



Country report: (3) Transposition

The transposition of the SE legislation in the Netherlands

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Reports from July 2004 and March 2004

Updated report (8 July 2004): The transposition of the SE legislation in the Netherlands

1. Introduction

The main part of this report concerns the (debate) on the transposition of the SE directive in the Netherlands. In section 2 the most recent amendments to the bill are described. Section 3 presents an outline of the bill. At the end of section 3 the major points from the checklist are given. Section 4 covers the debate and literature on the bill. Section 5 deals with (changes in) the procedure on information (withholding) and confidentiality. In sections 6 and 7 attention is paid to recent developments related to the SE and the role of employees: structure law and the Law on works councils.

2. Alterations to the bill

The bill on the implementation of the SE directive was sent to parliament in November 2003 (see also the 22 March report). On 28 April 2004, the bill was amended on several – mostly minor – points. The following changes are of particular interest:

- In the Netherlands, members of the special negotiating body (SNB) are appointed by the works council(s). If there are no works councils, SNB members are elected by the employees. A list of candidates for these elections can be put forward by the unions and – this is the new element – by one or more employees who are not union members.
- In the original bill it was stated that works councils have no rights deriving from Dutch law (more specifically, the structure law and the Law on works councils) as far as the appointment of members of the (supervisory) board of the SE is concerned. Such rights should be based solely on the SE agreement or the annex to the SE directive. This restriction has now been mitigated. The Law on works councils gives works councils the right to be consulted on the appointment or dismissal of the labour director, who might also be a statutory member of the SE board, but not necessarily. This right will now also apply to the SE.

Prior to the amendment of the original bill, a discussion was held by the Standing Committee for Social Affairs and Employment, in which all parties in Parliament have one or more representatives. The discussion made clear that the focus is more on the statute and the relations of SE participation to existing law than on subjects like the SNB and information and consultation procedures.

3. The bill

The outline and the main features of the present bill are as follows:

Chapter 1 contains definitions and general rules. For unknown reasons the bill does not use the definition of consultation from the SE directive, but instead has copied the definition from the EWC directive, which is far more restrictive. Article 1(6) states that the structure law does not apply to SEs.

Chapter 2 contains the rules on negotiations, the SNB and the resulting agreement. In the Netherlands, works councils will appoint the members of the SNB. If there is no works council, there will be an election by the employees. SNB costs have to be paid by the companies partaking in the formation of the SE, on condition that expenses for external experts and legal procedures are communicated in advance.

Article 2(12) contains a list of the subjects that are supposed to be part of

the regulations for the SE works council. These regulations should be a by-product of the agreement. The subjects include:

1. cases or situations which should result in renegotiations;
2. the procedure to be followed when negotiating a new agreement, the way in which the agreement will be modified after structural changes in the SE (including changes in the number of workers in the different member states);
3. the consequences of not concluding a new agreement.

Article 2(13) pertains to SEs in which the abovementioned regulations do not contain provisions on renegotiations. When there are no provisions on subjects (1) and (2), the SE is obliged to start renegotiation with the SE works council (or, if no works council exists, with a newly created SNB) if this is requested by at least 100 employees or employee representatives of the SE or its subsidiaries and these employees constitute at least 20% of all the employees of the SE and its subsidiaries.

When there are no provisions on subject (3), and no new agreement has been reached within a year of the first meeting with the SE works council or the SNB, the annex to the directive shall apply unless the SE works council or the SNB prefers to prolong the original agreement. Articles 2(12) and 2(13) are meant to deal with the prescription in the Directive that member states should deal with possible misuse of SEs and uphold the “before and after” principle. It should be noted, however, that the parties involved in the negotiations can agree that article 2(13) shall not apply.

In Chapter 3, the provisions of the annex are implemented. Chapter 4 contains provisions on the election of Dutch representatives in SEs in other countries, as well as changes in other Dutch laws.

Checklist

- **Stage of transposition: draft law**
- **Transposition:** by law.
- **SNB:** works councils will appoint Dutch members of the SNB. If no works council exists: election by employees. External trade union members can be SNB members.
- **Budget:** the SNB is not limited to one expert.
- **Allocation of national seats (Annex Ib):** same as for SNB.
- **Opting out in case of mergers (art. 7 III):** no.
- **National procedure for allocation of board seats (Annex IIIb):** the SE works council shall allocate seats in proportion to the number of employees of an SE and its subsidiaries. If there is only one seat this will be given to the country in which the SE has the most employees. If there is more than one seat, but at the same time insufficient seats for every country in which the SE has employees, the second seat will be given to the Dutch employees (this is true for SEs established under Dutch SE law). If there are still some seats remaining these are given to the other countries not yet represented on the board. The right to appoint or nominate will be exercised by or on behalf of the employees of the country to which the seat is awarded (by the SE works council), according to the relevant rules. In the Netherlands this right will be exercised by the works council.
RB budget: funding limited to one expert (Annex I h).
- **Prior administrative authorisation if company wants to withhold information (art. 8 II):** no.
- **Right to negotiate in case of structural changes in SE?** See also above. Under certain conditions and only when there is an agreement on the role of employees.

