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‘Workers’ representation in undertakings’

Group Members: Matthieu van den Broeke, Laura de Sain, Sanne Vlastuin, Jostijn der Weduwe
Supervision: prof. Frans Pennings, prof. Teun Jaspers

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Chapter 1: Introduction

Workers' representation is seen as an essential element of Dutch labour law. The two most important types of workers' representation in the Netherlands are trade unions and the Works Council. The intervention of trade unions or the Works Council is almost indispensable. Since labour is a major part in most people's lives, so are working conditions. In order to achieve these working conditions, workers and enterprises have to work together. In order to collaborate, workers have a certain degree of participation and representation. In this report we will study workers' representation within and outside enterprises. How is workers' representation laid down in the Dutch legislation and how does the law work in practice? What are the basic principles of workers' representation and how are they protected?

In chapter 2, the first form of workers' representation will be discussed, namely the trade unions. Subsequently, in chapter 3, the Dutch Works Council will be explained as a second form of workers' representation. In chapter 4, the hierarchy between different types of workers' representation will be described. The right of collective action by trade unions will be discussed in chapter 5. The focus of chapter 6 will be on the protection of workers' representatives. In the chapter 7, we will look at workers' representation in small companies. In chapter 8 we will discuss some recent developments and future issues within workers' representation.

Below, you find a reading guide which will help you to easily find the answers written by the given questions. Also, a glossary is attached which will clarify basic and specific Dutch words in this report.

Reading Guide EWLL Seminar

Question	Chapter	Question	Chapter
1	**Chapter 2, 3 & 4**	9	**Chapter 3 & 4**
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3	**Chapter 2: 2.2**	11	**Chapter 2 & 4**
4	**Chapter 2: 2.2**	12	**Chapter 5**
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6	**Chapter 6: 6.1**	14	**Chapter 8**
7	**Chapter 2: 2.3**	15	**Chapter 8**
8	**Chapter 6: 6.2**		

Glossary

Term	In full	Explanation	Dutch
Collective agreement	-	A written agreement between one or more employers or employers' organisations and workers' organizations setting out agreements on working conditions	Collectieve arbeidsovereenkomst (CAO)
Collective Labour Agreement Act	-	Act containing rules on collective bargaining	Wet op de collectieve arbeidsovereenkomst (WCAO)
CWC	Central Works Council	An overarching Works Council for all present Works Councils within a group (in Dutch: concern)	Centrale ondernemingsraad (COR)
DCC	Dutch Civil Code	The Dutch Civil Code covers the nationale private law of the Netherlands	Nederland Burgerlijk Wetboek (BW)
Enterprise Chamber	-	The Enterprise Chamber is a special chamber (or division) of the Amsterdam Court of Appeal that is competent to hear various specific corporate law and social or financial-economic cases.	Ondernemingskamer (OK)
ESC	European Social Charter	A Council of Europe treaty which guarantees fundamental social and economic rights	Europees Sociaal Handvest (ESH)
Employer	-	The party who, on the basis of an employment agreement, is given the authority to use the workers' labour in the enterprise for the agreed period of time and under the agreed terms and conditions of employment.	Werkgever
ICCPR	International Covenant on Civil and Political Rights	Multilateral treaty containing rules on civil and political rights	Internationaal verdrag inzake burgerrechten en politiek rechten
ILO Convention	International Labour Organization Convention	Convention covering a wider area of social and labour issues including social dialogue	Verdrag van de Internationale Arbeidsorganisatie

Ktr.	Subdistrict court judge	Judge dealing with minor cases in civil and criminal law.	Kantonrechter
SER	Social Economic Council	The Social and Economic Council is an advisory council for government and parliament on socio-economic issues.	Sociaal-Economische Raad
Trade union	-	An organization that represents the individual and collective interests of affiliated workers and other members.	Vakbond
Vzr.	-	Judge dealing with urgent cases in civil or administrative law	Voorzieningenrechter
Worker	-	The person working on the basis of an employment agreement.	Werknemer
WCA	Works Council Act	The Works Councils Act regulates the composition and establishment of works councils.	Wet op de ondernemingsraad (WOR)
Works Council	-	A workers' representative body within an organization.	Ondernemingsraad (OR)

Chapter 2: Trade unions

This chapter discusses one of the major forms of workers' representation, namely trade unions. The first paragraph begins with an overview of the history and purpose of trade unions (paragraph 2.1). Following, the freedom of association will be explored (paragraph 2.2). The next paragraph will discuss whether yellow unions play a major role in Dutch Labour Law (paragraph 2.3). Lastly, the concept of collective bargaining will be explained (paragraph 2.4).

2.1 History and purpose

2.1.1 History

At the end of the nineteenth century the development of trade unions started in the Netherlands. Compared to the neighbouring countries the rise of trade unions was late. This was mainly due to the legal prohibition of trade unions, which existed until 1872.[1] But also after that abolition, employers' associations refused to recognize trade unions in the first part of the twentieth century. Moreover, membership in the union was not always beneficial for the workers. For example, the risk of the unions was that by means of a strike, the workers could be without income for a few days. But as the costs and benefits began to outweigh each other, more and more workers decided to join one of the trade unions in the early twentieth century. In 1906 a number of trade unions joined forces in the Dutch Association of Trade Unions (NVV). Together with the Roman-Catholic Workers Association (NKV), which was founded in 1909, they merged in 1981 in the Federation of Dutch Trade Unions (FNV).[2] Nowadays FNV is still the largest trade union in the Netherlands. 1.601.500 people were members of a trade union in 2019.[3] Just under 1 million of these union members are members of the FNV.[4] Other trade unions with a large number of members are 'De Unie', 'Vakcentrale middelbaar en hoger personeel' and 'Christelijk Nationaal Vakverbond' (CNV). There are also categorical unions such as the Dutch Association of Journalists (NJV) or the General Education Union (AOB).

Traditionally, the Dutch legislator plays a minor role in shaping employment conditions. Dutch labour legislation does not contain much more than minimum standards with regard to, for example, working hours, working conditions, holidays and wages.[5] Legislation concerning collective agreements is minimally regulated and there is a lot of freedom for parties to make their own agreements. The terms and conditions of employment are often shaped in a process of negotiations between employers and workers at individual and, in particular, collective level where trade unions play an important role.

[1] Tros & Albeda 2006, p. 3.
[2] Jansen 2019, p. 20.
[3] CBS Statline 25 oktober 2019.
[4] Lindelauff, 'Ledenaantal nipt beneden miljoen', *FNV Nieuws* 14 september 2019, fnv.nl.
[5] Jansen 2019, par. 2.3.1.

2.1.2 Purpose and sources of law

The trade unions are the most important workers' representatives during the formation of collective agreements. On the basis of article 1 Collective Labour Agreement Act it is their primary task to guarantee the quality of the working conditions of workers by negotiating collective agreements.

There is no legislation in the Netherlands that specifically regulates trade unions. Usually trade unions are associations, in that case Dutch association law applies to them. There are few formal requirements to qualify as a trade union. Trade unions are free to choose their own legal form. The Dutch Civil Code concludes in article 2:44 and article 2:45 that the board of the association is authorized to represent the association. In this way the board is able to conclude collective agreements. Trade unions represent not only the interests of their members but also those of workers in general. This is where trade unions distinguish themselves from other associations.

