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Employee Involvement in the
European Company

SER

Sociaal-
Economische
Raad

abstract

Employee Involvement in the European Company

English summary of the advisory report *De rol van werknemers in de
Europese vennootschap*

September 2003

The Social and Economic Council in the Netherlands

The Social and Economic Council (Sociaal-Economische Raad, SER) advises government and parliament on the outlines of national and international social and economic policy and on matters of important legislation in the social and economic sphere. Employers, employees and independent experts are equally represented in the SER. Their recommendations voice the opinion of organised industry. In addition to its advisory function, the council is responsible for the execution of certain laws.

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Social and Economic Council
Bezuidenhoutseweg 60
PO Box 90405
2509 LK The Hague
The Netherlands
Tel: +31 (0)70 - 3 499 499
Fax: +31 (0)70 - 3 832 535
E-mail: ser.info@ser.nl
Internet: www.ser.nl
Telephone Sales Department: +31 (0)70 - 3 499 505

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Preface

EU regulations on the European Company are not clear and consistent on all points. It is therefore the task of the Dutch legislature to make sure that the legislation it draws up for the introduction of the European Company as a new legal form in Dutch law is clear and well thought through. The European Company is a new legal form that must be incorporated into Dutch law before 8 October 2004.

On 20 June 2003, the Social and Economic Council of the Netherlands (*Sociaal-Economische Raad, SER*) adopted an advisory report on *Employee Involvement in the European Company* (*'De rol van de werknemers in de Europese vennootschap'*). The present publication contains a summary of this report in English. This summary is also available in Dutch (03/08/n).

The advisory report, published as SER publication 03/08, is available on the SER's website (www.ser.nl), where you will also be able to find a concise English summary of the various points of view taken in the report. The summaries have been drawn up on the initiative of the SER's Secretariat and fall under the Secretariat's responsibility.

J.M. Prakke
head of Department of Information

October 2003

1 Introduction

The creation of the 'European Company' (SE)

The creation of a statute for a 'European Company' (also known as *Societas Europaea*, or SE) has been the subject of much debate for more than thirty years. Such a statute would provide a legal form, not bound to any particular Member State, for companies operating across borders within the European Union.

The EU Regulation on the European Company Statute provides rules governing company law aspects of this new legal form. It is supplemented by the EU Directive on Employee Involvement in the European Company. The Directive is inextricably linked to the Regulation, which stipulates that an SE can only be established if the Employee Involvement Directive is also applied.

The Regulation applies directly in the Member States, although certain aspects of the way in which it is to be implemented still need to be specified. The Directive is to be incorporated into the national legislation of each Member State. The European Council of Ministers adopted both the Regulation and the Directive on 8 October 2001, and both have to be fully effective by 8 October 2004.

Request for advice

In mid-November 2002, in a letter from the Minister of Social Affairs and Employment (SZW), the Dutch Government asked the Social and Economic Council of the Netherlands (*Sociaal Economische Raad*, SER, also referred to in this document as the Council), to advise it on appropriate ways to incorporate the Employee Involvement Directive into national legislation. The Government specifically asked for the Council's views on ten proposed policy guidelines.

The Government did not ask the Council for advice on implementing the Regulation, which concerns company law aspects of the SE. Towards the end of March 2003, the Ministry of Justice published on its website a provisional draft (accompanied by an explanatory memorandum) of a legislative proposal for implementing the Regulation, thereby giving everyone an opportunity to comment on these documents.

2 Background

Regulation on the European Company Statute

An SE may be established by merger or by the formation of a holding or subsidiary company. A Dutch NV (company limited by shares) with a subsidiary or establishment in another Member State may become an SE. However, in all cases, before an SE can be established, there must be some EU dimension, in the sense that at least two companies under the jurisdiction of different Member States must be involved.

With respect to the management structure of the SE, founders may choose between a monistic management structure (where there is only an administrative organ) and a dualistic management structure (where there is both a management organ and an independent supervisory organ). Although there is currently no EU-based tax regime for the SE, the European Commission has announced that it will tackle the tax problems linked to the SE in the near future.

