

## SER Resolution concerning the Merger Code 2000

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RESOLUTION OF THE SOCIAL AND ECONOMIC COUNCIL OF THE NETHERLANDS (SOCIAAL-ECONOMISCHE RAAD, SER) OF 17 MARCH 2000 TO ADOPT ITS RESOLUTION CONCERNING THE MERGER CODE 2000 FOR THE PROTECTION OF THE INTERESTS OF EMPLOYEES

THE SOCIAL AND ECONOMIC COUNCIL OF THE NETHERLANDS HEREBY RESOLVES,

In view of Article 2 of the Industrial Organisation Act (*Wet op de bedrijfsorganisatie*) and

Whereas:

On 15 May 1970 the SER, acting in its capacity as an organ of the trade and industry sector, adopted a resolution providing for a Code of Conduct to be observed when mergers of enterprises are being prepared and implemented;

On 25 June 1971 the SER revoked this resolution and replaced it with a new resolution providing for a Code of Conduct to be observed when a public offer is being prepared or made and when mergers or take-overs of enterprises are being prepared and implemented;

On 21 November 1975 the SER revoked this resolution and replaced it with a new resolution, to wit the Merger Code 1975<sup>1</sup>, providing for a code of conduct to be observed when a public offer is being prepared or made and when mergers of enterprises are being prepared or implemented;

In its advisory report entitled *Revision of the Merger Code* of 16 February 1996, the SER expressed the view that the Merger Code 1975 was in need of revision in a number of respects, including the following:

- the rules for the protection of shareholders' interests should be incorporated in a regulation by or pursuant to law, and the supervision of compliance with that regulation should be assigned to an independent supervisory body;
- the rules for the protection of employees' interests should be improved and provided with a legal basis, particularly given the SER's recommendation that the scope of the code of conduct be extended to the non-profit sector, independent professionals and the public sector, and that the official supervision of compliance with these rules by the Merger Commission be replaced by a complaints procedure to be dealt with by a special committee to be set up by the SER, the Merger Code Adjudication Committee;

The government, to assist its decision-making with respect to the legal basis for a code of conduct to protect employees' interests as recommended by the SER,

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<sup>1</sup> Last amended by resolution of the Council on 21 December 1990, the amendments coming into force on 15 January 1991.

has asked the SER to undertake a revision of the Merger Code, based on the assumption that the code will not apply to the public sector;

The SER has asked its Merger Code Revision Committee to prepare the said revision;

Those employers' organisations and employees' associations that have been designated to appoint members of the SER have expressed their willingness to assist in promoting compliance with the Code in its revised form;

**TO DRAW UP AND PROMULGATE THE FOLLOWING CODE OF CONDUCT FOR THE PROTECTION OF EMPLOYEES' INTERESTS, TO BE OBSERVED IN THE PREPARATION AND IMPLEMENTATION OF MERGERS:**

### **Section 1 Definitions**

#### **Article 1**

1. For the purposes of this resolution, the words below shall be defined as follows:
  - (a) Enterprise  
Any organisation operating in society as an independent entity, where people work by virtue of employment agreements or by appointment under public law.
  - (b) Entrepreneur  
The natural or legal person by whom an enterprise is maintained.
  - (c) Group of enterprises  
Two or more enterprises that are maintained by:
    - i. one single entrepreneur
    - ii. two or more entrepreneurs associated in a group in the sense of Article 2:24b of the Dutch Civil Code (*Burgerlijk Wetboek*, BW)
    - iii. two or more entrepreneurs on the basis of a joint venture.
  - (d) Merger  
The direct or indirect acquisition or transfer of the control over an enterprise or part of an enterprise, as well as the formation of a group of enterprises.
  - (e) Employees' association (trade union)  
Any association with full legal competence whose aim, as defined in its articles of association, is to protect the interests of its members as employees, and:
    - i. from whose list of candidates at the last election for the works council of an enterprise registered in the Netherlands and involved in the merger at least one member was elected, or
    - ii. which plays a part in the regulation of pay and other terms of employment applicable to an enterprise registered in the Netherlands and involved in the merger, or
    - iii. which, for a period of two calendar years immediately prior to the proposed merger, has demonstrably been engaged in such activities on a regular basis for the benefit of members who are employees of an enterprise registered in the Netherlands involved in that merger.
2. If the code of conduct set forth in Section 3 is applicable to an enterprise pursuant to the provisions of Article 2, paragraph 2, then, notwithstanding the definition of

‘employees’ association’ in paragraph 1(e) above, an employees’ association shall be defined as:

Any association with full legal competence whose aim, as defined in its articles of association, is to protect the interests of its members as employees and which is a party to the collective bargaining agreement mentioned in Article 2, paragraph 2.