Collective agreements are the result of negotiations between parties on both the employer and workers' side. On the employer side, this can be a single employer or several employers together, an employer organization or employers' organizations. In this way an individual employer can conclude a collective agreement for its own enterprise and employers together or employer's organization(s) can conclude sectoral collective agreements. To be able to conclude collective agreements, trade unions must have full legal capacity according to article 1 Collective Labour Agreement Act. Pursuant to article 2 Collective Labour Agreement Act it explicitly must be stated in their constitution/statutes that trade unions are authorized to enter into collective agreements.

For the lawful conclusion of a collective agreement, the law does not require the associations of employers or workers to be representative. However, a workers' organization, which is not authorized by workers to do so, lacks power to negotiate with the employer.[6] Moreover, workers' organizations are not allowed to conclude a collective labour agreement for workers that they do not represent according to their association statutes.

There is no absolute right to be admitted to collective consultation. This would be contrary to the principle of freedom of collective bargaining. However, a party requesting admission may not be excluded from that consultation without a valid reason. Employers' associations are in principle free to choose their contracting parties.

2.2 Freedom of association

As discussed above, parties to the collective agreement are employers' and workers' organizations. To form certain parties, freedom of association can be an important element. This paragraph will therefore focus on the role and personal scope of the fundamental right of freedom of association in the system of workers' representation. The requirements for qualifying as an organization recognized by the freedom of association will also be discussed.

[6] Court of Appeal Amsterdam 30 July 1992, *KG* 1992/340.

2.2.1 The role of freedom of association

The freedom of association is based on the ability to function as a trade union, to conduct negotiations and the freedom to choose to join or not join a trade union. The collective freedom of association of trade unions only acquires substance if they are also given the opportunity to function in this manner. The right to collective bargaining is laid down in the ILO Convention number 98, article 6 ESC and article 12 EU Charter.[7] However, these international provisions don't have direct effect, which means trade unions cannot call upon them.

The establishment and organization of trade unions are not subject to specific legislation. The Netherlands does not have any constitutional or legal regulations that apply specifically to trade unions, whereas this is the case in France and Germany. It has to be noted that article 8 of the Constitution called 'freedom of association' states that the right of association is recognized, and may be restricted in the interest of public order. But it does not specifically say anything about the freedom of association of trade unions (or its restrictions). The establishment and organization of trade unions is governed by the general rule of association law.[8]

The Netherlands has a fairly liberal system, nothing has been settled. By law, no conditions are imposed on the formation of a trade union. When a trade union wants to join negotiations, it can do so. There is no fixed right for trade unions to participate in negotiations. This means that several trade unions are free to join negotiations. When a trade union wants their voice to be heard but is excluded from the bargaining process, it can only acquire access by collective action (discussed under chapter 5). It is important to know that, in general, enterprises see trade unions as an important partner for the regulations of working conditions.

2.2.2 The scope of freedom of association

2.2.2.1 Positive and negative freedom

There is also the individual freedom of association which entails the freedom of the individual worker to join a trade union of his own choice or not to join at all. The worker has this right without any restrictions. This is called the *positive* freedom of association, opposed to the right to be not organised, which is called the *negative* freedom of association. From an international perspective, the *negative* freedom of association is recognised to the extent that it is contrary to Article 11 of the ECHR if the loss of trade union membership leads to the loss of the employment contract. Which can be the case when there's a clause that obliges enterprise to only employ trade union members.[9] Compulsory membership is virtually no longer common in the Netherlands.

[7] See also Steenbergen, van, *TRA* 2019/106, afl. 12, p. 10; See also Jansen 2019, p. 64.
[8] Bakels 2019, p. 274.
[9] Bakels 2019, p. 277.

2.2.2.2 Self-employed workers

If the self-employed want to be represented by a trade union they (1) can join a trade union specifically for the self-employed or (2) they can join a traditional trade union. In practice, there are traditional trade unions in which the self-employed are incorporated. The FNV, for example, has such a union who also defends the interest of the self-employed. The FNV has several trade unions organized around different professions. Within these professions they also want to represent the self-employed. Self-employed persons can therefore join these unions. It has to be noted that there are also self-employed persons who appear to be self-employed but are actually workers. These persons are actually in a situation comparable to that of a worker and therefore need to be considered as workers.[10] The situation of self-employed workers will be further discussed in chapter 8.

2.2.3 Requirements recognized organization

The Netherlands does not have any legislation regarding requirements that have to be met to be recognized as an organization. This means that there are no specific requirements for trade unions or enterprises to be qualified as a legally or actually recognized organization. Therefore, there are no rules to being the most representative[11] trade union in negotiations. The concept of being the largest representative of all trade unions does not apply.[12] If a trade union is not involved within negotiations, there is nothing it can do about it. The only option the trade union has is to make use of its right of collective action (as discussed in paragraph 5.2).

Although there is no legislation regarding the requirements to be recognized as an organization, trade unions are important within the establishment of working conditions. Almost all employers and workers in the Netherlands 'embrace' the system of collective bargaining between employers (unions) and trade unions.[13] In practice, the unions and the trade unions are also the only parties to conclude collective agreements and thus regulate the terms of employment for the vast majority of enterprises and workers. There are very few exceptions to this 'system'.[14]

2.3 Yellow Unions

The term 'yellow union' is known in the Netherlands. However, it is not one of the major topics discussed in literature or within the Dutch government. The first time our country was introduced to a so-called yellow union was in the summer of 2003. In the procedure for declaring a collective agreement generally binding, the Minister of Social Affairs and Employment came across trade unions set up by the employer with the aim to enter into highly

[10] HvJ EU 4 December 2014, ECLI:EU:C:2014:2411, NJ 2015/205 *(FNV/Kiem)*; See also HvJ 14 December 2006, ECLI:EU:C:2006:784 *(Confederación Española de Empresarios de Estaciones de Servicio)*.

[11] See for a definition of 'representative': Opinion concerning the representativeness of organizations of entrepreneurs and employees in relation to the composition of public law colleges (Advice of 19 December 1975, SER 1976/5), The Hague: SER 1976/5, p. 9; See also Jansen 2019, p. 55.

[12] See also Jansen 2019, par. 6.3.3.

[13] See also Bakels 2019, p. 283-284.

[14] See also Steenbergen, van, *TRA* 2019/106, afl. 12, p. 10.

competitive collective agreements.[15] A discussion has been going on for over ten years about the desirability of curbing the role of such yellow unions.[16] Possible options and solutions are offered in Dutch literature, but it is not high on the legislator's agenda. The question is whether the role of yellow unions in the Netherlands is actually of such size that something needs to be done. There is no legal representativeness requirement in the Netherlands for the reason that only members are bound by a collective labour agreement and these members have voluntarily chosen for membership. Non-members therefore retain their contractual freedom at all times. Theoretically, they are free not to accept the applicability of a collective labour agreement. Although in practice, article 14 Collective Labour Agreement Act and the incorporation clauses (further elaborated in paragraph 2.4.2 and 2.4.4) provide for almost 100% boundness to the collective labour agreement. A worker should immediately state when drawing up his employment contract that he does not want to be bound by the collective agreement. This hardly ever happens in practice.

