

Merger Code 2015



Merger Code 2015

ENGLISH TRANSLATION INCLUDING NOTES

Social and Economic Council of the Netherlands

The Social and Economic Council of the Netherlands [Sociaal-Economische Raad] (SER) advises the Dutch Government and Parliament on the main outlines of social and economic policy and on important legislation in this area. It is also involved in enforcing certain legislation.

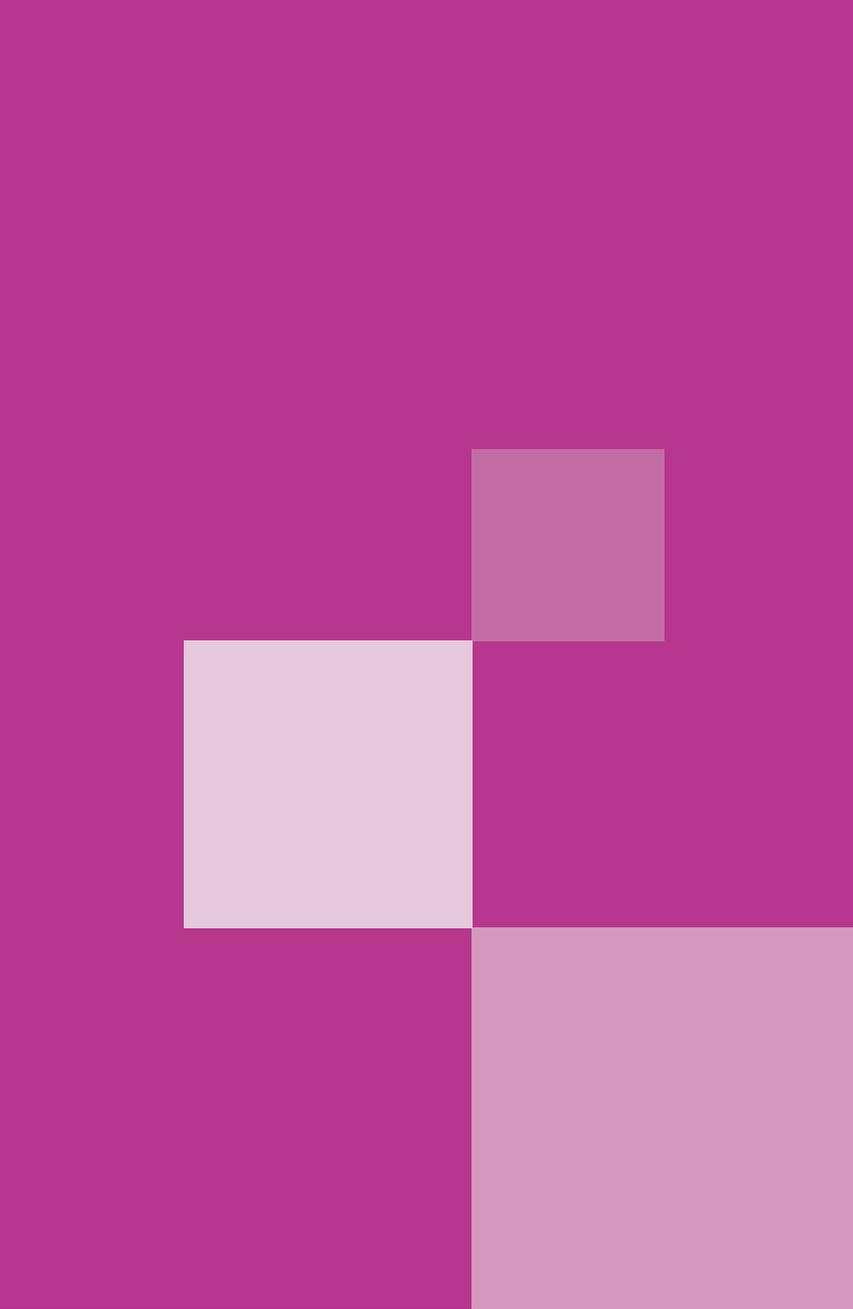
The SER was established by law in 1950. Its membership is made up of representatives of employers and employees, together with a number of 'Crown-appointed members' (i.e. independent experts). The SER is an independent body financed by the entire Dutch business sector. It is assisted in its work by a number of standing and temporary committees; under certain conditions, some of the former also operate independently.

The SER has its own website, with current information on matters including its composition, activities and its various committees; there are also press releases and breaking news. All the advisory reports published since 1950 are also available on the website, with the recent ones also being available in printed form.

The SER's monthly magazine provides news and background information about the SER, the consensus economy, and important socio-economic trends.

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1. Articles

Social and Economic Council's Resolution Concerning the Merger Code 2015 for the Protection of the Interests of Employees

Resolution of the Social and Economic Council of the Netherlands (*Sociaal Economische Raad*, SER) of 18 September 2015 establishing the merger code for the protection of the interests of employees (SER Merger Code 2015)

The Social and Economic Council of the Netherlands;

Having due regard for Article 2 of the Social and Economic Council Act (*Wet op de Sociaal-Economische Raad*);

Has resolved 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 between enterprises.

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. Employees:

i. Those persons who work for the enterprise by virtue of employment agreements or by appointment under public law, or by virtue of employment agreements with the entrepreneur by whom the enterprise is maintained. Persons who work for more than one enterprise of the same entrepreneur are deemed to work exclusively for the enterprise from where their work is managed.