4. Debate and literature

Early in 2004, the Association of Company Lawyers (Vereeniging Handelsrecht) published a so-called pre-advice on the SE. Two chapters deal (partly) with the Directive. Noteworthy subjects in these chapters are:

- the relevance of recent case law on the freedom of establishment (Überseering, Inspire Art) of SEs;
- the question of whether the structure law is applicable to SEs – according to the government (Memorandum of understanding accompanying the bill) this is not the case; several authors disagree, for example, in the case of transformation of a Dutch public company into an SE under the structure law;
- the (in)compatibility of the Dutch structure law with the one-tier board structure;
- whether the creation of affiliate SEs might be a way of circumventing existing forms of participation;
- the effect of the statute and the directive on Dutch company law, mainly regarding one-tier and two-tier structures: the latter is by far the dominant form in the Netherlands.

More specifically, as regards implementation of the directive:

- Under the Dutch implementation law, the SE works council is entitled to copies of all the documents presented to the general meeting of shareholders.
- The SE works council (and the SNB) should treat as confidential not only information designated as such, but also information which any reasonable person would regard as confidential. This is in keeping with Dutch traditions (both the Law on works councils and the Law on European works councils contain such a provision), but is stricter than the directive requires.
- The bill is quite clear on the subject of consultation. The obligation to consult the works council pertains not only to the measures that follow from a decision (and that have consequences for the employees), but also to the decision as such. This is also in keeping with Dutch traditions. In many other countries, however, the decision as such is given and consultation obligations apply only to the measures resulting from this decision.
- The so-called “dynamic” form of representation. The bill is very strict on the composition of the SNB: changes in the composition of the workforce of the companies concerned must be carried over straightaway into the composition of the SNB, even during negotiations. This does not seem very practical.
- The bill does not mention the principle that negotiations should be conducted in a spirit of cooperation. According to the Cabinet, this is obvious; however, while this might be true in the Netherlands, it may be less obvious in some other countries.
- In section 3 mention was made of articles 2(12) and 2(13) of the bill. These articles assume that the agreement does not contain provisions on renegotiations. The directive, however, seems to suggest that such provisions are obligatory. Also, these provisions should be part of the agreement, and not – as stated in the bill – part of the regulations governing the SE works council.
- It is rightly pointed out that articles 2(12) and 2(13) apply to the role of workers only on the basis of an agreement and not to situations in which the role of workers is based on the annex. This seems to violate the “before-and-after” principle.

5. Procedure on information (withholding) and confidentiality

As a consequence of both the Directive on information and consultation and the SE directive, Dutch legislation on information and confidentiality will be amended, both in the Law on works councils and the Law on European works councils. As in the SE implementation law, there will be a possibility to go to court if a works council (be it European, SE or Dutch) does not agree with the confidentiality rules imposed on it by the employer, or if it thinks that the refusal to give information is unreasonable.

6. Structure law

On 6 July, the First Chamber approved the bill on amendment of the structure law. For a more detailed account of the changes I refer to my earlier report of October 2003. If the bill becomes law (it remains to be seen whether this will happen soon), the “normal” system of participation in companies will alter. In all probability, this change will then to a certain extent carry over to SEs.

7. Law on works councils

The last major revision of the Law on works councils took place in 1998. Now, in June 2004, the Cabinet has announced that the Law on works councils will be replaced by a completely new law (the Law on employee participation). A major aim is to simplify the present law and make it more flexible. Although the bill has not yet been made public (it has first been sent to the Council of State), several points can be derived from an earlier Opinion from the Cabinet and the press release accompanying the bill:

- The dispute resolution system will be changed. The present 28 sectoral councils will be abolished and the Social and Economic Council will be tasked with developing a new system.
- Works council elections will be held at – more or less – the same time each year.
- The social partners can agree (in collective agreements) to set up different structures of co-determination than the ones currently in existence.
- At present, employer and works council can agree to extend the power of the works council. In the new law, agreements to diminish the rights of the works council will be made possible.

In the new law, the works council is also given information rights on remuneration policy for different categories of personnel, including management. An announcement to that effect was made by the Cabinet at the end of April 2004. This right is restricted to the 3,000 or so works councils in the private sector that represent 100 or more employees, and the larger organisations in the public sector.

FIRST REPORT (March 2004): Transposition of the SE Directive in the Netherlands

The bill to transpose the SE Directive into Dutch law was introduced in Parliament on 14 November 2003. The Parliamentary Standing Committee on Social Affairs and Employment held its first debate on the subject on 4 February 2004.

The following topics in the bill deserve particular attention:

- The definition of “consultation”: for unknown reasons the bill does not use the definition from the SE Directive, but instead has copied the definition from the EWC Directive, which is far more restricted.
- The Dutch legislator will not exercise the opt-out in case of mergers (Directive para. 7, sect. 3).
- Generally, works councils will act as employee representatives. In the SNB, however, union representatives are also permitted.
- Notwithstanding the advice of the Social and Economic Council, the bill makes provision for the SE to pay the costs of no more than one external specialist/consultant to the SE Works Council.
- If the SNB does not decide on the type of participation (Directive para. 7, sect. 2), the bill takes the Dutch type of participation (right to nominate or object to the appointment of SNB members) as the basis.
- The bill contains a number of provisions to minimize the possibility that the ‘before and after’ principle be violated. In the agreement to be reached by the SNB special attention should be paid to changes made after establishment of the SE.

On 21 November 2003, a bill to implement the SE Statute was put before Parliament.