Appendix B

Agreements between the Works Council and the entrepreneur about consultation between the Works Council and its electorate

1 Introduction

A well-functioning Works Council is important for the enterprise as a whole. A key aspect of the functioning of a Works Council is the form and content of its relationship with the persons it represents. Without proper communication with those employees, a Works Council cannot properly represent them. A Works Council will only be able to generate support for its decisions if it maintains good contact with the persons it represents. This contributes to the quality of the decision-making process in the enterprise.

The foundation for a close relationship between the Works Council and the employees it represents is laid at the elections. It is important that these result in a representative Works Council, i.e., a Works Council to which the various groups of persons represented (different levels of positions, men and women, age groups, etc.) can relate and which they feel truly represents them. WOR Article 9 (4) stipulates that, if necessary, the Works Council must include provisions in its Rules of Procedure to ensure that the various groups of employees are represented in the Works Council as fully as possible.

The Works Council is a representative body elected by the employees and therefore may not act independently of the wishes and interests of its electorate. The Works Council is expected to represent the interests of the employees, for the purposes of promoting the proper functioning of the enterprise with regard to all its objectives. Nevertheless, Works Council members bear individual responsibility for their actions and determine their standpoint independently after considering all the interests involved.

The WOR contains a number of provisions that regulate in varying degrees the Works Council's consultations with its electorate. Some of these provisions apply primarily to the Works Council, while others apply primarily to the entrepreneur.

The provisions that apply primarily to the Works Council (Articles 14 and 15) are designed to ensure that employees are kept well informed about and involved in the activities of the Works Council. For instance, the Works Council must specify in its Rules of Procedure the way in which the Works Council's meeting agendas and minutes and its annual report are to be made known to the persons working in the enterprise (WOR Article 14). One way for the Works Council to involve employees in its activities is to set up a standing committee, a divisional committee or a (temporary) preparatory committee. Within certain limits, employees who are not members of the Works Council may also sit on these committees (WOR Article 15).

The provisions that apply primarily to the entrepreneur (Articles 17 and 18) are designed to enable the Works Council and its committees to perform their duties. For instance, the entrepreneur must allow the Works Council and its committees to use any facilities that are at the entrepreneur's disposal and which they may reasonably be deemed to require in order to perform their duties (WOR Article 17 (1)). The Works Council and its committees may also make use of these facilities for the purpose of consulting their electorate. Furthermore, the entrepreneur must offer the members of the Works Council and its committees an opportunity for mutual consultation and consultation with 'other persons' on matters relating to the performance of their duties and for the purpose of acquainting themselves with working conditions in the enterprise. These consultations must take place during a specific number of hours per year (at least 60), to be determined jointly by the entrepreneur and the Works Council, during working hours and with full pay (WOR Article 18, see also Appendix C). WOR Article 18 (1) also contains a provision allowing Works Council members to 'consult with other persons' (i.e., their electorate). However, this provision applies only to members of the Works Council and its committees, not to the persons consulted (the electorate).

2 General provision regarding consultation of the electorate

A more general provision regarding the consultation by the Works Council (and its committees) of its electorate (i.e., the persons working in the enterprise) is given in WOR Article 17 (1), second sentence: '*The entrepreneur shall enable the Works Council and its committees to consult all persons working in the enterprise and shall enable the said persons to participate in such consultation, insofar as may reasonably be deemed to be necessary for the members of the Works Council and its committees to perform their duties*.'

This provision specifies only the basic arrangement: the details need to be filled in at company level in consultation between the entrepreneur and the Works Council. This consultation (and the resulting facilitation of the Works Council's consultation of its electorate) may stimulate the Works Council to arrive at an efficient and effective way of consulting with its electorate – to the benefit of both the Works Council and its electorate and the entrepreneur.

In further defining the general provision at the level of the enterprise, the entrepreneur and the Works Council and its committees need to bear the following factors in mind. The basic obligation that the law imposes on the entrepreneur is to facilitate the consultation of the electorate insofar as it '*may reasonably be deemed to be necessary for the members of the Works Council and its committees to perform their duties*'. This criterion of reasonableness applies in two directions: i.e., the entrepreneur is only obliged, on the one hand, to enable the Works Council and its committees to consult their electorate, and, on the other hand, to enable the 'persons working in the enterprise' to be consulted by the Works Council and its committees only insofar as this 'may reasonably be deemed to be necessary'.