- ii. Employees are also understood to mean:
 - a. those persons who in connection with the enterprise's operations have worked for the enterprise for at least 24 months on the basis of a contract with a temporary employment agency as referred to in Article 7:690 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW); and
 - b. those persons who by virtue of appointment under public law by or employment agreements with the entrepreneur work for an enterprise maintained by another entrepreneur.

d. 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, or
- iii. two or more entrepreneurs on the basis of a joint venture.

e. 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.

f. Employees' association:

Any association with full legal competence whose aim, as defined in its articles, is to protect the interests of its members as employees:

- 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 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 is applicable to an enterprise pursuant to the provisions of Article 2, paragraph 2, then, notwithstanding the definition of 'employees' association' in paragraph 1(f) above, an employees' association shall be defined as: Any association with full legal competence whose aim, as defined in its articles,

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 of operation

Article 2

1. The Merger Code 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 said group that are registered in the Netherlands is at least 50.
2. The Merger Code 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 Merger Code 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 Merger Code

Article 3 Notifying employees' associations

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 paragraphs 1 and 2 of the present article shall apply to the parties upon whom obligations are imposed in Articles 4, 5 and 6.

Article 4 Providing information to employees' associations

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 provision 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 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 said works councils can take these views into account when issuing advice as mentioned in Article 25 of the Dutch 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 Public offer

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. The board of the target company on whose shares a public offer is made shall also apply Article 4 *mutatis mutandis*.

Article 6 Gradual acquisition of shares or options on the stock exchange

Anyone wishing to effect a merger within the meaning of Article 1, paragraph 1(e), by means of the gradual acquisition of shares or options on the stock exchange shall apply Article 4 *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 3, paragraph 1, and Article 4, paragraph 1, as confidential. Unless the merger

parties and the employees' associations agree otherwise, the obligation to maintain confidentiality applies until the intended merger is made public.

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. The party requesting that the information be treated as confidential must also state the duration of said obligation.
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. The code of conduct set forth in Article 4 need not be observed in respect of employees' associations who refuse said request, unless they as yet accept, in writing, and in a timely manner, the obligation to maintain confidentiality. An employees' association that does not refuse a request within the above-referenced period, is deemed to have accepted said request.
4. An employees' association may request the Merger Code Adjudication Committee (*Geschillencommissie Fusiegedragsregels*) to terminate all or part of the obligation to maintain confidentiality, as meant in paragraph 1 or 2, if said association based on facts and circumstances to be put forward by it cannot reasonably be expected or can no longer be reasonably expected to comply with the obligation to maintain confidentiality ensuing from paragraph 1 or 2 when weighing the interests in question.

Section 5 Notifying mergers to Social and Economic Council

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 said Secretariat may require parties to furnish any information it deems necessary for the execution of this task.
3. If parties issue a notification, in the sense of paragraph 1, to the Secretariat of the Council and they are of the opinion that the Merger Code does not apply to the merger in preparation, the Secretariat of the Council may send an abridged notification to the employees' association or associations in question. Article 7, paragraph 1, shall apply mutatis mutandis to the abridged notification.

Section 6 The Merger Code Adjudication Committee

Article 9 The Merger Code Adjudication Committee

1. A committee of the Council shall adjudicate in the event of disputes concerning observance of the Merger Code.
2. The committee is named 'The Merger Code Adjudication Committee'.
3. The committee is hereinafter referred to as 'Adjudication Committee'.

Article 10 Composition

1. The Adjudication Committee shall consist of five members and five deputy members. Articles 5 and 9 of the Social and Economic Council 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's Executive.

4. The Council's Executive shall appoint the Chair of the Adjudication Committee from the midst of the members mentioned in paragraph 2. The two remaining members mentioned in paragraph 2 shall act as deputy chairs.
5. With respect to the remaining two members and their deputies, the Council's Executive 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.

Article 11 Term of appointment

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 Authorisation of the Executive

The Council may authorise its Executive to apply Article 11, paragraph 2, on its behalf.

Article 13 Independence and impartiality

Members of the Adjudication Committee shall prevent conflicts of interest from arising. Members must do everything in their power to prevent conflicts of interest or the impression thereof and shall not abuse their positions. Where necessary, a deputy member of the Adjudication Committee shall take said member's place in the Adjudication Committee.

Article 14 Replacing a member

1. One or more 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. During the oral hearing, said challenge may also be raised orally.

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 paragraph 3, the challenge shall be deemed to have been allowed.

Article 15 Confidentiality

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 Secretariat

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 mutatis mutandis to the staff of the secretariat.

Section 7 Procedures of the Adjudication Committee

Article 17 Deviating number of Adjudication Committee members

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. Any such rules may not conflict with the provisions of 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 Referring disputes

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 Adjudication Committee if, in 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 Procedure for referring disputes

A dispute within the meaning of Article 18 must be referred to the Secretariat of the Adjudication Committee by means of a statement of claim. The statement of claim must be submitted within a period ending one month after notification by or on behalf of one or more parties involved in the effectuation of a merger stating whether or not the merger will be effectuated.

Article 20 Contents of a statement of claim

1. The statement of claim shall contain the following:
 - a. the name and place of residence or seat of the party or parties designated as the claimant(s);
 - b. the name and place of residence or seat of the party or parties 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*, the statement of claim shall be submitted together with a power of attorney.

Article 21 Entitlement to request adjudication

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 a written and substantiated 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 Written defence

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 written 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 written defence is submitted on behalf of the respondent(s) by an agent who is not a Dutch lawyer, specifically an *advocaat*, the written 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 Oral hearing

1. As soon as possible after the written procedure mentioned in Articles 20 to 22, 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 Request for additional information

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 Confidentiality

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 Appearance at an oral hearing

1. 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.
2. If a party is represented by an adviser who is not a Dutch lawyer, specifically an advocaat, the adviser must submit a power of attorney issued by the party concerned prior to the oral hearing.

