of three years, the articles of association have to be changed in accordance with the legal requirements.

Companies which do not fulfil these criteria can apply structure law voluntarily.

The supervisory board has the following rights:

- appointment and dismissal of the management board;
- veto of all important strategic decisions;

The SB of a structure company consists of at least three members. Their term of office is four years, and they are eligible for reappointment without restriction. All SB members have the same legal rights and obligations. Their remuneration is agreed by the general meeting, usually based on a proposal from the SB itself. As already mentioned, a special feature of Dutch law is the independence of SB members (not only in companies under structure law, but in all companies). SB members may not act as representatives of a particular interest group (be it shareholders, employees, banks, or anything else) but must act in the interests of the company as a whole. SB members may not be employed by the company or a subsidiary, or by a trade union involved in collective bargaining with the company.

The most peculiar feature of the old system (prior to 1 October 2004) was the appointment of SB members by the system of so-called ‘controlled co-optation’.

In the new system, the SB is appointed by the general meeting of shareholders. The supervisory board nominates candidates when a vacancy arises. Candidates can be put forward by both the general meeting of shareholders and the works council. The general meeting can reject a candidacy, after which the procedure starts again.

The works council has an ‘enhanced’ right to nominate candidates up to a maximum of one-third of the seats on the supervisory board: that is, the supervisory board is in principle obliged to accept these nominations. If the SB objects to a candidate, it must consult the works council. If no agreement can be reached, the SB has the right to go to court (the Enterprise Chamber of the Amsterdam Court) for legal confirmation of its decision. If the Court upholds it, the works council has the right to propose a new candidate.

The nomination of one or more candidates by the SB can be rejected by the general meeting of shareholders with an ordinary majority, representing at least one-third of the issued capital. In that case, the whole procedure starts again, again in accordance with the (enhanced) nomination rights of the works council.

Until a maximum of one-third of the seats on the SB is filled with candidates nominated by the works council, the enhanced works council right shall apply to every second vacancy.

In the new system (from 1 October 2004) the general meeting of shareholders has the right to dismiss the entire SB. The works council must be informed of this in advance. After dismissal, an interim SB is appointed by the Enterprise Chamber of the Amsterdam Court. This interim SB shall be responsible for installing a new SB, according to the system outlined above.

Finally, members of the SB can be dismissed by the Enterprise Chamber at the request of the company (represented by the SB), the general meeting or the works council, for neglecting their duties, other substantial reasons or a change in circumstances.

This system applies to companies with a majority of employees working in the Netherlands. A mitigated system applies to international groups (with the majority of employees outside the Netherlands), whether or not their head office is in the Netherlands. Structure law does not apply to international holding companies, but only to holding companies of companies with their head office in the Netherlands (so-called subholdings) and in a weaker form (mitigated structure law). The appointment and dismissal of the management board is not carried out by the SB, but by the general meeting of shareholders. The SB of the holding company of Dutch subsidiaries again has veto power in important decisions, but only those taken by the management of its 'own' company, not decisions taken by the international holding.

If structure law is applied to one level in a group of companies, all other (affiliate) companies are exempted, whether or not they fall within the criteria mentioned above. This exemption rule applies to both international and national groups.

Companies in the form of co-operative societies (this includes several large food companies, a large bank and several insurance companies), who have members instead of shareholders, have a system comparable to the mitigated structure law.

4. How the Dutch system has been incorporated in the SE directive

Some critics take the view that the right to recommend or oppose the appointment of SB members is too 'weak' a power to deserve the name 'participation'. It should be stressed, however, that the Dutch system has been fully incorporated in the SE directive. This is clear from Article 2 (k) (Definitions), Article 4, paragraph 2 (g) (Content of the agreement) and Part 3 of the Annex under (b) (Beginning and end).

5. How the present system works

5.1 Coverage of structure law

Research shows that in 1999, out of a total of 184 listed companies 102 applied structure law to its full extent, 7 applied the mitigated system and 73 did not apply structure law (2 unknown). Eight companies applied structure law voluntarily (they did not meet the criteria). For at least 34 companies it could be established that they qualified for the exemption available to international holding companies. Nevertheless, almost two thirds of this group (22 companies) applied structure law in the international holding on a voluntary basis. There are no figures on the number of workers employed by these companies.

There are several reasons why a company might apply structure law on a voluntary basis. One reason is that structure law can be used as a defence against hostile takeovers. A second reason might be that an agreement has been reached with the works council to

maintain structure law, even when the criteria are not met or the company qualifies for an exemption. There are signs, however, that in recent years more and more companies have sought to elude application of structure law (at least at the level of the dominant holding) when possible. In 2003 and 2004, Aegon, ING and ABNAMro all abolished structure law at the level of the holding company.