Employee Involvement Directive

As its main point, the Directive stipulates that, when an SE is established, employee involvement must be one of the issues for negotiation between the founding companies and a 'special negotiating body' of employees. The Directive places great importance on these negotiations, and leaves the parties considerable freedom in reaching agreement. If the founders of the SE are unable to reach agreement with the special negotiating body within six months, they may only establish the SE if they apply the 'standard rules' (*referentievoorschriften*) – to be drawn up by the Member States – which must satisfy the provisions set out in the Annex to the Directive. The Annex contains provisions about the representative body of the SE (Part 1), communication of information to and consultation with employees (Part 2) and employee participation (Part 3).

The Directive defines 'employee involvement' as any mechanism (including the communication of information to employees, the consultation of employees and employee participation) which enables employee representatives to influence decisions to be taken within the SE. This covers a narrower range of meanings than the Dutch term *medezeggenschap*. Rather, it refers to what may be called 'company participation' (i.e., the influence employees can exert on the composition of the supervisory organ or the administrative organ of the SE by virtue of their right to elect or appoint some of the members, or their right to recommend or oppose the appointment of some or all of the candidates for membership).

3 General considerations of the Council

Scope of the Council's considerations

The Regulation and the Directive were formally adopted in October 2001; their content is fixed and is not considered further in this advisory report. However, the Regulation and the Directive do allow the Member States a certain amount of leeway in specifying their implementation in national legislation. The SER Committee responsible for preparing the Council's advice encountered a number of questions and issues arising from the Government's proposed guidelines for implementing the Directive and from the close relationship that exists between the Directive and the Regulation. In its report, the Council draws the attention of the Government and legislature to several of these points. On some of these the Council's opinion is unanimous, and on others it is divided.

Relationship between the Regulation, Directive and Annex to the Directive

The Council notes that the Regulation and the Directive are closely related in terms of content. The Regulation lays down the company law aspects of the SE, while the Directive and the Annex to the Directive provide rules about matters such as employee participation (as expressed in the influence employees are able to exert on the composition of the supervisory organ or the administrative organ of the SE, as specified in the Regulation, by virtue of their right to elect or appoint some of the members, or their right to recommend or oppose the appointment of some or all of the candidates for membership).

Legislative procedure

At the present time, a legislative proposal for the implementation of the Directive is being drafted by the Ministry of Social Affairs and Employment, and a legislative proposal for the implementation of the Regulation is being drafted by the Ministry of Justice. The Government wishes to submit both proposals to Parliament at the same time. The Council recommends that the preparation of the two proposals be properly coordinated prior to their introduction, so that they may adequately reflect the close relationship that exists between the Directive and the Regulation.

In addition, the Council points out that it is important, when making decisions, not only to keep in mind the structure and unifying purpose of the Directive and the Regulation, but also to aim for consistency between the SE legislation to be enacted on the one hand and the relevant Dutch laws on the other – including consistency in the use of the discretionary freedom permitted by the Regulation and the Directive. Finally, the Council points out that a decision by the legislature to avail itself of that freedom to draw up rules of implementation may have consequences for the negotiations on the management and employee participation structure of the SE, as provided for by the Directive.

Management structure and employee participation in the SE

The Member States must offer the founders of an SE the choice of a monistic management structure (where there is only an administrative organ) or a dualistic management structure (where there is both a management organ and an independent supervisory organ). Dutch company law allows for both options, although the dualistic management structure has been formalised to a much greater extent than the monistic management structure.

‘Normal’ Dutch NVs (companies limited by shares) and BVs (private companies with limited liability) are not obliged to set up a supervisory organ (the Supervisory Board). However, ‘large’ Dutch NVs and BVs, to which the structure regime applies, are obliged to set up such a Supervisory Board. By law, this compulsory supervisory organ in ‘structure regime companies’ has certain powers, such as the power to appoint and dismiss members of the Board of Management of the company and the power to veto major decisions of the Board. Through the Works Council, employees, together with the Board of Management and the shareholders, are able to influence the composition of this Supervisory Board. The Works Council may put forward candidate members or raise serious objections to an appointment proposed by the Supervisory Board.