Article 27 Witnesses or experts

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 Public oral hearing

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 Deviation from periods

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 Ruling of the Adjudication Committee

Article 30 Written ruling

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 Substantiation of the ruling

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 Types of rulings

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 that 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 Public ruling

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 is 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 paragraph 2.

Section 9 Final provisions

Article 34

The SER Merger Code 2000 is hereby revoked.

Article 35

This resolution comes into force on 1 October 2015.

Article 36

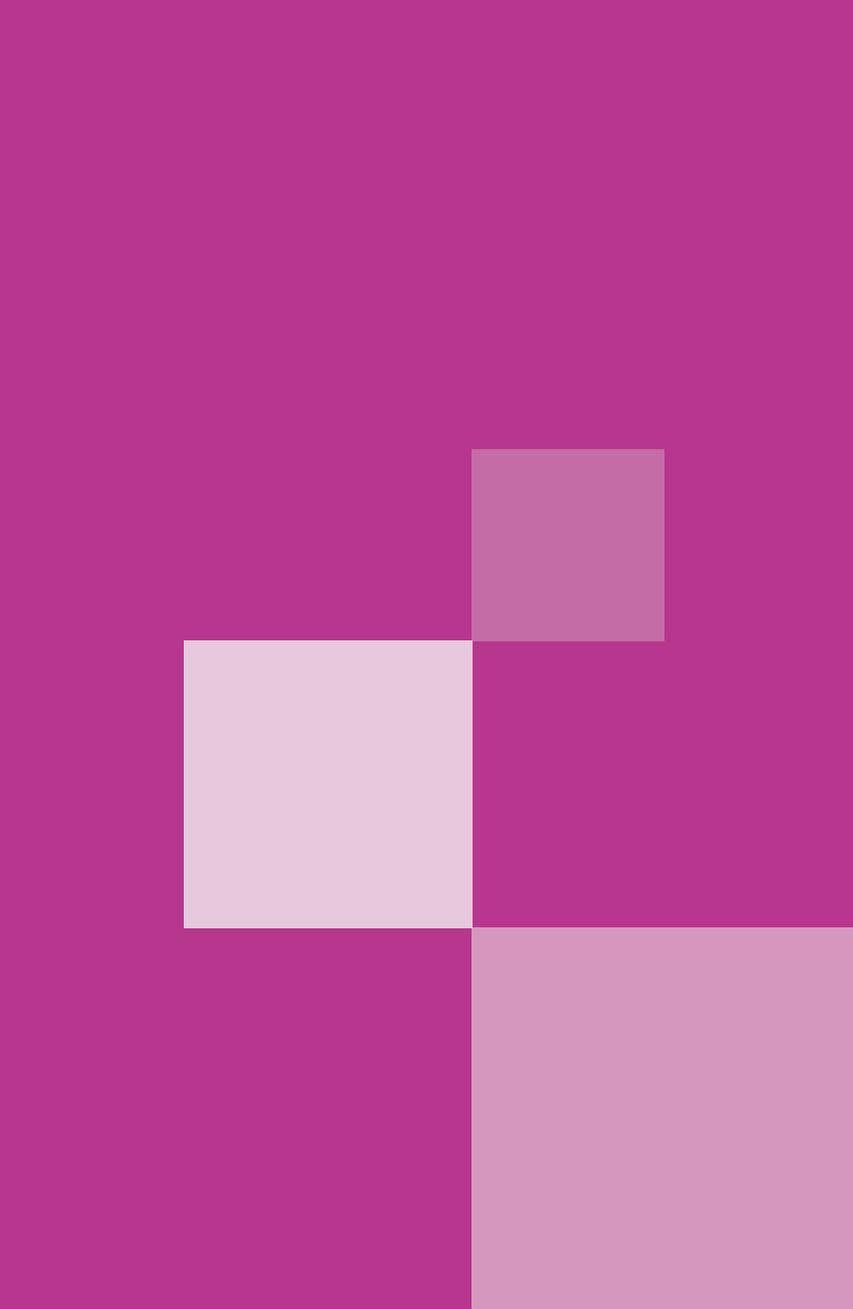
This resolution will be referred to as: SER Merger Code 2015.

This resolution, including the explanatory notes, shall be published in the Dutch Government Gazette (*Staatscourant*).

The Hague, 18 September 2015

M.I. Hamer
Chair

M.G. Bos
Deputy General Secretary



2. Explanatory notes

General explanatory notes

The purpose of the SER Merger Code 2015 ('Merger Code') is to protect employees' interests in the event of an intended merger.

The Merger Code applies to all enterprises in the business sector within the meaning of this Merger Code and that satisfy all conditions set forth in this resolution. In this respect it is important to note that the Merger Code might also apply to non-profit organisations, government organisations and independent professions. That is the case if they can be regarded as part of the business sector within the meaning of the Merger Code. In broad strokes, the determining factors in this respect are whether an organisation (i) operates on the market, and (ii) is organised as a business.

The exception that applied in the past where the Merger Code did not apply to government organisations, non-profit organisations and independent professions no longer applies.

The core of the Merger Code is that merger parties must notify the employees' associations concerned in good time about an intended merger, provide information about the merger to them and afford them the opportunity to give their views on the merger in so far as it may affect employees' interests. 'In good time' is understood to mean: before an agreement concerning the merger is reached. The merger parties must implement this provision such that the views of the employees' associations may *substantially effect* whether or not the merger is implemented and the manner in which it is effectuated.