## **Section 2 Scope**

### **Article 2**

1. The code of conduct set forth in Section 3 shall apply if:
  - a. the merger involves at least one enterprise that is registered in the Netherlands and normally has at least 50 employees;
  - b. one of the enterprises involved in the merger is a member of a group of enterprises and the total number of persons together employed by those members of the said group that are registered in the Netherlands is at least fifty.
2. The code of conduct set forth in Section 3 may also apply to enterprises other than those defined in paragraph 1 if so stipulated in a collective bargaining agreement.
3. The code of conduct set forth in Section 3 shall not apply if:
  - a. all enterprises involved in the merger form part of the same group of enterprises;
  - b. the merger is a consequence of the operation of the law of persons, family law, insolvency law or the law of succession;
  - c. the merger leads to the transfer of control in an enterprise or enterprises which normally have a joint total of fewer than 10 employees;
  - d. the merger does not fall within the jurisdiction of Dutch law.

## **Section 3 The Merger Code**

### **Article 3**

1. The employees’ associations shall be informed about the contents of any public announcement concerning the preparation or implementation of a merger before such announcement is made.
2. If prior notification of employees’ associations as mentioned in paragraph 1 is in conflict with any general regulation governing securities transactions, the employees’ associations shall, notwithstanding the provisions of paragraph 1, nevertheless be notified of the contents of any public announcement no later than the time of such public announcement.
3. The obligations referred to in the previous paragraphs of the present article shall apply to the parties upon whom obligations are imposed in Articles 4, 5 and 6.

### **Article 4**

1. Before agreeing to a merger, parties shall inform the employees’ associations that a merger is in preparation, observing the provisions of the following paragraphs of the present article.
2. Parties shall explain to the employees’ associations why a merger should be considered, what policy the enterprise would pursue with respect to the merger, what social, economic and legal consequences the merger might be expected to

have, and what measures the enterprise intends to take in connection with those consequences. This explanation shall be supplied in writing, unless agreed otherwise with the employees' associations.

3. Parties shall give the employees' associations an opportunity to express their views on the merger in so far as it may affect employees' interests.
4. Parties shall give the employees' associations an opportunity to discuss in a meeting with parties the following issues:
  - a. the basic principles underlying the policy to be pursued by the enterprise in relation to the merger, including social, economic and legal aspects;
  - b. the basic principles underlying the measures to be taken to prevent, eliminate or minimise any adverse consequences of the merger for employees, including the provision of financial compensation;
  - c. when and how the employees will be informed;
  - d. how the proceedings of any meeting held pursuant to this article are to be reported, with the proviso that any minutes taken or reports made of the proceedings will be distributed to all those present at the meeting.
5. Upon request, parties shall provide the employees' associations with further information about the topics mentioned in paragraphs 2 and 4, in so far as the employees' associations may reasonably be deemed to need such information in order to be able to form an opinion on the said topics, and in so far as requiring provision of such information may be considered reasonable.
6. Parties shall implement the provisions of the preceding paragraphs in such a way that views of the employees' associations may substantially affect whether the merger is implemented or not and, if it is, also the manner in which it is implemented.
7. Parties shall give the works councils of the enterprises whose merger is being contemplated an opportunity to consider the views of the employees' associations referred to in paragraph 6, so that the said works councils can take these views into account when tendering advice as mentioned in Article 25 of the Works Councils Act (*Wet op de ondernemingsraden, WOR*).
8. In the present article, parties shall be defined as the natural and/or legal persons who are party to the agreement by which the merger is actually effected. The obligations referred to in the preceding paragraphs towards the employees' associations shall apply to each of these parties.

#### **Article 5**

1. Anyone wishing to effect a merger by means of a public offer other than on the basis of an agreement as referred to in Article 4, paragraph 1, shall apply Article 4 *mutatis mutandis*.
2. Such offeror shall give written notification of his offer to the board of the enterprise for whose shares the offer is to be made at least fifteen days before the offer is made public.
3. The board referred to in paragraph 2 shall apply Article 4 *mutatis mutandis* before making any public announcement of its views concerning the offer or informing the enterprise's shareholders of those views.

#### **Article 6**

1. Anyone wishing to effect a merger by means of the gradual acquisition of shares or options on the stock exchange shall apply Article 4 *mutatis mutandis*.
2. The provisions of Article 5, paragraph 2, shall apply *mutatis mutandis*.