The SE will become a separate legal form alongside the Dutch NV and BV. The provisions of the Regulation apply directly to SEs. However, where the Regulation is not sufficiently specific, the legal provisions enacted by the Dutch legislature for the implementation of the Regulation will apply, along with the legal provisions applicable to a ‘normal’ Dutch NV. This means that the provisions of the structure regime do not automatically apply to a ‘large’ SE.

Employees of the SE cannot claim employee participation in organs of the SE by invoking national law. Whether and in what sense employees of the SE are entitled to employee participation is, in the first instance, determined by the agreement entered into by the founders and the special negotiating body. If no agreement has been entered into, employees may be granted employee participation on the basis of the standard rules to be drawn up by Member States. These are intended to specify, amongst other things, the rules governing employee participation when the parties involved are unable to reach agreement. In the case of employee participation on the basis of standard rules, the point of departure for determining employee involvement in the SE is the national legislation governing employee participation rights in force before the SE is established. For the conversion of an existing NV into an SE, the Annex to the Directive stipulates that all the elements of employee participation that applied to the NV also apply to the SE. If, before the registration of the SE, no rules for employee participation applied to any of the participating companies, the SE will not be obliged to introduce provisions for employee participation. Where an SE is established by other means (i.e., by merger, by the formation of a holding company or by the formation of a subsidiary company), and more than one form of employee participation existed within the various participating

companies, the Directive leaves it to the special negotiating body to decide which form employee participation is to take – either the right to elect or appoint some of the members to the supervisory or administrative organ, or the right to recommend or oppose the appointment of some or all of the candidates for membership. The Annex to the Directive provides ‘arithmetic formulas’ to determine the number of supervisory or administrative organ members to whom a particular form of employee participation shall apply. If the special negotiating body fails to exercise its right to decide, a Member State may issue rules that, in the absence of such a decision, apply to an SE registered within its territory.

On the basis of these considerations, the Council makes the following recommendations.

The term ‘forms of employee participation’ receives different interpretations in the literature. The legislature, in consultation with the other Member States, should therefore try to define this fundamental term more clearly. In addition, the legislature should also indicate the procedures that will be used to determine how employees can exercise their employee participation rights if the special negotiating body fails to exercise its above-mentioned right to decide.

Furthermore, the Council notes that the Directive and the Annex do not appear to be consistent with respect to the ‘counting’ of employees of subsidiary companies of the (prospective) SE. The Council asks the Government to raise this matter in the EU Council of Ministers.

Finally, the Council draws the Government’s attention to Article 11 of the Directive, which instructs Member States to take measures to prevent the procedure of establishing an SE from being misused to deny or deprive employees of their employee involvement rights. Neither the Regulation, nor the Directive, nor Dutch law forbids the restructuring of the SE or of the group of which the SE is (or will be) a part, even if such a restructuring has consequences for employee rights. Restructuring is not by definition an ‘abuse’ if it restricts the rights of employees. Under certain circumstances, however, if such a restructuring takes place before the establishment of an SE (or within a short period after the establishment), this could nonetheless raise the question of whether the restructuring is in conformity with the principle defined in Article 11 of the Directive.

Management structure and employee participation in the dualistic SE

The Regulation assumes that the management organ of the dualistic SE will be appointed and dismissed by the supervisory organ. However, the Member States may determine (or allow for the possibility) that appointments and dismissals are the responsibility of the Shareholders’ Meeting. In the ‘provisional draft’, the power to appoint and dismiss members of the management organ is assigned to the supervisory organ, unless the articles of association stipulate that it shall be assigned to the Shareholders’ Meeting.

The Regulation leaves it to the SE's articles of association to stipulate the kinds of decisions for which the management organ requires the approval of the supervisory organ. The Member States may stipulate the categories of decisions the SE must minimally define in its articles of association as requiring such approval. The provisional draft, following the primary rule of the Regulation, contains no such provision for the approval of decisions.