The representativeness of a trade union can still be tested by the court at two moments. This is the case when a trade union wants to be admitted to collective bargaining and when workers question the applicability of the collective agreement. In the first case, a trade union can go to trial and question the independence of the yellow union. The court will have to examine whether the yellow union is sufficiently representative and fits the fundamental conditions of being a trade union. In the second case, workers can state that they are not bound by the collective labour agreement concluded by the yellow union because they are not recognized as an independent trade union and were not allowed to conclude the collective agreement. International conventions, such as ILO conventions 87 and 98, also provide guarantees for freedom of association and thus also provide the qualitative standards that must be set for free trade unions. In the Netherlands, a request for dispensation requires that there must be 'specific enterprise characteristics'. The number of collective labour agreements concluded with yellow unions is now relatively small.[17]

Illustration of yellow unions in Dutch jurisprudence

A ruling was given by the court in Amsterdam[18], which, at the request of an FNV association, ruled that a collective agreement entered into by the Union with regard to the reorganisation of the HEMA stores, was non-binding. The court's consideration: under the articles of the association, the Union's objective was to act for the senior staff and the collective agreement only concerned lower (store)staff.[19]

[15] Jaspers, *TRA* 2004/1.
[16] Bakels 2019, p. 293.
[17] Bakels 2019, p. 294.
[18] Court of Amsterdam (vzr.) 29 December 2005, ECLI:NL:RBAMS:2005:AU8865.
[19] Plessen, *TRA* 2012/54; Jansen 2019, p. 150; See also Heerma van Voss, *SR* 2006/73;

2.4 Collective bargaining

2.4.1 Collective agreements on employment conditions

Trade unions have the power and authority to lay down binding rules within labour law. The collective agreement is an agreement between trade union(s) and the employers' associations within a certain (corporate) sector or between an employer and trade union(s). Primary, secondary and tertiary employment conditions can be laid down in a collective agreement.

2.4.2. Binding effect of the collective agreement

Workers who are a member of a trade union are bound by the collective agreements concluded by the trade union on the basis of their membership pursuant to article 9 Collective Labour Agreement Act. Even when a worker is not a member of a trade union the employer has to apply the collective agreement on the worker on the basis of article 14 Collective Labour Agreement Act. In accordance with article 14 Collective Labour Agreement Act the employer who is bound by the collective agreement must apply the provisions of the collective agreement to all his employees. In principle, the collective labour agreement therefore also applies to the workers who are not members of a trade union. This is only different if the worker who is not bound explicitly indicates to the employer that he does not want to be bound.
Only workers who are a member of the trade union can - in contrast with non-members - directly invoke the collective agreement. Underlying idea is that one still has advantages when one is a member of a trade union.[20]

A clause in the individual employment agreement that conflicts with a collective agreement, whereby employer and worker are bound, is void on the basis of article 12 Collective Labour Agreement Act and will be replaced automatically by the provision of the collective agreement.

2.4.3. Generally binding to the collective agreement

The binding effect of collective agreements can be extended by a specific decision of the government. Parties may also request the Minister for Social Affairs and Employment to declare a collective agreement to be generally binding (AVV) pursuant to Article 2 (1) in conjunction with Article 4 (1) Act declaring provisions of collective agreements to be generally binding. In that case, the Minister of Social Affairs and Employment shall assess whether the collective agreement in question should be declared universally binding pursuant to Article 4 (2) of the Act. If the Minister decides to declare the collective agreement in question to be generally binding, this shall be deemed to be a decision under public law within the meaning of Article 5 of the Act. The collective agreement in question then applies to the entire sector, regardless of whether or not the employer or the worker is a member of one of the parties to the collective agreement.

2.4.4. Incorporation

Lastly, employers and workers can be bound by a collective agreement through the employment contract. If the applicability of a collective agreement explicitly is included in the

[20] Supreme Court 7 June 1957, NJ 1957, 527 *(Suk/Brittania)*.

employment contract, the provisions of the collective agreement are directly inserted in the individual employment contract. This is called an *incorporation clause*. Based on contract law, both the employer and the worker can invoke the applicable collective agreement when an incorporation clause is included.[21]

[21] Supreme Court 20 December 2002, ECLI:NL:HR:2002:AF2166, (*Bollemeijer/TPG Post)*, r.o. 3.3; See also Jansen 2019, p. 81.

Chapter 3: The Works Council

To sufficiently support workers' representation, the Works Council also has various rights and duties laid down in the Works Council Act (hereinafter: "WCA"). This chapter will first discuss the history and purpose of the Works Council as is known thus far in the Netherlands (paragraph 3.1). Secondly it will discuss the rights and duties of the Works Council. These can be subdivided in general rights and duties (paragraph 3.2), the advisory right (paragraph 3.3) and the right of consent (paragraph 3.4). Since the advisory right and the right of consent are such important traits of the workers' representation in the Netherlands, these rights will be discussed in more depth and detail. Thirdly, a couple of options according to procedural powers of the Works Council will be discussed in paragraph 3.5. Lastly, we will discuss the option the Works Council has to sign an agreement with the employer (paragraph 3.6).

3.1 History and purpose

3.1.1 History

On the 4th of May 1950 the WCA was adopted, which forms the basis for the Works Council and its rights and duties (paragraph 3.2). Since then there have been some changes made to the WCA. In 1971 a comprehensive revision of the WCA was made which provided for participation and consent for the first time. In 1979 the legislation of the WCA was adapted into "The New Style Works Council". With this new legislation the Works Council first of all became an independent corporate body with only elected members (so without the entrepreneur being member). Second, the consultation between the Works Council and the entrepreneur from then takes place via a consultation meeting. And thirdly, there was an extension of the powers of consultation and consent. From 1995 until now there have been several legislative amendments. This has shaped the WCA as we know it to date and as will be discussed in this chapter.

3.1.2 Purpose and sources of law

The Dutch Works Council is the elected representative body of workers. The Works Council represents and protects the interests of the workers with due regard for the interests of the enterprise. In the sense of the WCA the concept of an enterprise is *'any organizational entity acting in a self-employed capacity within society in which work is carried out on the basis of an employment contract'*.[22] The purpose of the Works Council is consultation between the entrepreneur[23] with, and representation of, the persons working in the enterprise *'in the interest of the proper functioning of the enterprise in all its objectives'*.[24]

[22] Article 1 (1) (c) WCA.
[23] The WCA has its own definition of 'entrepreneur' which is laid down in Article 1 (1) (d).
[24] Article 2 WCA.

3.1.2.1 The 'general' Works Council

Every enterprise in the Netherlands with over 50 persons working is required to have a Works Council. It is mandatory by law, as stipulated in the WCA.[25] The Netherlands is the only country in the EU where the employer is obliged to establish a Works Council. Although there are no major consequences if there is none, the Dutch open and cooperative culture considers it 'not done' to not abide by this law. The Social Economic Council (SER) is the body supervising compliance with this requirement. In practice, the Social Economic Council is not very strict in monitoring this requirement. Currently, only 67% of all enterprises comply with the required establishment of a Works Council laid down in the WCA. You could say that, for some reason, the employer is not so keen on establishing a Works Council. However, the establishment of a Works Council is enforceable. On the basis of article 36 WCA every party with a legitimate interest may petition the judge of the court to rule that the entrepreneur must comply with all requirements stipulated in or pursuant to the WCA relating to the establishment of a Works Council.