## **Section 4 Confidentiality**

### **Article 7**

1. Unless notified otherwise in writing, employees' associations shall treat the information that a merger is in preparation, given pursuant to Article 4, paragraph 1, as confidential.
2. If, prior to the provision of other information pursuant to Article 4, employees' associations are requested in writing to treat such information as confidential, then the employees' association shall be under an obligation to maintain confidentiality with respect to this information.
3. An employees' association shall be entitled to refuse a request as mentioned in paragraph 2 to treat information as confidential at any time during a period of three working days following the date of such a request being made. Any employees' association that refuses a request for confidentiality cannot thereafter require application of the provisions of Articles 4, 5 and 6 unless it subsequently and in good time gives a written undertaking to treat the said information as confidential. Any employees' association which does not expressly refuse a request for confidentiality within the term mentioned above shall be deemed to have accepted it.
4. The point at which the undertakings regarding confidentiality (as mentioned in paragraphs 1 and 2) expire in whole or in part shall be determined by mutual consent. If no agreement can be reached, either of the parties may request the SER Merger Code Adjudication Committee (as mentioned in Section 6) to decide.
5. Notwithstanding the provisions of paragraph 4, in the case of technical or economic information that is expressly supplied in confidence, the expiry of the undertaking to maintain confidentiality shall be at the sole discretion of the party supplying the information. The Adjudication Committee referred to in the previous paragraph may, upon request, annul in whole or in part the obligation to maintain confidentiality in the event that unreasonable use is made of this exception.

## **Section 5 Notifying the SER of a merger**

### **Article 8**

1. When the employees' associations are notified (as mentioned in Article 4, paragraph 1) that a merger is under consideration, or, if no employees' associations are involved, when they would otherwise have been so notified, the person responsible for issuing this notification shall at the same time send the same notification to the Secretariat of the Social and Economic Council, hereinafter referred to as the Council.
2. It is the responsibility of the Secretariat of the Council to ensure that the notification mentioned in Article 4, paragraph 1, is duly issued, and the said Secretariat may require parties to furnish any information it deems necessary for the execution of this task.

## **Section 6 The Merger Code Adjudication Committee**

### **Article 9**

1. A committee of the Council shall adjudicate in the event of disputes concerning observance of the Merger Code.
2. The committee shall be called the Merger Code Adjudication Committee.
3. The Committee shall hereinafter be referred to as ‘the Adjudication Committee’.

### **Article 10**

1. The Adjudication Committee shall consist of five members and five deputy members. Articles 5 and 9 of the Industrial Organisation Act shall apply *mutatis mutandis*. The deputies of the members mentioned in paragraph 2 shall not be personal deputies. The deputies of the members mentioned in paragraph 5 shall be personal deputies.
2. Three members and three deputy members shall be independent lawyers. These members may not be members or deputy members of the Council. The Council may lay down rules governing the extent to which membership of the Adjudication Committee is compatible with the holding of other positions.
3. The members and the deputy members shall be appointed by the Council.
4. The Council shall appoint the Chair of the Adjudication Committee from the members mentioned in paragraph 2. The remaining two members of those mentioned in paragraph 2 shall serve as deputy Chair.
5. With respect to the remaining two members and their deputies, the Council shall invite eligible employers’ organisations jointly to propose one member and one deputy member, and eligible employees’ organisations jointly to propose one member and one deputy member. The eligibility of the organisations shall be at the discretion of the Council.

### **Article 11**

1. The Chair, members and deputy members of the Adjudication Committee shall be appointed for a term of four years. All shall be eligible for immediate reappointment.
2. At the recommendation of the Adjudication Committee, the Council may prematurely dismiss any member of the Adjudication Committee whose actions or omissions may be seriously detrimental to the proper execution of the work of the Adjudication Committee or to the trust placed in the Committee.

### **Article 12**

The Council may authorise its Executive to apply Article 10, paragraphs 3, 4 and 5, and Article 11, paragraph 2, on its behalf.

### **Article 13**

A member of the Adjudication Committee may claim exemption from participation if facts or circumstances relating to that member might jeopardise impartial examination of the dispute. In such case, a deputy member of the Adjudication Committee shall take the said member’s place in the Committee.