The merger parties shall afford the works councils the opportunity to consider the views of the employees' associations so that said works councils can take these views into account when issuing advice within the meaning of Article 25 of the Dutch Works Councils Act (*Wet op de ondernemingsraden*, WOR).

The moment the employees' associations concerned are notified, the merger parties must also notify the Secretariat of the Council of the merger in preparation. To ensure the confidential nature of a merger in preparation and the parties involved, the Merger Code includes an obligation to maintain confidentiality.

In the event of a dispute concerning the failure to comply fully or properly with the rules of the Merger Code, both an employees' association and a merger party may

file a complaint with the Council's Merger Code Adjudication Committee. One or more parties may also opt for mediation through the Merger Code Adjudication Committee.

No direct legal basis exists for the Merger Code. The adoption of the Merger Code falls within the purview of the Council's general duty to provide guidance as set forth in Article 2 of the Social and Economic Council Act. The Merger Code may be regarded as the product of a broadly adopted view about stakeholders' roles in the event of mergers. The code is based on the willingness of Dutch businesses to voluntarily comply with the rules and is a form of self-regulation.

This explanation is more extensively formulated than the official explanatory notes as adopted in the SER Merger Code 2015 (Social Economic Council's Resolution Concerning the Merger Code 2015 for the Protection of the Interests of Employees). Besides a general explanation, the section by section explanation includes some additional clarifications for the benefit of legal practice.

Section-by-Section Explanation

Section 1 Definitions

Article 1, paragraph 1(a) (enterprise)

The definition of ‘enterprise’ is identical to the definition given in Article 1, paragraph 1(c) of the Dutch Works Councils Act (*Wet op de ondernemingsraden*, WOR).

If an enterprise has been granted a suspension of payments or is bankrupt, it is nevertheless still an enterprise within the meaning of the Merger Code, which means that the Merger Code applies. However, circumstances may arise that could affect what the merger parties and the employees’ associations may reasonably expect from one another within the framework of Article 4.

Article 1, paragraph 1(b) (entrepreneur)

The definition of ‘entrepreneur’ is identical to the definition given in Article 1, paragraph 1(d) of the Works Councils Act. Given the general interpretation of the term entrepreneur as used in the Works Councils Act, the term entrepreneur in the Merger Code also includes partnerships that maintain an enterprise.

Article 1, paragraph 1(c) (employees)

The definition of ‘employees’ is identical to the definition given in Article 1, paragraph 2 of the Works Councils Act. The wording of this subsection is identical to the provisions of Article 1, paragraphs 2 and 3 of the Works Councils Act.

Article 1, paragraph 1(d)(i) (group of enterprises)

In the first place, ‘group of enterprises’ is understood to mean two or more enterprises maintained by a single entrepreneur.

Article 1, paragraph 1(d)(ii) (group)

‘Group’ within the meaning of Article 2:24b of the Dutch Civil Code is understood to mean both the ‘vertical’ group and the ‘horizontal’ group or group of legally separate entities under unified control without a parent company [*nevenschikkingsconcern*]. Besides the ownership of shares and the control associated with said shares, said enterprises may form a group based on their articles of association and/or contractual provisions.

Article 1, paragraph 1(d)(iii) (contractual joint venture)

This concept concerns cases where the activities are the subject of a pure contractual joint venture, which is not implemented in a joint subsidiary or in a partnership (since in that case (i) applies). See also the explanation to Article 2, paragraph 3(a).

Article 1, paragraph 1(e) (merger)

A merger is deemed to be a merger within the meaning of the Merger Code if the control over an enterprise or *a part of an enterprise* is acquired or transferred on a *lasting basis*. The phrase 'acquisition or transfer of control' expresses the notion that the nature of a merger is generally twofold: the acquisition on the one hand and the corresponding transfer on the other hand. Situations exist where the nature of a merger is not twofold, such as the forms of unilateral acquisition within the meaning of Articles 5 ('hostile' public offer) and 6 (gradual acquisition of shares or options on the stock exchange).

A situation only involves a merger if the control over the enterprise is transferred to another party on a lasting basis (the requirement of durability). That is generally not the case, for example, where a building consortium is formed to complete specific works. The same holds true when a joint venture is temporary in nature, which means that control is not transferred on a lasting basis.

If part of an enterprise is acquired or transferred on a lasting basis, that constitutes a merger, provided that it concerns a clearly defined part of the activities carried out in an enterprise. In other words: a separate and distinct activity.

Acquisition or transfer of control

Control also includes *potential* control, such as an unconditional option on some or all of the shares or the assets and liabilities of an enterprise.

Control, within the meaning of the present Merger Code, may be acquired or transferred in the following manners.

1. Firstly, control is transferred (or transmitted) and acquired in the case of an asset merger and in the case of a statutory merger (within the meaning of Article 2:308 et seq. of the Dutch Civil Code): the transfer and the acquisition, respectively, of the assets and liabilities of an enterprise (assets/liabilities transaction).

The acquisition or transfer of control as a consequence of a statutory or other division also falls within the scope of the Merger Code.