If the founders of the SE and the special negotiating body enter into an agreement regarding employee participation (possibly including agreements about the duties and powers of the supervisory organ), the Council does not consider it necessary to make legal provisions for defining the duties and powers of the supervisory organ.

If no agreement is entered into (and the standard rules, to be drawn up by the Netherlands, consequently apply) **part of the Council**¹ is of the opinion that, in the case of SEs that meet certain size criteria, what is currently proposed in the provisional draft is inadequate. In the interests of efficient management and supervision, this part of the Council considers it important that, in the circumstances described here, the supervisory organ be given material powers. This would also take due account of the fact that employee participation in the dualistic SE finds its expression in the degree of influence employees can exert on the composition of the supervisory organ. In the view of this part of the Council, the above-mentioned material powers of the supervisory organ should include the power to appoint and dismiss the management organ and the power to veto major decisions made by that management organ.

Contrary to what is stipulated in the provisional draft, in the circumstances described here, the legislature should in any event follow the basic principle of the Regulation, which is that the supervisory organ appoints the members of the management organ, unless the SE is a dependent company or a joint-venture company. Furthermore, in such circumstances, the legislature should avail itself of the option offered by the Regulation, i.e., that Member States can determine which decisions taken by the management organ should, minimally, require the approval of the supervisory organ and should be included in the SE's articles of association.

By ensuring – for the circumstances described here – that the supervisory organ is granted these powers, the legislature reinforces the central role of the supervisory organ in the decision-making process in an SE with a dualistic structure.

This part of the Council considers this approach to be consistent both with the Regulation and with the Dutch structure regime. In developing the Dutch structure regime, the same considerations applied as in the present case: on the one hand, there

1 Comprised of the union representatives and the following Crown-appointed members: Asscher-Vonk, Bakker, Cramer, Van Ewijk, Goudswaard, Kolnaar, Leune, Linschoten, Wilke and Wijffels.

was a need to properly equip the management organ and supervisory organ; while on the other hand there was the knowledge that, in a dualistic structure, it is the supervisory organ that provides the means whereby employees can exercise their rights of employee participation, in consequence of which the supervisory organ should be given material powers.

Another part of the Council² notes that the Regulation clearly leaves open the possibility that the Shareholders' Meeting, rather than the supervisory organ, may appoint the members of the management organ. The Regulation makes it clear that, to be in accordance with the proper supervision required by Recital 14 of the Regulation, it is not necessary for the powers of appointing and dismissing members of the management organ to be granted to the supervisory organ. This part of the Council therefore endorses the opportunity offered by the provisional draft to stipulate in the SE's articles of association that the Shareholders' Meeting may have the power to appoint and dismiss the members of the management organ.

In addition, this part of the Council objects to the suggestion that Dutch legislation should specify which management decisions, minimally, an SE's articles of association should stipulate are subject to the approval of the supervisory organ. The Regulation leaves it up to the SE to specify in its articles of association whether the approval of the supervisory organ is required, and, if so, which actions of the management organ require such approval. In the view of this part of the Council, the provisional draft follows this standpoint in not containing any provision for the approval of decisions made by the management organ.

In the opinion of this part of the Council, in both cases discussed above, wherever the Regulation allows the Dutch legislature some discretionary freedom, the provisional draft rightly follows the general principle that the legislation should cohere as far as possible with the legal provisions applicable to a normal Dutch NV.

With respect to the two issues discussed above, this part of the Council wishes to make the following remarks. At various points in its Advisory Report, the Council notes that the Dutch structure regime does not apply to an SE. In view of this, as the explanatory memorandum to the provisional draft rightly points out, it would be inappropriate to make that regime, or elements derived from it, applicable to the SE. Such an approach is felt to be even less appropriate given that the current structure regime is based on the balancing of a number of different interests involved in the operation of a large NV or BV, and not just on the interests of employees in a properly functioning employee representative body. When drawing up the structure regime, in addition to safeguarding

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employee interests, the legislature also sought, as far as possible, to take account of the interests of groups such as providers of capital.