If after the establishment of the Works Council an enterprise no longer generally employs at least 50 persons, the Works Council generally ceases to exist by operation of law at the end of the current term of the Works Council.[26] If an enterprise has less than 50 workers it can be obliged to have a Works Council in case a collective agreement entails such obligation.[27] It can also voluntarily decide to have a Works Council.[28] In case of a voluntary Works Council, the Works Council does not cease to exist by operation of law as laid down in article 2 (2) WCA.

3.1.2.2 The Central Works Council

The enterprise can also have a Works Council which applies on a higher level, the Central Works Council (CWC).[29] An enterprise is obliged to have a Central Works Council when it is part of a group of enterprises (which is called a 'concern' in Dutch). A Central Works Council consists of members elected by the relevant Works Councils from the members of each of those councils.[30] On the basis of article 35 WCA the Works Council has the same rights and duties as the 'general' Works Council in the sense of article 22a till 32 WCA (with the exception of articles 23c and 24 (3) WCA). This is important to take note of since the Central Works Council can exercise all its rights and duties on matters of common interest to all or a majority of the enterprises for which they have been established, regardless of whether or not powers in respect of such matters are vested in the individual Works Council.[31] This means that if certain matters of common interest are vested in separate 'general' Works Councils, these shall be transferred to the Central Works Council.[32] Beside the general rights (paragraph 3.2), the most important rights that transfer to the Central Works Council are the advisory right (paragraph 3.3) and the right of consent (paragraph 3.5). All matters within the lists on the advisory right and the right

[25] Article 2 (1) WCA.
[26] Article 5a (1) WCA
[27] Article 5a (1) WCA.
[28] Article 5a (2) WCA.
[29] Article 33 (1) WCA.
[30] Article 34 WCA.
[31] Article 35 (1) WCA.
[32] Article 35 (2) WCA.

of consent that have common interest are then transferred to and therefore exercisable by the Central Works Council.

3.2 General rights and duties

The Works Council has special rights and duties laid down in the WCA. In this paragraph the general rights and duties of the Works Council will be discussed; the right to information, the consultation right and the right to initiative.

To make sure the Works Council can function in the best way they first have a ***right to information*** laid down in article 31a and 31b WCA. Article 31a of the WCA is the provision of general information about the activities and results of the enterprise (at least twice a year), the submission of the adopted annual accounts and related information. Article 31b WCA can be considered as the social counterpart of article 31a WCA. The obligation to provide information relates to social and personnel data and is referred to as the annual social report. The entrepreneur shall also communicate its expectations regarding the development of the workforce and its intentions regarding the social policy to be pursued. After all, it is in the interests of the Works Council to hear at an early stage if the entrepreneur intends to set up an institution for the benefit of workers working in the enterprise. The method of providing information differs from subsection 1 in that the entrepreneur is allowed to provide the information orally to the Works Council.

Secondly, the Works Council has a ***consultation right*** laid down in article 23 and 24 WCA. If a Works Council wishes to be consulted with the director, it may, on the basis of article 23 WCA, submit a request stating the reason for the consultation. The consultation meeting must take place within two weeks after the request of the Works Council. The director may also submit such a request to the Works Council. The Works Council may deliberate on all subjects if it deems this necessary or if the WCA requires so. The Works Council also has a consultation right laid down in article 24 of the WCA. In this consultation meeting the director and the Works Council discuss the general course of affairs within the enterprise. The director can tell the Works Council what has happened during the past period and what is on the agenda. In this way, the Works Council can prepare for any requests for advice (paragraph 3.3) or requests for consent (paragraph 3.5). According to the WCA the consultation right must take place at least twice a year.

Thirdly, the Works Council has the ***right of initiative*** laid down in article 23 (3) WCA. When the Works Council considers an issue within the enterprise important, it does not have to wait for the director to come up with a plan. There are two forms of the right of initiative: (1) When the Works Council makes a suggestion during a consultation meeting, it makes use of the oral right of initiative. (2) With the written right of initiative, the Works Council can also submit proposals outside the consultation meeting. The Works Council may make unsolicited proposals to the director on all social, organizational, financial and economic matters. Before deciding on the proposal, the director must consult the Works Council at least once. After the consultation, the director must inform the Works Council in writing as soon as possible whether he accepts the proposal. The director must also explain why he does or -more important- does not agree with the proposal.

3.3 Advisory right

One of the most important rights to which the Works Council is entitled to the advisory right laid down in article 25 of the WCA.

3.3.1 Subjects of advisory right (article 25 WCA)

This advisory right is related to decisions intended by the entrepreneur in the financial-economic field.[33] The Works Council only has advisory rights with regard to intended decisions on matters included on the list of article 25 (1) WCA:

a. Transfer of control of the enterprise or any part thereof;
b. The establishment, take-over or relinquishment of control of another enterprise, or entering into, making a major modification to or severing a continuing collaboration with another enterprise, including the entering into, effecting of major changes to or severing of an important financial holding on account of or for the benefit of such an enterprise;
c. Termination of operations of the enterprise or a significant part thereof;
d. Any significant reduction, expansion or other change in the enterprise's activities;
e. Major changes to the organization or to the distribution of powers within the enterprise;
f. Any change in the location of the enterprise's operations;
g. Recruitment or hiring of labour on a group basis;
h. Making major investments on behalf of the enterprise;
i. Taking out major loans for the enterprise;
j. Granting substantial credit to or giving security for substantial debts of another entrepreneur, unless this is normal practice and part of the activities of the enterprise;
k. The introduction or alteration of an important technological provision;
l. Taking an important measure regarding the management of the natural environment by the enterprise, including the taking or changing of policy-related, organizational or administrative measures relating to the natural environment;
m. Adopting a provision relating to the bearing of the risk mentioned in Article 40, paragraph (1) of the Social Insurance Funding Act;
n. Commissioning an expert from outside the enterprise to advise on any of the matters referred to above and formulating his terms of reference.

It has to be noted that the advice of the Works Council must be requested at such a time that it can have a substantial influence on the decision to be taken. These provisions, which attempt to give substantive content to the right of advice, are indispensable for the proper functioning of article 25 WCA. This means the decision has to be an 'intended' decision.[34] This is important because the enterprise has to actually take the advice of the Works Council seriously into account in its decision-making process.

[33] Houweling, Vestering, Zondag & Laagland, in: *Sdu Commentaar Arbeidsrecht Thematisch,* art. 25 WOR.
[34] Court of Appeal Amsterdam (Enterprise Chamber) 1 mei 1980, ECLI:NL:GHAMS:1980:AB7579 *(OR/Linge Ziekenhuis)*.

3.3.2 Dispute resolution

3.3.2.1 The Enterprise Chamber

The Works Council has the ability to go to court. The following case law under paragraph 3.3.3 stems from rulings by a special chamber of the Court of Appeal Amsterdam, the Enterprise Chamber. With regard to judgments relating to article 25 (and 26) WCA, it is the Enterprise Chamber that rules. In comparison to other countries, it is a unique aspect that the Works Council has to enforce its rights in court. In terms of the content of the right of advice, the Enterprise Chamber is not allowed to say much. Whereas, if the enterprise does not comply with the prescribed procedural aspects of article 25 and 26 WCA, the Enterprise Chamber has far reaching powers. The ability for the Works Council to go to the Enterprise Chamber is therefore a strong weapon towards the entrepreneur.