2. Secondly, control can be acquired or transferred in the event of the acquisition or transfer – whether directly or indirectly – of a block of shares in a public limited liability company (*NV*) or private limited liability company (*BV*). In the context of the present Merger Code, the situations listed below constitute a *refutable* suspicion of acquisition of control:
 - a. the acquisition of the power to appoint more than half of the members of the administrative body, the management body or the supervisory body (depending on whether the situation involves a one-tier or two-tier management structure) of an *NV/BV*;
 - b. the acquisition of more than 50 percent of the voting rights in the general meeting of an *NV/BV*; or
 - c. the acquisition of more than 50 percent of the shares (controlling interest) in an *NV/BV*.

With regard to the acquisition of a stake of 50 percent it is furthermore important to note that the phrase ‘the formation of a group of enterprises’ included in the definition of the term ‘merger’ means that based on those grounds the majority of the ‘50 percent cases’ are regarded as a merger within the meaning of the Merger Code.

As stated previously, for the purposes of the Merger Code, the acquisition or transfer of the majority of shares constitutes a refutable assumption of control. Conversely, a 50 percent or minority stake does not enable the acquirer to exercise control in a lasting manner. If, however, the holder of said stake acquires control based on additional rights under the articles of association and/or contractual rights, the acquisition will constitute a merger and the Merger Code will apply.

3. Thirdly, control within the meaning of the Merger Code can also be acquired or transferred without any equity participation, exclusively through powers under the articles of association and/or additional structural contractual arrangements. The latter option occurs particularly in the event of mergers between associations or foundations.

A merger between associations can be effectuated by arranging the articles of the subsidiary association such that it is made ‘subordinate’ to the parent

association. This can be achieved through the subsidiary's 'group oriented' object clause. The parent association can also be granted control for such matters as eligibility for appointment, nomination of candidates and appointment and dismissal. In the event of a merger between foundations, a group-oriented object clause that is binding on the board is also conceivable. The same holds true for appointing and dismissing the board, which includes personal unions. Another option is that the parent be granted power to give instructions and to approve important decisions.

4. Fourthly, the formation of a partnership and the merger between two or more partnerships where an enterprise is contributed or transferred constitute the acquisition or transfer of control.

Article 1, paragraph 1(f) (employees' associations/'trade unions')

Employees' associations are not the umbrella federations of trade unions, but rather the non-affiliated trade unions organised by district that are active in various sectors for their members who are employees.

The definition of 'employees' associations' includes the phrase 'an enterprise involved in the merger'. What is important is that the work of the employees' associations concern the enterprises whose activities are affected by the merger, i.e. the enterprises whose control is acquired or transferred as a result of the merger. The phrase 'enterprises involved' also includes the enterprises of one of the merger parties whose control does not shift, but in respect of which it can reasonably be assumed that the merger will affect their activities.

Article 1, paragraph 1(f)(ii) (terms of employment)

Employees' associations that are involved in the formation of a collective bargaining agreement that has binding effect at an enterprise involved in the merger qualify as employees' associations within the meaning of the Merger Code.

Article 1, paragraph 1(f)(iii) (protecting interests)

Employees' associations that have regularly acted in the interest of their members in a manner recognisable by the board of the enterprise (recognisability requirement), qualify as employees' associations within the meaning of the Merger Code.

Section 2 Scope of operation

Article 2, paragraph 1 (scope of operation)

As regards the scope of operation of the Merger Code, it is noted in a general sense that the Merger Code also applies if the merger does not affect the employees' positions. Likewise, the merger provisions of collective bargaining agreements do not affect the obligation to comply with the Merger Code.

Article 2, paragraph 2 (expansion of the scope of operation)

The Merger Code's scope of operation may be expanded in a collective bargaining agreement. It is possible to reduce the criterion of 50 employees or more who work for one of the enterprises or a group of enterprises involved in the merger under a collective bargaining agreement. The provisions of Article 2, paragraph 2, do not apply to the exceptions to the scope of operation set forth in Article 2, paragraph 3.

Article 2, paragraph 3(a) (*intra-group* exception)

The Merger Code set forth in section 3 does not apply if all enterprises involved in the merger form part of the same group of enterprises (*intra-group* exception). See Article 1, paragraph 1(d), and the explanatory notes on said article for the definition of 'group of enterprises'.

If participants in a joint venture, who each conduct their own separate activities in addition to the joint activities, decide to expand their cooperation by one or more other activities or have all their activities managed jointly, the restriction of the scope of operation, within the meaning of Article 2, paragraph 3(a), does not apply, given that the envisaged cooperation goes beyond the scope of the existing joint venture, rendering the Merger Code applicable.

Article 2, paragraph 3(b) (marital community of property, administration, testamentary disposition, guardianship or bankruptcy)

The Merger Code does not apply if control is transferred as a result of the inception or termination of a marital community of property, administration, testamentary disposition, guardianship or bankruptcy. However, the Merger Code applies if the bankruptcy trustee or guardian transfers an enterprise.

Article 2, paragraph 3(d) (jurisdiction exception)

Whether the Merger Code applies to the acquisition by a Dutch enterprise of a foreign enterprise *depends on the consequences* that may reasonably be expected from

such a transaction for the employees who work for the acquirer's enterprise in the Netherlands.

The Merger Code only applies to two foreign enterprises if the merger concerns only or primarily one or more enterprises registered in the Netherlands.

Section 3 Merger Code

Definition of public announcement

The term 'public announcement' means any announcement made to the public about the preparation or implementation of a merger. How said announcement is made is irrelevant. Public announcements include, but are not limited to, press releases, notifications to employees in the form of a letter or e-mail sent to them, verbal announcements made during a staff meeting (at which no obligation to maintain confidentiality is imposed) and announcements made by directors of enterprises during a press conference.