The figures given concern listed companies. According to the Registry of Companies, 304 non-listed companies applied structure law. The actual figure is probably higher because the Registry is not completely reliable in this connection: at least some of the 304 companies mentioned above can be considered large in terms of employment (38 companies with 100–199 employees; 67 with 200–499; 18 with 500–749; 10 with 750–999; and 20 with more than 1,000 employees).

5.2 Works councils and structure law

Research conducted in 1995 showed that in that year only a minority of works councils exercised the right to recommend one or more SB members, although the number seems to have risen in the meantime. Several large companies have reached agreement with the works council on the composition of the SB, reserving one or more seats for members proposed by the latter. I will use the expression “social SB members” for SB members proposed by the works council.

Since 1971, the works council has formally objected to an appointment proposal in only a few cases, resulting in the SB going to court. From the relevant court cases it can be inferred that, as a rule, representatives of company headquarters should not constitute the majority of SB members, and at least one member should have some knowledge of the Dutch social and economic system.

Partly due to the rule that SB members are not allowed to act on behalf of (among other things) the works council and partly for fear of becoming isolated within the SB, social SB members tend to act as ‘normal’ SB members, although in many cases they pay more attention than average to employee-related matters.

The frequency and intensity of contacts between social SB members and the works council show large variations: from virtually non-existent to remarkably close, especially in times of crisis. On average, there is quite some distance between the works council and social SB members.

In recent years, works councils seem to have become more active. The central employers’ and trade union federations have lent support to a nationwide database for (candidate) SB members. No data are yet available on the degree of success of this initiative, however.

5.3 The Corus case

In March 2003, the Corus case showed that structure law, even when applied to the subholding of Dutch companies in an international group, should not be underestimated. The aluminium activities of Corus plc are part of Corus BV (the Dutch company). Corus plc wanted to sell these activities to the Pechiney group, to generate cash. The SB of Corus BV refused to approve the sale, despite becoming liable to a penalty of 20 million euros to be paid to Pechiney for breach of agreement. Corus plc started a lawsuit at the Enterprise Chamber of the Amsterdam Court, summoning both the SB and the central works council of Corus BV. Corus plc demanded that the SB be suspended for 24 hours and that the central works council not exercise its right to demand a delay of one month if it did not agree with the decision to sell the aluminium business. The Enterprise Chamber gave only a (preliminary) ruling on the first demand. It stated that the SB had sufficiently taken into account all the interests involved and could in fairness have refused to approve the sale.

Under the current system, Corus plc, in the form of its general meeting of shareholders, would have been able to get its way by dismissing the SB.

6. The trade union position on workers' participation at enterprise level¹

The Dutch trade union confederations certainly welcomed the introduction of the structure regime in 1971 after long years of arguing for workers' participation. They had advocated that supervisory boards be appointed directly or indirectly by the workers and the shareholders on an equal footing, but contented themselves with the compromise formula worked out by the Social and Economic Council and adopted by the legislator. They expected that this formula – co-optation combined with the right to recommend and oppose appointments – would stimulate a “contractual” practice wherein recommendations from the works council and the general shareholders' meeting be adopted in equal proportion. The prevailing reality was that supervisory boards filled vacancies in their ranks in consultation with the management board, with works councils depending on supervisory board benevolence in order to have a say in the appointment procedure.

It should be noted, however, that trade unions did little to endorse works councils in the exercise of their legal rights to recommend and oppose candidates. They never succeeded in setting up a professional and workable register of persons specifically qualifying for being recommended by works councils; only a year ago they decided to participate in a general register founded in co-operation with the employers confederations. They never decided to undertake a common effort to assist works councils in exercising their rights consistently and strategically.

In practice, the trade unions have always remained aloof from the structure regime. The main statutory anchorage for workers in asserting influence on the enterprise and defending their interests is the works council. Works council involvement in the formation of the supervisory board was looked upon as an auxiliary instrument only. Trade unions also justified their reticence with reference to the lack of legitimacy of the co-optation procedure and the restricted grounds for opposing an appointment. They did not want the works councils to have to assume a pound of responsibility for an ounce of influence. Indeed, the statutorily valid reasons for opposing candidates are restricted. However, works councils would have been far more influential if they had learned to use the right to oppose as a threat, since supervisory boards are always averse to open conflict and to bringing works council objections before a court.

It has never been controversial that the structure regime statute excluded those trade union officials from standing for supervisory board membership who are engaged in negotiating employment conditions for the company's employees. This legal incompatibility was considered to be crucial for maintaining a clear division of responsibilities between trade unions and company boards. For a similar reason, it was not disputed that works council membership was incompatible with supervisory board membership. Trade unions gradually distanced themselves, however, from legal incompatibility with regard to other employees of the company. Subordination to the management as an employee is not intrinsically incompatible with supervising that same management as a member of the supervisory board, on the understanding that the employee board member – like all board members – be mentally and practically capable of aligning the workers' interest with the general interest of the company.