3.3.2.2 The procedure

If the enterprise fails to comply with article 25, the Works Council can appeal to the Enterprise Chamber of the Amsterdam Court of Appeal on the basis of article 26 WCA in three cases. The Works Council can do so when (1) the entrepreneur deviated from the advice, (2) when new facts have come to the surface after the advice has been given or (3) when no advice was sought where this is required. An appeal shall be lodged against a final decision, as referred to in article 25 (5) WCA, and not against an intended decision.[35] It has to be noted that the Works Council does not sit on the chair of the entrepreneur, but all formal points as stated above can lead to a procedure on the basis of article 26 WCA. It can therefore be a far-reaching limitation of the entrepreneurs' powers.

To comply with article 25 WCA, the entrepreneur has to follow the procedure set out. First, the entrepreneur asks the Works Council for advice on an intended decision.[36] The entrepreneur has to submit the intended decision to the Works Council timely and in writing, stating the reasons for the decision.[37] Secondly, there will be a first consultation meeting, followed by an advice from the Works Council.[38] The decision of the entrepreneur following the advice of the Works Council can be positive, negative or conditional. The entrepreneur has to motivate the decision based on the advisory right.[39] In case the entrepreneur decides to deviate from the advice of the Works Council, there will be a suspension of execution of the decision for one month.[40] This rule is related to the right of appeal laid down in article 26 WCA. Failure to comply with article 25 of the WCA not only means that the Works Council has not been able to take notice of the contents of and the reasons for the intended decision in the prescribed manner, but also that the entrepreneur has not been able to take notice of the opinion of the workers' participation in the prescribed manner.[41]

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[35] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 26 WOR.
[36] Article 1 (1) and (d) WCA.
[37] Article 25 (2 and 3) WCA.
[38] Article 25 (4) WCA.
[39] Article 25 (5) WCA.
[40] Article 25 (6) WCA.
[41] Court of Appeal Amsterdam (Enterprise Chamber) 1 May 1980, ECLI:NL:GHAMS:1980:AB7579 *(OR/Linge Ziekenhuis)*.

The assessment criterion for the Enterprise Chamber is that *the entrepreneur could not reasonably have reached a decision when weighing up the interests involved.*[42] This makes that the decision is considered as being taken manifestly unreasonable.[43] If the Enterprise Chamber considers the appeal to be well-founded, it may make provisions if the Works Council has requested them. It may oblige the entrepreneur to revoke its decision in whole or in part, as well as to undo the consequences of the decision to be indicated. On the basis of article 26 (6) WCA the Enterprise Chamber may attach a penalty for failure to comply with an injunction or order of the Enterprise Chamber.[44]

Data shows that 520 decisions have been rendered by the Enterprise Chamber pursuant to article 26 WCA up to the end of 2018. This amounts to an average of 13,3 per year. With regard to the results of the judgements of the Enterprise Chamber, the entrepreneur has won the case in 57% of cases and the Works Council in 43% of cases.[45] Taking into account that, over the years, 73% of the requests submitted to the Enterprise Chamber are withdrawn before the Enterprise Chamber has to issue a decision, it can be concluded that the entrepreneur and the Works Council have equal chances of success with a procedure before the Enterprise Chamber.[46]

3.3.3. Effectiveness of article 25

In order to get a better perspective on what such matters entail in practice, matters which have been given substance in case law from the Enterprise Chamber will be discussed below. The following examples entail topics that are elementary to the right of advice when it comes to important decisions within the enterprise.[47]

Article 25 (1) (b) WCA

On the basis of article 25 (1) (b) WCA the Works Council can first exercise its advisory right when there is a change of control within the enterprise. Secondly the Works Council has an advisory right when there is a change in the termination of a long-term cooperation with another enterprise (including financial participations within another enterprise).[48] According to the Enterprise Chamber a signed declaration of intent can be considered an important decision if it concerns a long-term cooperation lasting at least twelve months.[49] A declaration can therefore imply a duty to provide advice. In this case the entrepreneur wrongly did not ask the Works Council for advice regarding the intended decision to enter into the agreement laid down in the letter of intent.[50]

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[42] Article 27 (4) WCA.
[43] Court of Appeal Amsterdam 1 May 1980, *NJ* 1981/271.
[44] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 26 WOR.
[45] Meyer & Sprengers 2019, p. 27-40.
[46] Sprengers, *TRA* 2019/109, p. 25-26.
[47] See for a more detailed overview of court decisions on the basis of Article 25 WCA: Meyer & Sprengers 2019, p. 65-69.
[48] According to case law, this cooperation has to be sustainable; Court of Appeal Amsterdam (Enterprise Chamber) 16 December 1993, *ROR* 1994/5.
[49] Court of Appeal Amsterdam (Enterprise Chamber) 20 January 2011, *JAR* 2011/69, r.o. 3.2.
[50] Court of Appeal Amsterdam (Enterprise Chamber) 20 January 2011, *JAR* 2011/69, r.o. 3.4.

Article 25 (1) (c) WCA

On the basis of article 25 (1) (c) WCA has an advisory right when there is a termination of operations of the enterprise or a significant part thereof, in practice it often involves a relocation of a certain department. According to the Enterprise Chamber it can be taken into account if it concerned an independent part of the enterprise that concentrated on a specific and recognizable activity.[51] Besides, the view of the number of workers involved also plays a role.[52] This was also the case when a freight forwarder did not request an opinion of the Works Council on the decision to relocate the freight forwarding department.[53] This decision was also subject to the advisory right because it entailed a significant part of the enterprise.

Article 25 (1) (d) WCA

On the basis of article 25 (1) (d) WCA the Works Council has advisory right when there is a significant reduction, expansion or other change in the enterprise's activities. In the case of downsizing, contrary to the intention to close down, this concerns decisions that do not involve the cessation of all activities but part of them. The requirement is, however, that it must be a significant reduction. Whether there is a 'significant reduction' is determined by the specific circumstances of the case. In case of the cessation of part of the production it was the entrepreneur who was favoured by the Enterprise Chamber. According to the Enterprise Chamber there was no significant reduction as referred to in article 25 (1) (d) WCA in the situation where such decisions are taken twelve to twenty times a year.[54]

Article 25 (1) (e) and (f) WCA

The Works Council can, for example, exercise its advisory right on the basis of article 25 (1) (e) WCA when the enterprise decides to make significant changes in the organization, or in the distribution of powers within the enterprise. For example, changing from a three-person board to a one-person board. This decision was not only important because of the number of staff directly concerned, but mainly because of the indirect consequences for the workers covered by the board.[55] On the basis of article 25 (1) (f) WCA the Works Council has advisory right when there is a change in the location of the enterprise's operations. Temporary relocations can also be subject to the advisory right.[56] This does not include relocation within a building.[57]

Article 25 (1) (h) WCA

On the basis of article 25 (1) (h) WCA the Works Council has advisory right when there are major investments on behalf of the enterprise. But what is considered a 'major' investment? The existence of a significant investment is not only determined by the size of the amount involved, the implications on the workers also play a role. How major the investment is will also be judged by the size of the entrepreneur's annual investment.[58] An investment by the University of Amsterdam of €16 million out of a total amount of €29 million in 2000 and €46