This customised approach requires the entrepreneur to weigh, on the one hand, the potential organisational problems and loss of work time that will be caused by consultations between the Works Council and its electorate, against, on the other hand, the interests of the Works Council and, indeed, of the entrepreneur in being well informed about the opinions of the workforce.

The reasonableness criterion requires of the Works Council and its committees that they determine the manner and frequency of their consultations wisely, taking into account the circumstances prevailing in the enterprise. The Works Council is naturally expected to try to arrange its consultations in a responsible way, in the context of the operational management of the enterprise.

The entrepreneur and the Works Council need to consider together whether, in a given situation, employees or groups of employees need to be consulted orally during working hours, or whether some other, less intense form of consultation (e.g., in writing) or consultation outside working hours would be 'reasonable'. In the case of decisions (or proposed decisions) that are likely to have a great impact on the enterprise or some part of it, with significant consequences for a large part or all of the workforce, it may be necessary for employees or groups of employees to be given an opportunity to be consulted orally during working hours. Such meetings should probably only be held rarely and in exceptional circumstances. In the case of less far-reaching decisions on which the Works Council wishes to consult with the employees, such forms of consultation, which impose a burden on the entrepreneur, will normally be unnecessary. The reasonableness criterion would then imply that it should be sufficient for the Works Council to conduct a written survey or hold a meeting either outside working hours, or partly in working hours and partly during a break (e.g., a lunch meeting). The reasonableness criterion requires parties to find a reasonable balance between the importance of consulting the electorate and the means of consultation chosen (i.e., there should be proportionality). The entrepreneur and the Works Council need to reach a reasonable agreement on such matters in mutual consultation.

3 Matters to consider when making agreements

The WOR deliberately abstained from making detailed provisions regarding the consultation by the Works Council of its electorate. The Works Council's relationship with those it represents depends strongly on the situation within the enterprise and issues that are current at any given time. The amount of time required, the facilities needed and the associated costs are not quantified, and no minimum or maximum is stated.

Differences exist between enterprises and their circumstances, pertaining, for example, to the size and structure of the enterprise. Is the enterprise situated in one location, or in several different locations? Is everything going smoothly or do many things change within a short period of time? Are there many different groups, positions and activities within the enterprise, or not? Is the company culture such that employees are notified and consulted about changes through the line organisation or is the Works Council the messenger of change? Is time available for consultations, or not? How much attention is given to communication within the company and are there resources such as a company newsletter, staff magazine, e-mail, or suchlike? Consultation between the Works Council and its electorate must therefore be tailored to these differences and circumstances. This is why the Works Council and the entrepreneur must obviously make agreements about the time and facilities required. Such agreements may take the form of a 'works agreement', i.e., a written agreement between the entrepreneur and the Works Council as meant in WOR Article 32 (2) (*ondernemingsovereenkomst, see Appendix A*).

The basic arrangement of WOR Article 17 (1) may be implemented in the form of a general provision for consultation between the Works Council and its electorate as part of the facilities arrangement. In addition, specific supplementary agreements may be made for each case. In making an arrangement or agreement, the following aspects need to be discussed: *When? About what? Which group or groups are involved? Which facilities are needed? What are the costs?* Each of these aspects is briefly explained in more detail below.

When? About what?

The questions of *when* and *about what* are closely connected. The WOR provides that, at least twice a year, in order to discuss (amongst other things) the general operation of the enterprise, the Works Council is informed either orally or in writing about the activities and the results of the enterprise in the previous period (WOR Article 31a, (1)). The entrepreneur should also inform the Works Council about his expectations regarding the activities of the enterprise and its results in the coming period. During these discussions, the entrepreneur should also inform the Works Council of any decisions he is preparing that relate to the matters referred to in WOR Article 25 (advice) and WOR Article 27 (endorsement) and should make arrangements with the Works Council as to when and how the Works Council should be involved in the decision-making process (see WOR Article 24). In the light of such matters, the Works Council may then wish to consult with its electorate.