**Article 14**

1. Parties may challenge one or more members of the Adjudication Committee on the grounds of facts or circumstances that might jeopardise the impartial hearing of the dispute.
2. The challenge, together with a statement of the grounds upon which it is made, must be brought before the Adjudication Committee as soon as possible.
3. If the challenged member of the Adjudication Committee does not acquiesce in the challenge, the other members of the Adjudication Committee shall rule immediately upon the challenge raised, after having heard both the member so challenged and the party or parties raising the challenge.
4. The grounds upon which the ruling is reached shall be given, and both the party or parties who raised the challenge and the opposing party or parties shall be notified immediately.
5. In the event of a tie in the votes cast towards the ruling mentioned in the previous paragraph, the challenge shall be deemed to have been allowed.
6. In the event that the challenged member acquiesces or the challenge is allowed, a deputy member shall act in the matter in place of the challenged member.

**Article 15**

1. The members and deputy members of the Adjudication Committee shall keep confidential all enterprise and business secrets to which they may be made privy in their capacity as members of the Committee.
2. Furthermore, they shall keep confidential all matters which the Chair of the Adjudication Committee has decided are confidential, or whose confidential nature they may be expected to recognise.

**Article 16**

1. The Adjudication Committee shall be assisted in its work by a secretariat.
2. The Secretary of the Adjudication Committee and the other staff of the secretariat shall be appointed by the General Secretary of the Council.
3. Article 15 shall also apply to the staff of the secretariat.

**Section 7 Procedures to be followed by the Adjudication Committee****Article 17**

1. The Adjudication Committee may appoint a subcommittee of three of its members to deal with any dispute submitted to it whose nature is such that it allows such treatment.
2. The Adjudication Committee may lay down additional rules regarding its procedures, providing that such rules do not conflict with the provisions contained in this Resolution.
3. The Adjudication Committee may lay down additional rules regarding the procedures to be followed by its secretariat. Any such rules shall be subject to approval by the General Secretary of the Council.
4. The rules regarding the procedures of the Adjudication Committee mentioned in paragraph 2 and the rules regarding the procedures of the Committee's secretariat mentioned in paragraph 3 shall be recorded in the Merger Code Adjudication

Committee Rules of Procedure ('Reglement werkwijze Geschillencommissie Fusiegedragsregels').

### **Article 18**

1. Disputes may only be referred to the Adjudication Committee by one or more employees' associations or by one or more parties involved in the effectuation of a merger.
2. An employees' association may refer a dispute to the Adjudication Committee if, in the association's view, the parties involved in the effectuation of a merger partially or completely fail to comply with the provisions of the Merger Code.
3. A party involved in the effectuation of a merger may refer a dispute to the Arbitration Committee if, in the said party's view, one or more employees' associations partially or completely fail to comply with the provisions of the Merger Code.
4. 'Party involved in the effectuation of a merger' shall be understood to mean any of the parties referred to in Article 3, paragraph 3.

### **Article 19**

In the event of a dispute, a statement of claim must be submitted in writing within one month of the complete or partial failure to comply with the Merger Code becoming apparent to the claimant, or within one month of the time at which such non-compliance could reasonably have become apparent.

### **Article 20**

1. The statement of claim shall contain the following:
  - a. The name and place of residence or seat of the claimant(s);
  - b. The name and place of residence or seat of the party designated as the respondent(s);
  - c. A description of the circumstances that have given rise to the dispute and the conclusions drawn from them by the claimant(s);
  - d. An indication of the ruling being sought from the Adjudication Committee.
2. If the statement of claim is submitted on behalf of the claimant by an agent who is not a Dutch lawyer, specifically an *advocaat* or a *procureur*, the statement of claim shall be submitted together with a power of attorney.

### **Article 21**

1. After receiving the statement of claim, the Chair of the Adjudication Committee shall consider whether the claimant is entitled to request adjudication by the Committee.
2. If the Chair decides that the claimant is not entitled to request adjudication by the Committee, the Chair shall issue a written statement to this effect, giving the grounds for the decision.
3. The Secretary of the Adjudication Committee shall send a copy of the Chair's statement regarding the decision of non-entitlement to the claimant(s) and the respondent(s).
4. Within fourteen days of having been sent a copy of the statement, the claimant may lodge objection with the Adjudication Committee to the decision of the Chair as mentioned in the preceding paragraph.
5. The Adjudication Committee shall decide whether such objection is justified or not. It shall issue a written statement of its decision, giving the grounds for the

decision. If the Committee sustains the objection, the decision of the Chair shall lapse.

6. The Secretary of the Adjudication Committee shall send a copy of the Adjudication Committee's statement regarding its decision on the objection to the claimant(s) and the respondent(s).