[51] Court of Appeal Amsterdam (Enterprise Chamber) 29 May 2007, *JAR* 2007/204 (*TNT Fashion Group*).
[52] Court of Appeal Amsterdam (Enterprise Chamber) 29 September 2003, *JAR* 2003/261 (*Topcraft*).
[53] Court of Appeal Amsterdam (Enterprise Chamber) 29 May 2007, *JAR* 2007/204 (*TNT Fashion Group*).
[54] Court of Appeal Amsterdam (Enterprise Chamber) 26 March 1981, *NJ* 1982/246.
[55] Court of Appeal Amsterdam (Enterprise Chamber) 23 January 2004, *JAR* 2004/47.
[56] Court of Appeal Amsterdam (Enterprise Chamber) 8 January 1987, *NJ* 1988/401.
[57] Court of Appeal Amsterdam (Enterprise Chamber) 20 July 2005, *JAR* 2005/219.
[58] Court of Appeal Amsterdam (Enterprise Chamber) 1 March 2001, *ROR* 2001/12.

million in 2001 was considered making a major investment and was therefore an important decision.[59] Whereas the investment of €31.000 with an annual investment of €900.000 was too small and therefore not subject to the advisory right.[60]

Article 25 (1) (n) WCA

On the basis of article 25 (1) (n) WCA the Works Council has a right to give advice and has a right to choose an expert. The Enterprise Chamber explains section n broadly. For example, it considered the entrepreneur's intended decision to participate in a working group where it was discussed how savings would be implemented and would be subject to the obligation to provide advice under Article 25(1)(n).[61]

Extension of the advisory right (article 32 WCA)

The advisory right can also be extended on the basis of article 32 WCA. In the event of a collective agreement, a unilateral decision by the entrepreneur or a written agreement concluded between the entrepreneur and the Works Council, more powers may be granted to the Works Council. This means that the Works Council can therefore also have an advisory right on matters not subjected in article 25 WCA.[62]

3.4 Right of consent

The right of consent under article 27 of the WCA is, besides the advisory right of article 25 WCA, one of the most important rights of the Works Council.

3.4.1 Subjects of right of consent

The right of consent relates to intended decisions of the entrepreneur in the field of working conditions of the personnel.[63] The endorsement of the Works Council shall, on the basis of article 27 WCA, be required for every intended decision on the part of the entrepreneur to lay down, amend or withdraw:[64]

a. Regulations pursuant to a pension agreement, a profit-sharing scheme or a savings scheme;
b. Regulations relating to working hours and rest periods or holidays;
c. Pay or job-grading systems;
d. Regulations relating to working conditions, sick leave or reintegration;
e. Regulations relating to policy on appointments, dismissals or promotion;
f. Regulations relating to staff training;
g. Regulations relating to staff appraisals;
h. Regulations relating to industrial social work;
i. Regulations relating to job coordination meetings;
j. Regulations relating to complaints procedures;

[59] Court of Appeal Amsterdam (Enterprise Chamber) 1 March 2001, *ROR* 2001/12.
[60] Court of Appeal Amsterdam (Enterprise Chamber) 10 July 2003, *JAR* 2003/238.
[61] Court of Appeal Amsterdam 29 November 1984, Rechtspraak medezeggenschap IV, 40.
[62] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 32 WOR.
[63] Houweling, Vestering, Zondag & Laagland, in: *Sdu Commentaar Arbeidsrecht Thematisch*, art. 27 WOR.
[64] Article 27 (1) WCA; In Supreme Court 26 June 1987, NJ 1988/93 *(Amro)* the Supreme Court has previously ruled that when interpreting the list of Article 27(1) WCA, the subjects must be interpreted according to their nature and meaning.

k. Regulations relating to the handling and protection of personal information of persons working in the enterprise;
l. Regulations relating to measures aimed at or suitable for monitoring or checking the attendance, behaviour or performance of persons working in the enterprise;
m. A procedure for dealing with a report of a suspected abuse, as mentioned in Article 2, paragraph (1) of the Whistleblowers Authority Act.

In short, the entrepreneur must ask the Works Council for its approval for the establishment, amendment or withdrawal of matters being insofar as they relate to all the persons working in the enterprise. Such as regulations for working hours, working conditions, training, job assessments and absenteeism.[65] Not every act with consequences for working hours or renumeration can be considered a decision requiring consent on the basis of article 27 WCA.[66] Decisions that have a one-time character and an ad hoc nature fall outside the scope.[67] But if those decisions are a result of policy considerations made in advance they fall within the scope and therefore require consent.[68] In order to get a better perspective on what such matters entail in practice, matters which have been given substance in case law will be discussed below.

3.4.2 Dispute resolution

3.4.2.1 The court

In comparison to the advisory right, it's a different court who is authorized according to procedures relating to the right of consent. It is the 'ordinary' court (in Dutch called the kantonrechter) that decides on such cases.

3.4.2.2 The procedure

If the Works Council refuses to consent, the entrepreneur can go to the court to ask permission to take the decision. The court may give its consent when the decision of the Works Council not to give its consent is unreasonable or if the intended decision is required of the entrepreneur for serious organizational, economic or social reasons.[69] The court assesses if the opinion of the Works Council not to give its consent is unreasonable by balancing the interests between the various arguments put forward by the entrepreneur and the Works Council. If the position of the entrepreneur is judged to be more reasonable, the position of the Works Council is therefore unreasonable. If both positions are weighed equally, the position of the Works Council is not reasonable, which is also the case if the position of the Works Council is more reasonable than that of the entrepreneur.[70]
When a decision is taken without the required consent of the Works Council or substitute consent of the court, the decision is null and void. However, this nullity only takes effect if the

[65] Houweling, Vestering, Zondag & Laagland, in: *Sdu Commentaar Arbeidsrecht Thematisch*, art. 27 WOR.
[66] Sprengers, *TRA* 2019/109, p. 28.
[67] Supreme Court 8 March 2019, ECLI:NL:HR:2019:314, *TRA* 2019/50, m.nt. I. Zaal; *TRA* 2019/61, m.nt. L.C.J Sprengers; Court of Appeal 's-Hertogenbosch 9 May 2019, ECLI:NL:GHSHE:2019:1789.
[68] Court Arnhem (pres.) 4 July 1995, *JAR* 1995/173 en Court Arnhem (ktr.) 5 March 1996, *JAR* 1996/101 *(OR/Koninklijke Gazelle)*.
[69] Article 27 (4) WCA; See for example: HR 24 January 2014, ECLI:NL:HR:2014:159 *(OR/Stena Line)*; Court Limburg 22 October 2018, ECLI:NL:RBLIM:2018:10045, *JAR* 2019/26 *(Weir Minerals Netherlands BV)*.
[70] Sprengers, *TRA* 2019/109, p. 29.

Works Council has invoked the nullity against the entrepreneur within one month.[71] The entrepreneur may request the court to declare that the Works Council has wrongfully invoked nullity.[72]

3.4.3 Effectiveness of article 27

In order to get a better perspective on what such matters entail in practice, matters which have been given substance in case law from the court will be discussed below. The following examples entail topics that are elementary to the right of consent when it comes to important decisions within the enterprise. It has to be taken into account that the right of consent almost always concerns the policy of the enterprise according a certain matter, fundamentally it does not entail individual cases.

