



**Country report: (3) Transposition**

**The transposition of the SE legislation in the Netherlands**

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# The Netherlands – Transposition Process

## 1. Introduction

On 1 April 2005, the laws implementing the SE Statute and the SE Directive came into force, almost six months after the official deadline. Notwithstanding this delay, SEs had already been created in the Netherlands, the first as early as 8 October 2004.

The major part of what follows is devoted to the implementation of the Directive. I will also pay attention, however, to implementation of the Statute, and the – complex – relationship between the law implementing the Directive and other codetermination laws.

## 2. Overview

The Dutch legislator has followed the Directive rather closely. On several issues, choices could be made. The main choices were:

- works councils appoint the members of the SNB and the representative body and nominate or appoint the members of the board in the case of participation;
- the Dutch law allows the presence of union officials in the SNB;
- the funding of experts is not restricted in the case of the SNB; it is restricted to one expert for every issue on the agenda in the case of the representative body;
- there is no opting out as regards SEs created through mergers;
- there is a set of rather intricate and complicated provisions for renegotiation;
- the definition of consultation in Chapter 1 of the Dutch law is rather meagre (see below). Moreover, the Dutch law contains no provision on the spirit of cooperation as formulated in article 9 of the Directive. Clearly, the Dutch legislator considered this to be self-evident.

## 3. Transposition of the Directive in detail

On 31 March 2004, the law on the implementation of Directive 2001/86/EC was published in the Official Journal of the Netherlands (Staatsblad 2005, 166). The law came into force the next day. In what follows, we analyse the main features of the law and pay particular attention to the debates which took place during the transposition process.

### 3.1 General

Chapter 1 contains the definitions to be used and several other, more general provisions. On some points, there are differences from or elaborations of the text of the Directive itself:

- There is a separate definition of *Dutch participating company*: a participating company with its statutory seat in the Netherlands.
- Employee representatives: works councils.
- Information – this is to a certain extent defined more broadly than in the Directive. Information has to be supplied on questions which concern the SE or one or more of its subsidiaries. However, in the definition there is no statement on the timeliness of the information; this is prescribed only in the Annex.
- Consultation – in the Netherlands, the definition of consultation in the EWC Directive has been transposed. This definition is more restricted than the definition in the SE Directive: the obligation that dialogue and exchanges of views should be established ‘at a time, in a manner and with a content which allow the employees’ representatives, on the basis of the information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE’ has been left out from the definition as such, and has been included only in the Annex.
- Employees (not defined in the Directive) – as far as the Netherlands is concerned every person employed on the basis of an employment contract is considered an employee. This means that temporary agency workers are included in the definition.

Article 1.4 contains provisions on the rights and obligations of employee representatives (be it in the SNB, the SE works council, the [supervisory] board or other). Subjects include confidentiality (cf. article 8 of the Directive), protection of employee representatives (article 10 of the Directive), the right of employee representatives to carry out their duties during their normal working hours and to receive training (cf. article 10 of the Directive) and the right of every employee or employee representative in the Netherlands to request information on the number and distribution of employees in the relevant countries.

Article 1.5 transposes article 12 of the Directive (compliance). The relevant court is the Enterprise Chamber (Ondernemingskamer) of the Amsterdam court, the same court as is responsible for handling cases concerning EWCs and right-of-appeal cases of works councils.

Article 1.6 concerns the relation between the law implementing the SE Directive and other laws. The law follows the Directive on two points (non-applicability of Directive 94/95 EC on EWCs and non-interference with national laws on information and consultation, and so on), but adds an important third point: in the case of participation in the board, the so-called structure law (which gives works councils the right to nominate members of the supervisory board, see under 1: national system) does not apply.

### 3.2 Involvement of employees on the basis of an agreement

Chapter 2 covers the involvement of employees on the basis of an agreement. Article 2.2 covers the establishment and the purpose of the SNB and contains provisions on the information that has to be given by the participating companies. Article 2.3 transposes 3.2 of the Directive on the composition of the SNB. In principle, every participating company with employees in the Netherlands should be represented in the SNB, unless this would result in an increase in the total membership of the SNB.

The Dutch legislator has paid considerable attention to making the composition of employee bodies representative. This is true not only for the SNB, but also for the SE works council (see below). With regard to the SNB, article 2.3, for example, contains a complicated arrangement for situations in which the number of SNB members from a Member State changes without elections having been held.

Article 2.4 states that members of the SNB are appointed by the works councils in the (Dutch) participating companies. If there are umbrella works councils that solely represent participating companies, these umbrella works councils appoint the members of the SNB. In the complete absence of works councils, the SNB will be elected by the employees in the participating companies. Lists of candidates for these elections can be proposed by unions and/or one or more individual employees who are not members of a union that has submitted a list of candidates. If only one or some of the participating companies have no works council(s), while other companies have, the employees in the companies without works councils have the right to be consulted on the composition of the SNB. This consultation procedure has not been elaborated.