Article 3, paragraph 1 (main rule about notifying employees' associations)

The purpose of the main rule set out in paragraph 1 is to afford employees' associations the opportunity to request additional information about a public announcement before said public announcement is made, with the proviso that no obligation exists to suspend making the public announcement.

Article 3, paragraph 2 (exception to the main rule)

Paragraph 2 sets out an exception to the main rule, which exception applies exclusively where mandatory notifications (such as those pursuant to Part 5.5 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) and the Dutch Public Takeover Bids (Financial Supervision Act) Decree (*Besluit openbare biedingen Wft*), Article 59 of Part 5 of the Financial Supervision Act and Articles 12 to 14 Dutch Market Abuse (Financial Supervision Act) Decree (*Besluit marktmisbruik Wft*) concerning the publication of price-sensitive information, or similar foreign regulations) conflict with making prior notifications to employees' associations.

Article 4 (core of the Merger Code)

The procedure for making announcements, sharing information and holding consultations laid down in this article forms the core of the Merger Code. The merging parties must at all times fulfil their obligations set out in said article in such a way that the views of the employees' associations may substantially affect

whether the merger is implemented or not and also the manner in which it is implemented.

The authority of the employees' association to express their views explicitly concerns the merger *in preparation* (Article 4, paragraphs 3 and 6).

The nature of this rule is that the *initiative* to comply associated with each aspect of the procedure lies with the merging parties. Conversely, the employees' associations are obliged to exercise the powers assigned to them in connection with this procedure within a *reasonable period of time*.

Article 4 does not serve to guarantee an agreement between merging parties and employees' associations. Nor does the procedure imply an obligation for the merging parties to conclude any agreement with the employees' associations.

Deviation from the procedure may be justified in special cases. Failure to comply with the procedure may be justified in the event of force majeure. Deviation from the procedure is excusable if urgent circumstances or circumstances outside the merging parties' control arise. In the case of force majeure, the agreement reached must explicitly include a reservation in connection with the views of the employees' associations yet to be heard. The employees' associations must be informed after an agreement is reached and must be invited to a meeting. The mere fact that a situation involves bankruptcy or the intention to file for bankruptcy does not automatically constitute force majeure.

Article 4, paragraph 1 (definition of 'agreement')

'Agreement' means the reaching of a consensus between the merging parties about the terms of the merger. The envisaged merger parties may not reach a consensus until after all steps of the Article 4 procedure have been followed, which means: binding themselves in respect of one another to an irreversible merger resolution.

Article 4, paragraph 2 (scope of the duty to provide information)

Article 4, paragraph 2 explains the categories of information that may be important to employees' associations for the purpose of forming their views about a merger in so far as it may affect the employees' interests. This may mean that access must be granted to published or non-published financial statements and that information must be provided regarding the intentions in terms of the policy to be pursued in connection with the quality of the work and the number of jobs in the future and the organisation of the company and the production. The specific

circumstances of a merger determine the scope of the duty to provide information under Article 4, paragraph 2.

The purpose of the duty to provide information is to enable employees' associations to form a well-founded view about the desirability of the merger in so far as it affects the employees' interests.

Article 4, paragraphs 3 and 4 (meeting with the employees' associations)

Based on the information to be provided under paragraphs 2 and 5 and after a reasonable period of internal deliberation, the parties, within the meaning of paragraph 8, must afford the employees' associations the opportunity, at one or more meetings, to state their views on the intended merger in so far as it may affect employees' interests, paying attention to the issues referred to in paragraphs 4(a) to (d).

Article 4, paragraph 5 (additional information)

The concrete obligation to provide information depends in part on the question of whether the provision of the information requested may reasonably be demanded from the merger parties concerned. The information requested by the employees' associations must be reasonably necessary for them to be able to form an opinion. They may not request information that does not relate to the merger as such.

Article 4, paragraph 6 (substantial impact of trade unions' views)

Article 4, paragraph 6 forms the core of the Merger Code. Where a merger is in preparation that falls within the scope of the Merger Code, the parties must notify the employees' associations, provide them with the information specified in paragraph 2, and, in accordance with paragraph 4, afford them the opportunity to state their views. This must be done 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.

The words 'in such a way' concern:

- the nature of the information provided;
- the structure of the meetings;
- the point in time when the information is provided and the meetings take place.

Article 4, paragraph 7 (pacing of merger meetings)

The requirements of the Article 4 procedure have consequences for the pacing of the merger meetings. Under paragraph 7 of said article, the merger parties must

give the works councils of the enterprises an opportunity to consider the views of the employees' association or associations so that they can take these views into account when issuing advice as mentioned in Article 25 of the Works Councils Act.

The essence of this rule is twofold: to guarantee a certain degree of coordination between the co-determination procedures of the works councils of the enterprises and those of the employees' associations. The Merger Code thus specifies the order in which the meetings must take place, from which order the parties may only deviate if the works councils state in advance that they do not wish to wait for the views of the employees' association or associations (which may also be evident from their conduct). Based on Article 4 of the Merger Code and Article 25 of the Works Councils Act, said order is as follows: the works council must consider the views of the employees' association or associations concerned before it issues advice within the meaning of Article 25 of the Works Councils Act. In that way, the views of the employees' association or associations may substantially affect the merger resolution and the manner in which it is implemented.

This rule does not mean that the information and consultation procedure of employees' associations and works councils cannot be followed at the same time, provided that Article 4, paragraph 7 is satisfied in the final stage of that procedure.