¹ This paragraph is taken from a paper by Joan Bloemarts, labour and company law adviser FNV (Netherlands Trade Union Confederation).

7. Debate on and changes in the corporate governance system

7.1 Introduction

Corporate governance is a hot topic in the Netherlands. If we define corporate governance as the set of mechanisms shareholders use to discipline management, the debate covers them all:

- voice;
- takeovers;
- direct supervision;
- remuneration;
- external control (which will not be analysed in this report).

The general feeling is that shareholders should have more power than they have now. To this end, several initiatives have been taken: codes of conduct on corporate governance, bills and changes in the law. The general picture that arises is that the position of (the general meeting of) shareholders has been strengthened with regard to both management and SB (the changes in structure law being a major example), while the position of the works council (and in some cases the unions) remains more or less the same. There are examples in relation to which shareholders and employees have a common interest (especially with regard to management remuneration), but in other cases this is less clear. To a certain extent, employee representatives gain by having a powerful management because the whole concept of codetermination has its starting point in the relationship between the two. When management room for manoeuvre diminishes in favour of the shareholders, the room for codetermination also diminishes.

We have already looked at direct supervision (by the SB). In the following sections I will look at *voice*, *takeovers* and *remuneration*.

7.2 Voice

Shareholders' use of *voice* has increased in the past few years. Several large institutional investors take a more active stance, both in the general shareholders meeting and in bilateral talks with the board. Another way in which voice is used is in requests for an investigation of the affairs of the company. This right to request an investigation belongs to both shareholders representing 10% or more of the issued capital (or alternatively, 225,000 euros) and trade unions with members in the company or a subsidiary (or participating in collective bargaining with the company or a subsidiary). The right of investigation has hardly ever been used by the unions; shareholders, however, have increasingly been exercising this right, also in takeover battles. Their success has been limited because the Supreme Court is reluctant to grant shareholders more influence without prior legislation.

Pension funds occupy a special position. The biggest funds own huge tranches of shares and are thus able to exercise *voice* effectively. At the same time, the boards of these funds are jointly composed of employer representatives and employee representatives (union officials). Hitherto, pension funds have not behaved significantly differently from other institutional investors.

7.3 Takeovers

In 1997, a bill was introduced to restrict the use of defensive measures against hostile takeovers. To a certain extent it resembled the thirteenth directive, but in a weaker form. An enterprise acquiring 70% or more of another company's issued capital could go to the Enterprise Chamber of the Amsterdam Court and demand the removal of one or more of the defences. A rather weak right of consultation of the works council by the Enterprise Chamber is also part of the bill. The bill has not yet become law and it is possible it will remain dormant, in expectation of the thirteenth directive.

In September 2001, a new merger code was issued by the SER. According to this code of conduct, unions have to be informed and consulted in due time when a merger is planned. In the former code, unannounced hostile takeovers were explicitly ruled out. The present code does not contain such a prohibition. This change can probably be attributed to anticipation of proposal(s) for the thirteenth directive which do not rule out unannounced hostile bids.

7.4 Remuneration

Since the end of the 1990s, there has been increasing criticism of sometimes lavish SB remuneration schemes. At present, these schemes are usually set up by the SB; works councils and unions have no influence on remuneration issues. Proposals to change this (for example, a right of information for the works council) have met with a mixed response, to say the least.

Apart from these proposals, there have been some changes in the Civil Code to increase the transparency of board remuneration. More importantly, the new Code of Conduct on corporate governance (the so-called 'Tabaksblat code') contains several principles and recommendations on remuneration, including measures which will strengthen the position of the general meeting of shareholders.

On 5 October 2004, a bill for a new Law on works councils was presented (Law on workers' codetermination). This bill contains a works council right to information on the remuneration of different personnel categories (including management). The bill will in all probability become law only from 1 January 2006.

7.5 The end of workers' participation through involvement in company bodies?

A recent development in the debate is a questioning of employee involvement in the company structure as such, not with a view to doing away with codetermination itself, but rather to dividing codetermination in the enterprise from codetermination in the company structure. In the financial press there have been proposals to concentrate all codetermination rights in the Law on works councils. According to these proposals, works councils should have no rights in the company structure at all. It is odd that no reference is made in these proposals to the SE directive or the recent SCE directive.

The clarification accompanying the 'Tabaksblat code' was very critical of structure law, as was the Minister of Justice in his recent Memorandum on the modernisation of Dutch company law, although it is not entirely clear whether the Minister is heading towards abolishing structure law or restricting its scope to very large companies.