In addition, this part of the Council notes that, in the interest of ensuring that the Netherlands is an attractive place in which to establish an SE, it is highly undesirable that certain elements derived from the structure regime should apply to SEs established in the Netherlands. Finally, this part of the Council points out that even the minimum in legislation on this point could influence the negotiations provided for in the Directive. In the light of the principle of the Directive stipulating that employee participation must be given form through negotiation, it considers such influence undesirable.

Group exemptions

The structure regime applies to 'large' NVs and BVs under Dutch law that meet the criteria set by that law. An NV or BV that is not legally obliged to apply the structure regime may implement it voluntarily. If it chooses to do so, it may then opt for a full or partial regime, which, in the latter case, means it can give the Shareholders' Meeting the power to appoint and dismiss members of the Board of Management and adopt the annual accounts. The structure regime stipulates that subsidiary companies of a structure regime company are not obliged to apply the structure regime themselves: employees of the subsidiary companies may exercise their rights to recommend or object at the level of the parent company. The Annex to the Directive contains a similar set of regulations for the implementation of employee participation in the SE.

The provisional draft does not provide for group exemptions for subsidiary companies of an SE applying the structure regime. However, the explanatory memorandum raises the question of whether such an exemption scheme should be applied, and if so under which conditions.

Part of the Council³ considers it problematic that a Dutch exemption scheme would only apply to Dutch structure regime companies that are subsidiaries of an SE, and not to foreign subsidiaries with a comparable system of employee participation. Employees of those foreign subsidiaries would retain their participation rights in subsidiaries of the SE in the country in question. By contrast, Dutch employees would have to relinquish their participation rights in the Dutch subsidiary structure regime company in exchange for participation rights in the SE, which they would be obliged to share with employees of foreign companies whose interests would not always coincide with those of the Dutch subsidiaries and their employees. This part of the Council is of the opinion, therefore, that full exemption would lead to inequity, a situation which would only be exacerbated if the exemption scheme were to apply not only in the event of an SE accepting the Dutch structure regime, but also in the event of it accepting a foreign (or its 'own') regime with

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an equal level of participation. In the opinion of this part of the Council, full exemption for Dutch subsidiaries of an SE applying the structure regime (or a regime which may be considered equivalent in terms of its employee participation) would therefore only be acceptable in the context of an EU-wide regulation. However, this part of the Council would find acceptable a scheme whereby Dutch subsidiaries would be partially exempt from the structure regime in the context of a group-wide policy pursued by the SE. Such a scheme would need to be defined in legislation in more detail.

Another part of the Council⁴ is in favour of a system of full exemption for the subsidiaries of an SE. Such a system could give an important stimulus to the negotiations between the special negotiating body and the SE, in so far as the parties to those negotiations seek agreement on the type of participation regulation expressed in the structure regime. In addition, it is desirable for the SE to pursue a group-wide policy and for the Netherlands to be seen as an attractive place in which to set up business. An exemption scheme should therefore take account of the fact that the Dutch structure regime does not automatically apply to the SE and that, if the SE does apply the structure regime, it is on the basis of completely voluntary agreements between the founders and the special negotiating body.

Where an SE does apply the structure regime, no stricter requirements should be imposed on the SE than are imposed on a Dutch NV and BV that voluntarily applies the structure regime. Under the terms of the exemption scheme in the structure regime, it is sufficient for such NVs and BVs to apply the regime in weakened form in order to ensure that their subsidiaries are exempt. There would appear to be no reason to place heavier obligations on the SE.

Moreover, the legislature should consider whether there are any obstacles to granting exemptions not only to an SE applying the structure regime, but also to an SE operating a foreign or some 'own' system of participation which allows at least the same level of representation as that provided for in the structure regime.

Management structure and representation in the monistic SE

In the literature, the question has been raised as to whether the rather summary way in which the Regulation is dealt with in the provisional draft and the concise regulation regarding the monistic management structure in Dutch law will be capable of ensuring a sound management structure for monistic SEs.