Article 4, paragraph 8 (obligations of merger parties)

Particularly in a group context it may occur that the party to the merger agreement is not the party that will directly acquire/transfer control. The purpose of the wording of paragraph 8 is to take this possibility into account: all parties meant in the preceding sentence are obliged to comply with the Merger Code.

Advisers or intermediaries, however named, are not regarded as 'merger parties'.

The obligations set out in paragraphs 1 to 7 may be satisfied by all parties acting collectively, by each party individually or by one or more parties acting on behalf of one or more other parties. The compliance methods mentioned above may also be alternated or combined.

Article 5 (public offer)

Article 5 of the Merger Code covers situations where a public offer is made to achieve a merger, whereas no merger meetings whatsoever have been held between the bidder and the board of the target company, or where such meetings were held but did not result in an agreement. Under such circumstances, the procedure for

notifying and providing information to and holding meetings with employees' associations laid down in Article 4 does not apply directly since said procedure is based on merger meetings that lead to an agreement between merger parties. Article 5 provides that in such situations the rules set out in Article 4 will be applied in so far as possible. What does this mean?

If the public offer is the result of successful merger meetings (friendly offer), the bidding process commences with the public announcement, usually in the form of a press release, that the bidder is planning to make a public offer on the shares in the target company. At the latest, said announcement must be made when the bidder and the target company have reached a conditional or unconditional agreement (Article 5, paragraph 1 of the Public Takeover Bids (Financial Supervision Act) Decree).

A comparable moment in cases where no merger meetings have taken place or where they have not led to an agreement (bid without previous notice or hostile bid) is the moment that a bidder announces specific information about the contents of the intended public offer (Article 5, paragraph 2 of the Public Takeover Bids (Financial Supervision Act) Decree). This is the case if the bidder mentions the name of the potential target company and an intended price or exchange rate, or a specifically described intended timing for the intended public offer. As a rule, the bidder must have complied with the procedure for notifying and providing information and consulting with the employees' associations laid down in Article 4 of the Merger Code prior to that moment. However, the financial law rule set out in Article 25i, paragraph 2 of Part 5 of the Financial Supervision Act must be taken into account. Said rule provides that an issuing institution shall, without delay, make price-sensitive information as referred to in the definition of inside information in Article 53, paragraph 1 of Part 5 of the Financial Supervision Act which directly pertains to itself generally available. If the prior notification of the intended offer to the employees' associations conflicts with this rule, said notification may be made at a later point in time. Cf. Article 3, paragraph 2 of the Merger Code. For more information on price-sensitive information, see also the relevant brochure issued by the Netherlands Authority for the Financial Markets.¹

In cases that fall within the scope of Article 5 of the Merger Code the board of the target company must also follow the procedure set out in Article 4 as much as

¹ Visit www.afm.nl/nl-nl/professionals/doelgroepen/effectenuitgevende-ondernemingen/meldingen/koersgevoelige-informatie.

possible. It may only announce its final position on the public offer after it has consulted with the employees' associations concerned. This need not prevent the board from giving a provisional response, provided that it make a reservation in connection with the views of the employees' association or associations yet to be heard.

Article 6 (gradual acquisition of shares or options on the stock exchange)

The rules of procedure set out in Article 4 do not apply directly to this form of merger, as they are based on merger meetings between the merger parties. For this reason, Article 6 provides that Article 4 must be applied as much as possible to mergers that are effectuated by means of the gradual acquisition of shares or options on the stock exchange, before the acquirer acquires control over the enterprise in question. The explanatory notes to Article 1, paragraph 1(e) (the definition of merger) explain when a situation involves a refutable suspicion of acquisition of control.

Section 4 Confidentiality

Article 7 (confidentiality)

Confidentiality and compliance with the obligation to maintain confidentiality are important cornerstones of the Merger Code.

If an employees' association rejects a request to treat information as confidential within the meaning of paragraph 2, the rules of the Merger Code set out in Article 4 need not be observed in respect of said association. As such, an agreement may be reached on the merger without first holding a meeting within the meaning of Article 4, paragraph 4 with said employees' association. If an employees' association that initially rejected a request to maintain confidentiality reconsiders its decision and it as yet wishes to participate in the procedure described in Article 4 with due observance of the duty to maintain confidentiality, that participation shall be possible from that moment forward, i.e. from the phase in which the procedure is at that moment, with the provision that the information within the meaning of Article 4 must as yet be provided to it. The extent to which Article 4 can still be observed in respect of said employees' association in all other respects will depend on the status of any consultations held with other employees' associations and the status of the merger meetings.

It is important that clear agreements be reached concerning the end of the period during which confidentiality must be observed, given that they are the deciding factor. For instance, an employees' association that has the impression that it is no longer bound by the duty of confidentiality based on, for example, newspaper articles, is not automatically at liberty to make statements about the information that was provided to it under Article 4; it will first have to check with the parties concerned whether or not its impression is correct.

Article 7, paragraph 1 (broad interpretation of the obligation to maintain confidentiality)

In *ABN-AMRO/De Unie*, the Adjudication Committee² found that the obligation to maintain confidentiality set out in Article 7 must be interpreted broadly and that the notification referred to in Article 3 also falls within the scope of that obligation. The amendment serves to codify that ruling.

Article 7, paragraphs 1 to 4 (providing information to third parties)

Employees' associations have the option of also informing third parties about the notification and the information within the meaning of Article 4, provided that they first provide the names of those third parties to the enterprises involved in the merger and those enterprises consent to the employees' association or associations in question providing information to said third parties. If the enterprises involved in the merger consent to the employees' association or associations providing information to said third parties, the employees' association or associations shall, in turn, request said third parties to maintain the same confidentiality requested from the association or associations themselves and for the same period as the association or associations were requested to maintain confidentiality.