Article 27 (1) (a) WCA

The Works Council can exercise its right of consent on the basis of article 27 (1) (a) WCA when the entrepreneur intends to take a decision to adopt, amend or revoke plans under a pension agreement, profit-sharing plan or savings plan. Resulting from the legal history of article 27 WCA a change in pension insurance schemes is considered a secondary employment condition, which has not been withdrawn from the right of consent of the Works Council.[73]

Article 27 (1) (b) WCA

On the basis of article 27 (1) (b) WCA the Works Council has a right of consent on regulations relating to working hours and rest periods or holidays. A working time or rest time regulation does not concern the determination of working hours, but rather a regulation that determines the hours at which work is carried out. With regard to a holiday scheme, the right of consent does not concern the determination of the holiday, but rather a scheme that determines the days on which holidays are taken.[74] The vast majority of jurisprudence in the field of the right of consent relates to decisions that fall under this section.[75]

Article 27 (1) (c) WCA

On the basis of article 27 (1) (c) WCA the Works Council has a right of consent according to reward- and job grading systems. A reward system does not include the amount of the reward. But it does concern the way in which rewards are calculated and jobs are valued.[76] According to the court a scheme indicating the circumstances under which a certain group of workers may be eligible for options or bonuses is subject to the right of consent.[77]

Article 27 (1) (d) WCA

On the basis of article 27 (1) (d) WCA te Works Council has a right of consent according to regulations relating to working conditions policy deals with the matters relating to safety,

[71] Article 27 (5) WCA.
[72] Article 27 (6) WCA.
[73] Parquet at the Supreme Court 25 October 2013, ECLI:NL:PHR:2013:1106 *(OR/Stena Line),* r.o. 2.8.
[74] Court Midden-Nederland 6 March 2015, ECLI:NL:RBMNE:2015:1348, r.o. 4.5.
[75] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 27 WOR, par. 3.
[76] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 27 WOR, par. 4.
[77] Court of Appeal 's-Hertogenbosch 31 July 2002, *JAR* 2002/187; Court of Appeal 's-Hertogenbosch 23 May 2006, *JAR* 2007/33.

health and well-being at work.[78] An example was a decision to change the number of supervisors in casinos that may also have an impact on safety at work. But since the employer did not intend to regulate those safety aspects, it was not covered by the right of consent.[79]
The Works Council also has a right of consent if there is a sick leave scheme or reintegration policy. This is the case when the entrepreneur wants to inforce to reduce absenteeism or the establishment, amendment or withdrawal of an absenteeism regulation. This does not include a reintegration plan focused on a worker.[80]

Article 27 (1) (g) WCA

On the basis of article 27 (1) (g) WCA the personnel assessment system used by the entrepreneur is subject to the right of consent. In practice, the entrepreneur often uses a cycle of interviews. It is possible that the rating system used in these interviews has consequences for the reward policy as discussed under article 27 (1) (c) WCA. For example, the use of mystery-guests to assess the performance of bus drivers can lead to a mandatory scheme of consent.[81]

Article 27 (1) (k) WCA

The Works Council can exercise its right of consent when there is a creation of personal records and regulations concerning the collection, storage, use and security of personal data drawn up by the entrepreneur.[82] According to the court the decision to authorize a manager to grant access to workers' e-mailboxes falls under this scope.[83] The Works Council did not have a right of consent when first names of workers were included in a customer satisfaction survey.[84]

Extension of the right of consent (article 32 WCA)

The Works Council can also have a right of consent with subjects not mentioned in the list of article 27 (1) WCA.[85] The right of consent can be extended on the basis of article 32 WCA.

3.5 Procedural powers of the Works Council

In addition to the dispute resolutions under article 25 and 27 WCA, the Works Council also has other options with regard to the settlement of disputes. In principle, only natural and legal persons have standing to institute proceedings. However, the Works Council may also have this power if the WCA or another law explicitly grants this power.[86] Two options will be discussed below (it has to be noted that the Works Council has more specific procedural powers that will not be discussed in this paragraph).[87]

[78] Court Haarlem (ktr.) 20 July 2001, JAR 2002/120 *(OR Corus Packaging Plus).*
[79] Supreme Court 20 December 2002, *JAR* 2003/18.
[80] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 27 WOR, par. 5.
[81] Court of Appeal 's-Hertogenbosch 17 November 2016, ECLI:NL:GHSHE:2016:5163.
[82] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 27 WOR, par. 11.
[83] Court of Appeal Amsterdam 14 May 2013, ECLI:NL:GHAMS:2013:1495.
[84] Court Amsterdam 10 October 2017, ECLI:NL:RBAMS:2017:7888 (*OR Apple Retail Nederland*).
[85] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 32 WOR.
[86] Supreme Court 3 December 1993, *NJ* 1994, 375.
[87] See for a description of the other procedural powers: Nekeman & Schijf, *ArbeidsRecht* 2010/5.

3.5.1 Procedure of compliance with the WCA (article 36 WCA)

According to article 36 (2) WCA the Works Council may request the court to rule that the enterprise must comply with the other provisions of or by virtue of the WCA, to the extent that this depends on the enterprise.[88] This concerns all compliance requests other than those referred to in article 36 (1) WCA.[89] On the basis of article 36 (5) WCA the court may impose an injunction (an obligation to refrain from performing certain acts) or an injunction (an obligation to perform certain acts). Article 36 (7) WCA declares the enterprises failure to comply with an injunction to perform a prohibited act. This means that failure to comply can be punishable.[90]

3.5.2 Procedure on postponement of the time limit and suspension of the advisory procedure

In practice the entrepreneur imposes the Works Council strict deadlines to exercise its advisory right. If this deadline is not achievable, the Works Council has the option of seeking an extension in summary proceedings by the court. According to the court the postponement can be granted when the Works Council needs the time to give careful and substantiated advice.[91] It is also possible for the Works Council to demand an injunction to suspend the decision of the entrepreneur.[92] In practice this could be an option for the Works Council in case the Works Council could not exercise its advisory right within the set period and the entrepreneur subsequently takes the decision without awaiting the opinion of the Works Council.[93]

3.6 Enterprise agreement

In comparison to the trade union, the Works Council cannot conclude a collective labour agreement. But, the entrepreneur can conclude an enterprise agreement with the Works Council. After all, the entrepreneur is free to choose with whom to make agreements on employment conditions. There is no legal obligation for the entrepreneur to reach an agreement with trade unions on working conditions. It has to be noted that the enterprise agreement is an alternative route for the entrepreneur that has yet to be worked out. The enterprise agreement is more of an exception than a rule.

The agreement between the entrepreneur and the Works Council must be regarded as an enterprise agreement according to article 32 (2) WCA. Compliance with these arrangements is therefore enforceable. The entrepreneur can enter into an enterprise agreement on subjects that may qualify for it. It has to be noted that not many subjects qualify for an enterprise agreement. Most subjects are regulated in the collective agreement or are matters of the WCA. In practice, the subjects within the enterprise agreement often involve additional aspects, for example the extension of the rights/obligations under article 25 and 27 WCA. The enterprise agreement only applies between the entrepreneur and the Works Council as a body (and not to the members of the Works Council).