The Council therefore believes that greater consideration should be given to the question of whether, in order to develop a good management structure for the monistic SE, some parts of the current Dutch legislation for NVs need to be fleshed out in more detail.

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The Council notes that the explanatory memorandum accompanying the provisional draft for the implementation of the Regulation observes that in Dutch law there are two forms of participation in the sense of the Directive. With respect to participation in the composition of the Supervisory Board of an NV or BV, the memorandum refers to the structure regime. With respect to participation in determining the composition of the Board of Management of an NV or BV, the memorandum asserts that it is a question of ‘the right of the Works Council to advise regarding proposed resolutions concerning the appointment or dismissal of a director (Article 30 of the Works Councils Act)’.

The Council is of the opinion that the interpretation given by the memorandum of Article 30 of the Works Councils Act is incorrect. The right of the Works Council to offer advice in the event of the appointment or dismissal of a ‘director’ of the company in the sense of the Works Councils Act does not imply that the Works Council has any rights of participation with respect to the composition of the administrative organ of the company. That means that, contrary to the view expressed in the memorandum, this right of advice on the part of the Works Council does not have the same meaning as ‘participation’ in the sense of the Directive.

The Council notes moreover that, in the event that the founders of the SE and the special negotiating body enter into an agreement concerning the participation of employees (possibly including agreements about the duties and powers of the administrative organ), no legal provision relating to express decision-making with regard to certain management actions is required.

In the event that no such agreement is entered into (and that *standard rules* to be drawn up by the Netherlands therefore apply), **part of the Council**⁵ is of the opinion that, for SEs that meet certain size criteria, the provisional draft as currently formulated is inadequate. In the interests of an efficient and sound management structure for the monistic SE, and given that in the monistic system the management function and the supervisory function are united in a single administrative organ, this part of the Council believes that the law should provide safeguards to ensure that the administrative organ takes decisions on important matters collectively. These legal safeguards would also take account of the fact that participation in the monistic SE finds its expression in the degree of influence employees can exert on the composition of the administrative organ.

The Regulation determines that the articles of association of the monistic SE must stipulate the categories of activities with respect to which the administrative organ itself is required to take an ‘express decision’. The thrust of that provision is that decision-making relating to those matters cannot be delegated to one or more individual members of the administrative organ (or to a third party). The Regulation offers Member

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States the opportunity to determine which categories of activities the articles of association of the monistic SE must submit to the administrative organ for ‘express decision-making’. The provisional draft contains no such provision. This part of the Council is also of the opinion that the Dutch legislature should avail itself of the option offered by the Regulation for such a situation, and should specify in legislation a number of types of management decisions for which the administrative organ of a monistic SE is required to act collectively.

Another part of the Council⁶ endorses the opinion that the management structure should meet the requirements laid down in Recital 14 of the Regulation (namely, efficient management and sound supervision), but believes that these requirements are defined in sufficient detail in the Regulation itself (specifically, in section 3, on the structure of the SE). In Article 48, the Regulation states that the articles of association of the monistic SE must list the categories of activities on which the administrative organ must take an express decision. The Regulation therefore leaves it to the SE to determine in its articles of association whether or not certain activities require express decision-making and, if so, what those activities are. In this matter, in line with its general principle, the provisional draft follows the primary rule, which entails that wherever the Regulation leaves the Dutch legislature discretionary freedom to do so, it strives for as much coherence as possible with the legislation that applies to ordinary NVs, which contains no regulations concerning express decision-making for certain management activities. In addition, this part of the Council points out that even the minimum in legislation on this point could influence the negotiations provided for in the Directive. In the light of the principle of the Directive stipulating that employee participation must be given form through negotiation, it considers such influence undesirable.

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4 The request for advice and the Council's view

General

In the interests of consistency of policy and legislation, the Government, in its request for advice on the implementation of the Directive on the involvement of employees in the SE, states that it wishes legislation to be in line with the European Works Councils Act. This Act and the Directive on European Works Councils on which it is based both take the same approach as the Directive on the involvement of employees in the SE that is, a 'contract model' with a 'safety net' on the basis of the law.