Articles 2.5 through 2.13 concern negotiations on an agreement. According to article 2.6, the participating companies have to supply the SNB with sufficient information. According to article 2.6(2), however, information that can damage the companies concerned may be excluded. Also, the companies have the right to swear the SNB to secrecy, preferably before the matter in question arises.

Article 2.7 makes clear that the SNB can either approve the agreement reached or decide to refrain from or end negotiations, in which case the Annex does not apply. Article 2.8 contains the rules on decision making in the SNB (for example, reinforced majority of votes required in case of ending the negotiations without an agreement having been reached, or in case of a reduction in participation rights). In a situation in which the SNB has decided to refrain from or end the negotiations, at the request of at least 10% of the employees of the SE and its subsidiaries, the SE is obliged to restart the negotiation process. However, when no agreement can be reached, the Annex does not apply.

The SNB has the right to seek assistance from experts. There is no restriction as to the funding of (the number of) experts, on condition that the participating companies have been informed on this issue (article 2.10).

Article 2.11 contains the rules on the duration of the negotiations (cf. article 5 of the Directive): six months with the possibility of extension by another six months.

Article 2.12 pertains to the content of the agreement (cf. article 4 of the Directive). Overall, the list given in article 4 of the Directive has been transposed. There are some differences, however:

- the agreement should mention the location of the meetings of the representative body (and not only the frequency);
- the agreement should mention the term (duration) of membership of the representative body;
- the agreement should contain the procedure for adapting the agreement to changes in the structure and size of the SE and in the numbers of employees in the Member States;
- the consequences of not reaching a new agreement;
- when, instead of a representative body, the participating companies decide to introduce one or more information and consultation procedures (cf. article 4.2.f), all the rules that apply to the contents of the agreement on the representative body also apply to these procedures.

Article 2.12 also literally transposes articles 4.3 and 4.4 of the Directive.

Article 2.5 states explicitly that the SE is responsible for compliance with the agreement.

Article 2.13 contains rules on renegotiation and is quite complicated. Where the agreement does not contain procedures for renegotiations (see above article 2.12), or these procedures do not result in the participation of employees who only became part of the SE after the agreement was concluded, the SE should start negotiations with the representative body (or, failing that, a newly created SNB), if a request for (re)negotiations is put forward by at least 100 'new' employees, representing at least 20% of the total number of employees of the SE and its subsidiaries.

If the agreement does not contain provisions on the consequences of not reaching a new agreement *and* there is no new agreement within one year of the renegotiation process (with the representative body or the newly created SNB) getting under way, the Annex applies, unless the representative body or the newly created SNB prefers continuation of the agreement already in existence.

### 3.3 The Annex

Chapter 3 transposes the Annex to the Directive. Articles 3.1 and 3.2 define the applicability of the Annex (for example, when the parties concerned agree or no agreement can be reached and the special rules for participation in the case of SEs created through merger apply; cf. article 7 of the Directive). Article 3.2 also transposes article 6.4 of the Directive, requiring an enhanced majority when the SNB decides to decrease the level of participation.

In cases where no decision has been taken on the issue of participation, the standard rule is that the Dutch form of participation (the right of works councils to nominate members of the supervisory board) applies. In other cases, that is, when there are stronger forms of participation in the participating companies, these forms apply. One should note here that in most cases the Dutch system will be considered the strongest form of participation because the nomination right applies to all members of the supervisory board. The Directive does not take into account that the right itself is rather weak.

Articles 3.3 through 3.6 transpose Part 1 of the Annex on the representative body. In principle, the members of the body are appointed by the works councils, for a period of four years. Article 2.4 (see above) applies.

As far as the composition of the body (covered by article 3.4) is concerned, article 2.3 applies (where one should read 'representative body' instead of 'SNB'). In cases where the body cannot be considered representative anymore, the representative body should change its composition within one year. As long as this change in composition has not yet been effected, the members from the respective countries are accorded voting rights as if the change in composition had already taken place.

Article 3.5 covers the functioning of the representative body. It should elect a chairman and one or more substitutes. It can elect a select committee, comprising at most three members (cf. Annex, Part 1, (c)). Every member of the representative body has one vote, unless the body decides otherwise. The body shall adopt rules of procedure. The board of the SE should be consulted on these rules prior to their adoption (there is no equivalent of this consultation in Part 1 of the Annex).

No later than four years after its establishment the representative body shall decide whether it wants to start renegotiations on an agreement (article 3.6). The relevant articles on this issue (2.8, 2.11, 2.12 and 2.13) apply (where again one should read 'representative body' instead of 'SNB').