In addition, the Works Council and/or the employees may periodically wish to discuss the functioning of the Works Council itself, possibly on the basis of the annual report and/or a Works Council work plan or policy plan. It is recommended that this be linked to the consultation about the general operation of the enterprise.

Furthermore, the Works Council will want to consult with its electorate if there are any proposed decisions that have major consequences for the enterprise and for all or some of the employees. These may be matters such as those listed in WOR Article 25, such as a reorganisation, merger or change of location of all or part of the enterprise. New arrangements regarding working hours, appointments or remuneration schemes (WOR Article 27) may also have a major effect.

If the enterprise is a publicly held company, the Works Council may wish to consult employees in connection with the Council's right to speak at the general shareholders' meeting. In exercising its right to raise the matter of the company's remuneration policy for board members, or the appointment or dismissal of members of the Board of Management or Supervisory Board the Works Council may wish to consult its electorate.

In certain cases, in view of the interests at stake, the Works Council members may need to treat certain information in confidence. This confidentiality (see WOR Article 20) may complicate the consultation between the Works Council and its electorate. As a result, in such cases, the entrepreneur and the Works Council should carefully check what information is confidential and how long it is under embargo. Great care should be taken to ensure that the Works Council is not effectively prevented from consulting its electorate prior to reaching its final decision. Exceptionally, however, it may be necessary to observe confidentiality until the decision-making process has been completed.

Which group or groups are involved?

What are the group or groups of people the Works Council wishes to consult? If the issue in question applies to the whole enterprise, this will of course be all of the staff. For specific matters, one or more groups will usually be the interested parties and will want to be involved.

The Works Council is expected to organise consultations with its electorate in such a way that the group or groups concerned are heard in particular or exclusively, without losing sight of the interests of all staff. A proposal to reorganise the enterprise or to set up a savings scheme usually concerns the enterprise as a whole. In the case of a proposal to change the production process in a particular department, for example, or to review the working hours arrangement of the employees of a particular department, the matter clearly does not affect the whole enterprise, and consultation may therefore be limited to the employees concerned.

What facilities are needed?

This question is closely linked to the specific circumstances in the enterprise in question. The facilities or resources needed partly depend on the issue in question and on the objectives to be achieved. The objectives may include communicating relevant information, collecting questions and points of interest, hearing opinions and standpoints of those involved, and testing opinions about the Works Council's standpoint (definitive or provisional).

- When *communicating relevant information*, which is one of the Works Council's key objectives, the Works Council should maintain regular contact with its electorate by distributing agendas and lists of meeting decisions/minutes and any other form of communication customary in the enterprise, such as newsletters. In consulting with its electorate about proposed changes, the Works Council requires facilities for the dissemination of information (insofar as that information has not already been communicated through the line organisation and the 'usual' means of communication). If merger reports or proposals for reorganisation have already been widely dispersed, the Works Council will not need to do this. If it is purely a matter of communicating information, a written document or e-mail may be sufficient.
- *Collecting questions and points of interest* may sometimes take place by written communication (including e-mail), for instance, in the form of a questionnaire. Works Council members may also visit employees in their place of work, or hold consultation hours. Alternatively, a meeting may be organised. The Works Council may appoint members from among its number to maintain contact with certain groups of staff (this is self-evident when Works Council members are elected from certain groups of employees in the context of a group electoral system).
- *For hearing the opinions and standpoints of those involved*, in principle, the same means of communication are suitable. However, it will often be necessary to convene a meeting, as a meeting is an appropriate way of informing people, exchanging opinions and reaching a consensus.
- *Testing opinions about the standpoint (definitive or provisional) of the Works Council* can be done in several different ways. A questionnaire, for instance, may be particularly suitable if discussion has reduced the Works Council's possible standpoints to two or three.

What costs are involved?

The costs of consultation between the Works Council and its electorate comprise not only the costs incurred by Works Council members themselves, but also the work time of the groups of employees being consulted. To minimise these costs, the Works Council is expected to use the facilities provided by the enterprise for the purposes of this consultation process, to ensure that the manner in which the process is organised is reasonable and necessary, and to discuss such matters with the entrepreneur, in accordance with WOR Article 17 (1).