The Council's view of the Government's proposals for the special negotiating body

The Government proposes that the manner of electing or appointing members of the special negotiating body should be in line with the corresponding regulation for the special negotiating body contained in the European Works Councils Act. The Council sees no objection to this. For companies and establishments registered in the Netherlands, this means that members of the special negotiating body are appointed by the Works Councils established in those companies or establishments. However, if a Central or Group Works Council has been established, this Central or Group Works Council shall exercise this power of appointment, with the proviso that employees whose Works Council is not represented in the Central or Group Works Council may exercise their right to appoint members of the special negotiating body through their own Works Council. If no Works Council has been established, members of the special negotiating body will be elected or appointed jointly by all employees working in the Netherlands. In the matter of the election and appointment of members of the special negotiating body by the relevant Works Councils and employees, the Council is also in agreement with the Government's proposal to follow the regulation in the European Works Councils Act which allows for the possibility that union representatives (regardless of whether these unions have any members amongst the employees) or other third parties may be members of the special negotiating body.

The Council also concurs with the Government's proposal that the reimbursement of fees for experts consulted by the special negotiating body should be in line with the regulation in the European Works Councils Act. That means that those costs which are considered to be reasonable and essential for the special negotiating body to be able to fulfil its duties will be borne by the SE. However, the fees of such experts will only be reimbursed if the management of the SE has been informed in advance of the costs to be incurred.

The Council's view of the Government's proposals concerning the representative body of the SE

The Council endorses the Government's proposal to follow the corresponding regulation relating to the European Works Council contained in the European Works Councils Act in specifying the manner in which members of the representative body of the SE are

elected or appointed. Only employees of the SE and the group as a whole may be appointed or elected as members of the representative body of the SE. With respect to financing the costs of experts consulted by the representative body, the Council proposes a more generous regulation than the Government, which proposes to follow the principle of 'one expert per agenda item', as per the related provision in the European Works Councils Act. The Council considers that this principle is not subtle enough. Instead, it suggests that the requirement that costs should be both 'reasonable and essential', together with the requirement that the management or administrative organ of the SE should be informed of such costs in advance, would be sufficiently clear in practice.

The Council concurs with the Government's proposal for the chair of informative and consultative meetings to alternate between the management or administrative organ and the representative body of the SE, unless the parties themselves agree otherwise.

View of the Council on the Government's proposals concerning the application of the Annex to the Directive

The Government considers that the provisions concerning 'participation' in the sense of the Directive (Annex, Part 3) should also apply in the event of a merger. The Council concurs with this, particularly on the grounds of the relationship between the Directive and the Regulation.

Furthermore, the Council notes that the Government does not intend to issue any regulations concerning the distribution of seats in the supervisory or administrative organ of an SE that are allocated to the Netherlands. The Government wishes to leave it to the Works Councils and the employees of the Dutch 'section' of the SE to jointly provide for a delegation of the Dutch employees in the administrative or supervisory organ.

The Council observes that in practice in such cases a wide variety of procedures may be followed. It suggests that, in order to regulate the exercise of the powers of appointment, recommendation and objection in respect of the composition of the administrative or supervisory organ of an SE, a regulation is required which is similar to that contained in the European Works Councils Act (and recommended earlier in this report) relating to the exercise of the powers of appointment of members of the special negotiating body and the representative body of the SE.

The Council's view of the remaining proposals in the Government's request for advice

The Government does not intend to make any refusal by the managing organ of an SE to divulge information (specifically information which would, if made public, seriously hinder or damage the functioning of the SE or its subsidiaries and establishments) subject to the prior approval of an administrative or judicial body. However, the Government does not rule out the possibility that such a refusal may later be referred to

a court. The Council concurs with this viewpoint of the Government, and also agrees that repressive measures are preferable to preventative measures in this matter.

Finally, the Council also concurs with the Government's proposal to draw up a regulation to guarantee the representative nature of the special negotiating body and of the representative body of the SE, in line with the relevant regulation in the European Works Councils Act.



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