#### **Article 22**

1. The Secretary of the Adjudication Committee shall send a copy of the statement of claim to the party or parties designated as respondent(s).
2. The respondent(s) may submit a defence against the claim in writing and with arguments to the Adjudication Committee within one month of having been sent a copy of the statement of claim.
3. If the defence is submitted on behalf of the respondent(s) by an agent who is not a Dutch lawyer, specifically an *advocaat* or a *procureur*, the defence shall be submitted together with a power of attorney.
4. The Secretary shall send a copy of the defence without delay to the claimant(s).

#### **Article 23**

1. As soon as possible after the written procedure mentioned in the preceding Article, the Adjudication Committee shall hold an oral hearing of the matter.
2. The Secretary of the Adjudication Committee shall notify all parties in good time of the place, date and time of the oral hearing.

#### **Article 24**

1. At any time during the procedure, the Adjudication Committee may ask any of the parties to provide additional information in writing.
2. The Secretary of the Adjudication Committee shall send to the other party or parties a copy of any such request and of the written information supplied to the Committee in response.

#### **Article 25**

1. At the request of any party, the Adjudication Committee may bind the other party or parties to confidentiality regarding certain information that the former may give the latter either in writing or during an oral hearing.
2. The request shall state explicitly which information is to be treated as confidential.

#### **Article 26**

Parties may appear at the oral hearing of the case by the Adjudication Committee in person or may be represented by an agent. Parties may be accompanied by legal counsel or other adviser.

#### **Article 27**

1. The Adjudication Committee may accept information from witnesses and/or experts during the oral hearing.
2. Parties may put forward witnesses and/or experts to be heard by the Adjudication Committee at the oral hearing, providing that they notify the Adjudication Committee and the other party or parties at least one week before the hearing of their intention to do so.

3. Parties and their legal counsel or other advisers shall be entitled to question the witnesses and/or experts mentioned in paragraphs 1 and 2 at the oral hearing.

**Article 28**

1. The oral hearing by the Adjudication Committee shall be held in public.
2. The Adjudication Committee may decide to hold the hearing, in whole or in part, in camera if it deems that holding the hearing in public would be detrimental to the proper administration of justice or the interests of the party or parties concerned.

**Article 29**

The Adjudication Committee may deviate from the periods stated in the present and the following sections and may also allow other parties to so deviate. It is the responsibility of the Adjudication Committee to ensure that the claim is heard without undue delay.

**Section 8 The Ruling of the Adjudication Committee**

**Article 30**

1. The Adjudication Committee shall give its ruling in writing as soon as possible after the claim has been heard.
2. The ruling shall be reached on the basis of a majority vote.

**Article 31**

The ruling of the Adjudication Committee shall be accompanied by an account of the reasons and grounds on which that ruling has been made.

**Article 32**

1. If the Adjudication Committee concludes that a claim submitted by an employees' association is justified, it shall rule that a party involved in the effectuation of a merger has failed to comply fully or properly with one or more rules of the Merger Code.
2. If the Adjudication Committee concludes a claim submitted by a party involved in the effectuation of a merger is justified, it shall rule that an employees' association has failed to comply fully or properly with one or more rules of the Merger Code.
3. In the circumstances mentioned in paragraphs 1 and 2, the Adjudication Committee may decide that the failure to comply fully or properly with the Merger Code is serious in nature and/or seriously reprehensible.

**Article 33**

1. The Secretary shall send a copy of the ruling to all parties involved in the dispute within seven days of the Adjudication Committee having made its ruling.
2. The Adjudication Committee's ruling may be made public.
3. On the grounds that disclosure may seriously damage the interests of any of the parties involved, the Adjudication Committee may, at its discretion, decide to omit the names of the parties involved or other details from the ruling as mentioned in paragraphs 1 and 2.

## Section 9 Final provisions

### Article 34

1. The SER Merger Code 1975 is hereby revoked.

### Article 35

1. This Resolution may be referred to as the SER Resolution concerning the Merger Code 2000.
2. It shall come into force on a date to be decided by the Chair of the Social and Economic Council (SER).<sup>2</sup>

The Hague, 17 March 2000

H.H.F. Wijffels  
Chair

N.C.M. van Niekerk  
General Secretary

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<sup>2</sup> The Resolution came into effect on 5 September 2001 (Resolution concerning the date upon which the SER Resolution concerning the Merger Code 2000 is to take effect, *Staatscourant*, 11 September 2001).