If the body decides to approve (after renegotiation) an agreement which no longer states that Chapter 3 (Part 1 of the Annex) is applicable, or which reduces the participation rights of employees, this decision requires an enhanced majority of two thirds of its members, coming from at least two member states. If no agreement can be reached within the normal (or extended) negotiation period, the Annex will continue to apply.

Articles 3.7 through 3.11 transpose Part 2 of the Annex (information and consultation). Article 3.7(1) stresses that information should be given at a time, in a manner and with a content which allows the employees' representatives to judge the effects thoroughly and prepare consultation with the SE (cf. the definition of information in article 2(i) of the Directive). Article 3.7(2) states the same with regard to consultation (cf. the definition of information in article 2(j) of the Directive). Article 3.7(3) contains rules on reservation of information and confidentiality (cf. article 8 of the Directive). Article 3.7(4) defines the competence of the representative body (cf. the Annex, Part 2(a)). The definition is slightly broader than in the Annex to the Directive, in the sense that the competence is limited to questions which concern the SE itself, one or more of its subsidiaries or establishments or which exceed the powers of the decision-making organs in a single Member State. The Directive uses the word 'and': the SE itself *and* any of its subsidiaries or establishments.

Article 3.8 transposes the Annex, Part 2 (b) on the annual meeting and the contents of information and consultation in relation to that meeting. Article 3.9 does the same for the (extra) meetings in case of exceptional circumstances (Annex, Part 2 (c)). Article 3.9 stresses (more than the Annex) that the meetings should be held at such a time that information and consultation make sense.

Article 3.10 contains provisions on the functioning of the representative bodies. The body (or the select committee) has the right to hold separate meetings (cf. Annex, Part 2 (d)). Meetings are chaired alternately by the SE and the

representative body (cf. Annex, Part 2 (d)). The representative body shall inform the employees, taking account of obligations on confidentiality (cf. Annex, part 2 (d)).

Article 3.11 contains the provisions on assistance from experts and the costs of the representative body and the select committee. Costs that are necessary for the functioning of the body or select committee shall be borne by the SE. The funding of experts, however, is restricted to one expert for each subject on the agenda, unless the parties agree otherwise. Costs of judicial procedures shall also be borne by the SE, on condition that the SE is notified beforehand. Other costs and time off for training without loss of wages, and so on, are already covered by article 1.4 (see above); these provisions are not repeated in Chapter 3.

Articles 3.12 through 3.14 transpose Part 3 of the Annex on participation.

Article 3.12(1) makes clear that in the case of an SE established by transformation, all aspects of participation shall continue to apply (cf. Annex, Part 3 (a)). Article 3.12 (2) literally transposes Annex Part 3 (b) on other ways of establishing SEs: the employees or representative bodies have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE equal to the highest proportion applicable. If no participation existed before, there is no duty to establish provisions after the registration of the SE (article 3.12 (3); cf. Annex Part 3 (b), second paragraph).

The representative body shall decide on the allocation of seats within the administrative or supervisory body according to the proportion of the SE's employees in each Member State (article 3.13 (1)). Article 3.13 (2) contains a provision in case after allocation of the first seat to the employees in a Member State with the largest proportion of employees there is no representation of Dutch employees or employees in one or more other Member States, in which case the second seat will be allocated to the Dutch employees. Third and following seats will then be allocated to employees from other Member States which are not yet represented.

According to article 3.13 (3), rules on the right to appoint, and so on, persons to the administrative or supervisory board are covered by national law. With a view to the execution of these rights, employees shall be informed in due time (article 3.13 (4)). In the Netherlands these rights have been allocated to works councils (article 3.13 (5); cf. article 2.4).

Article 3.14 transposes the last paragraph of Part 3 of the Annex: members of the administrative or supervisory board appointed or nominated by the employees have the same rights as shareholder representatives, including the right to vote.

### **3.4 Miscellaneous provisions**

Chapter 4 of the Dutch law contains miscellaneous provisions.

Article 4.1 contains rules for the representation of Dutch employees in a non-Dutch SE. The Dutch members of the SNB or representative body, and so on, will be appointed in the same way as in the case of a Dutch SE, that is, by works councils (cf. article 2.4 (1)). The same principle applies in the case of participation in the board (article 4:1 (2)).

Article 4.2 changes the Dutch Civil Code, in the sense that the provisions on protection of employee representatives (including provisions on

protection from dismissal) are extended to members, candidate members and former members of the SNB, the representative body or an information and consultation procedure.

Article 4.3 changes the Dutch law on European works councils by introducing a right of appeal against unreasonable refusal to supply information or unreasonable enjoining of secrecy.