If one or more enterprises involved in the merger do not consent or object to the employees' associations providing information to said third parties (for example because the enterprises involved in the merger are of the opinion that the information will have to be shared with too many people), the employees' association concerned may invoke paragraph 4. The obligation to furnish facts and the burden of proof lie with the employee's association that invokes Article 7, paragraph 4.

'Third parties' are not understood to mean only external experts and advisers (such as lawyers, tax advisers and auditors), but also the members of the employees' association or associations who work for one of the merger parties.

2 Merger Code Adjudication Committee, 7 January 2008, *PBO-blad* 2008/3 (*ABN- AMRO/De Unie*).

Section 5 Notifying mergers to the Social and Economic Council

Article 8 (mandatory notification to the Social and Economic Council)

Intended mergers must be notified to the Secretariat of the Council. The Secretariat shall forward copies of the notifications received to the employees' associations concerned, which will enable them to remain abreast of intended mergers. The Secretariat also has an identification duty. It, for example, reads press releases to determine whether the prescribed notification has taken place. The duties assigned to the Secretariat mean that it may request information that is needed to perform this duty and that said information must in fact be provided.

Article 8, paragraph 1 (notification)

With regard to merger transactions notified pursuant to the Merger Code, the Secretariat requires, at a minimum, the information listed on the notification form that can be found on the website of the Social and Economic Council. If this information is incomplete or not provided in the first notification, a request for further information shall be sent. After said information has been received, a confirmation of notification shall be sent, copies of which shall be sent to the employees' association or associations.

Article 8, paragraph 2 (request for information)

If and as soon as public announcements, press releases or information obtained from other sources give justifiable reason to suspect that a merger is in preparation or has been implemented, which has not yet been notified pursuant to Article 8, paragraph 1 (or Article 4, paragraph 1), the Secretariat will send a request for information to the presumed parties within the meaning of Article 4, paragraph 8. The contents and wording of the request will naturally depend on the contents of the press releases or announcements that have given rise to said request.

Article 8, paragraph 3 (abridged notification)

The abridged notification sent by the Secretariat of the Council shall state the intention to effectuate a merger, the parties involved in the intended merger and the opinion of the parties that the Merger Code does not apply to the merger in preparation. The abridged notification sent by the Secretariat of the Council to the employees' association or associations concerned shall not include any other information or documents.

Section 6 Merger Code Adjudication Committee

References in sections 6, 7 and 8 to 'party or parties' that do not provide any further explanation, concern the parties involved in the procedure.

Section 7 Procedure before the Adjudication Committee

Article 19 (procedure for referring disputes)

This article sets out the time limit for filing complaints. Article 19 of the Social and Economic Council's resolution concerning the Merger Code 2000 explained when the time limit for filing complaints commenced. In practice, the commencement date of that time limit often proved to be unclear and the subject of dispute. Often, the time limit of one month proved to be too short in practice. In addition, said provisions meant that in the event of various, non-concurrent violations, the time limit for filing complaints had to be observed for each violation of the Merger Code.

The amended wording serves to extend the time limit for filing complaints and to facilitate that various violations or suspected violations of the Merger Code by the same merger parties and that regard the same merger may be submitted as much as possible in a single complaint. The announcement of the fact that the merger may or may not be effectuated may take place in various ways, including by means of a press release, a non-confidential notification to the employees or a notification to the employees' association or associations made by or on behalf of one or both merger parties. If no public announcement is made as to whether or not the merger shall be effectuated, the time limit for filing complaints shall end one month after the date on which the employees' association or associations could have otherwise learned of the merger being or not being effectuated. All complaints filed before said time shall be deemed to have been filed on time.

In consultation with the parties, the Chair of the Adjudication Committee is allowed to make, or to arrange for, an attempt at mediation. Additionally, the parties (either individually or collectively) may request the Chair of the Adjudication Committee to mediate in the case of a dispute or imminent dispute.

Article 21 (entitlement to request adjudication)

Article 21 concerns situations where, after receiving a written statement of claim, the Chair of the Adjudication Committee determines – before the written procedure within the meaning of Article 22 commences – whether the claimant is

entitled to request adjudication by the Committee. The absence of such a determination does not alter the fact that the Adjudication Committee may as yet find in the further course of the proceedings that the claimant is not entitled to request adjudication. This is enshrined in Article 54 of Part 8 of the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*), among other places.

Section 8 Ruling of the Adjudication Committee

Article 30 (amicable settlements)

The fact that a dispute is handled by the Adjudication Committee does not necessarily mean that a 'ruling' within the meaning of section 8 will be handed down. The parties may reach an amicable settlement at any point in the proceedings, either at the initiative of the Adjudication Committee or at their own initiative.

Article 32 (sanctions)

The Adjudication Committee's ruling in a dispute brought before it concerns the determination of whether one of the parties involved in the dispute has or has not complied properly with the Merger Code. The sanctioning element lies in the fact that the Committee's ruling is available to the public. The general premise that all rulings of the Adjudication Committee are available to the public (Article 33, paragraph 2) means that the Adjudication Committee has the power to give shape to the way in the rulings are made available to the public in the manner that it deems suitable given the severity of the case. This may mean that in a dispute in which the Adjudication Committee is of the opinion that a party is seriously reprehensible within the meaning of paragraph 3, it may issue a press release concerning its ruling. Such an active publication stating the names of the offenders is the Adjudication Committee's most severe sanction.

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