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[88] It has to be noted that the enterprise can also request the court that the Works Council has to comply with the WCA.
[89] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 36 WOR, par. 2.
[90] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 36 WOR, par. 4.
[91] Court Amsterdam (vzr.) 28Aapril 1995, *JAR* 1995/148.
[92] Court Amsterdam (vzr.) 2 July 2009, *JAR* 2009/214.
[93] Court Amsterdam (vzr.) 28 April 1995, *JAR* 1995/148.

An arrangement between the entrepreneur and the Works Council also has different value:

(1) An agreement between the entrepreneur and the Works Council cannot directly bind individual workers. That is why the consent of each individual worker is necessary for the terms of employment agreed between the Works Council and the enterprise to apply.[94] In addition, the consent of a majority of workers does not mean that the terms of employment as agreed by the enterprise and the Works Council automatically apply to the minority of workers who refuse to agree.[95]

(2) If a collective agreement has been concluded on the same subject, this takes precedence.

The relationship between trade unions, works councils and this agreement is further discussed in chapter 4. As the enterprise agreement is a fairly new phenomenon, this will be discussed further in chapter 8.

[94] Court Amsterdam 8 February 1983, *NJ* 1985/19.
[95] Bakels 2019, p. 368.

Chapter 4: Hierarchy

An interesting question to ask if there's a kind of hierarchy between the organizational forms in which workers can collectively represent their rights and interests. In this chapter we will discuss the hierarchy between the powers of the trade unions and the Works Council.

4.1 Primacy of the collective agreement

The legislator aimed to establish a clear demarcation between, on the one hand, the tasks of the trade unions and, on the other hand, the tasks of the Works Council within the framework of article 27 WCA.[96] It derives from legislation and several ILO conventions that the collective labour agreement is the most essential instrument for establishing collective employment conditions.[97] As a result, the primacy of the collective employment conditions lies with the collective labour agreement and thus with the trade unions. Trade unions are seen as the most experienced representatives of workers in the field of primary employment conditions and play an independent role in the negotiation process.[98] On the basis of this primacy, the collective agreement has priority over agreements between the employer and other parties, such as the Works Council. Therefore, the Works Council may not make agreements on primary terms of employment if this is substantively regulated in the collective labour agreement.

4.2 Collective negotiations

As stated earlier, the Works Council can - despite the fact that the Works Council has no specific right to negotiate - participate in the collective negotiations between the employer and the trade unions. This is only possible if the Works Council is invited to do so by both parties, the employer and workers' organization. Without the invitation and hence the recognition of the Works Council as a negotiating party, the primacy of the trade union movement applies.[99] Reasons for involving the Works Council in collective bargaining may be the lack of representative trade unions in a particular sector or the desire to provide customization at enterprise level.[100]

An example of further cooperation between the Works Council and the trade unions is the obligation in case of reorganization.[101] The law imposes an obligation on the entrepreneur to enter into negotiations with the Works Council and the trade unions.[102]

[96] Slagter & Assink 2013, p. 2142.
[97] ILO Conventions 135 & 145.
[98] Drongelen, van & Jellinghaus 2008, p. 230.
[99] Jansen, in: *T&C* Arbeidsrecht 2018.
[100] Zaal, *AR* 2014/4.
[101] See also Directive 98/59/EC on the approximation of the laws of the Member States relating to collective reorganization.
[102] Articles 3, 4, 5, 6, 6a Wet Melding Collectief Ontslag and for the Works Council articles 4 (4 and 5) and article 6 (2) Wet Melding Collectief ontslag.

Involvement Works Council: the social plan

If the enterprise intends to reorganize, the Works Council must be given the opportunity to advise on the implementation of the reorganization plan, also referred to as the social plan. Despite a negative advice of the Works Council, the entrepreneur and the trade union can still decide to implement the social plan.

4.3 Lapse of right of consent

The primacy of the collective agreement is further expressed in various places in the law. Article 27 (3) WCA is particularly important in the relationship between the Works Council and the trade union. The right of consent of the Works Council lapses if the subject matter is already exhaustively regulated in a collective agreement.[103] Article 27 (3) WCA is only applicable if a collective agreement applies.

4.4 Decentralization provisions

The trade unions and the employer (who are parties to the collective agreement) can delegate their powers in the area of primary employment conditions to the Works Council by means of decentralisation provisions in the collective agreement. Powers are delegated if the collective agreement states that the employer may, in consultation with the Works Council deviate from the collective agreement or make agreements in the area of primary employment conditions. The Works Council can therefore be granted additional powers on the basis of decentralisation provisions.[104] Which is interesting because the Works Council is not a party within the negotiations. The decentralisation provision will usually be clearly formulated, stating what is open for negotiation and the limits of these negotiations. The delegation provisions will be used to further precise the collective agreements and customise them to the specific enterprise.

The parties can use this power to delegate, but it is not an obligation to do so. The employer can decide to negotiate with the Works Council on the subject that has been delegated. The resulting agreements are usually laid down in a separate regulation in addition to the collective agreement. Decentralisation provisions bind the members of the workers' organizations involved in the collective agreement during the term of the collective agreement.[105] Mostly this is done by incorporation clauses.

4.5 Enterprise agreement

A phenomenon that has re-emerged in recent years in the Netherlands is the construction of the enterprise agreement as an alternative to the collective agreement (as discussed under paragraph 3.6). Although the enterprise has this option on the basis of article 32 (2) WCA, in practice the collective agreement is still most common. It has to be noted that there is a certain hierarchy between the enterprise agreement and the collective agreement. First, an agreement

[103] Slagter & Assink 2013, p. 2143.
[104] Laagland, *TAP* 2014/204.
[105] See also Rodríguez Escudero & B. Dam-Keuken, van, *Loonzaken* 2015/06, p. 31-32.

between the enterprise and the Works Council cannot directly bind individual workers.[106] And, second, if a collective agreement has been concluded on the same subject, this takes precedence.

[106] Bakels 2019, p. 368.

Chapter 5: Collective action

This chapter will discuss on what basis trade unions have the right to act collectively against the enterprise. The Works Council is not entitled to collective action under the relevant legislation, namely article 6 (4) ESC.

5.1 Collective action

The right to collective action cannot be found in Dutch legislation but is laid down in the European Social Charter. Article 6 (4) ESC recognizes the right of action of workers, for example the right to strike, in a conflict of interests. Furthermore, this article recognizes the collective right of action of employers in such a dispute. Rules concerning strike and putting down work have been further elaborated in Dutch case law.

When questioning whether a collective action is lawful, it must first be determined whether that action falls under the protection of article 6 (4) ESC. Article G ESC offers the possibility to limit collective action rights when three requirements are met. First, the restriction must be included in the law. Secondly, the restriction must be necessary in a democratic society, to protect the rights and freedoms of others. And third, the restriction must be necessary for the protection of public order, national security, public health or morals.

Article 6 (4) ESC guarantees the use of collective actions to enable collective bargaining. In this way the right to collective action serves the right to collective bargaining. The concept of collective action is broader than the concept of strike. Collective action may also include other forms of action such as short-term work interruptions or selective strikes where only part of an enterprise strikes.[107] Furthermore collective actions must primarily focus on conflicts of interests between employers and workers. Purely political strikes are unauthorized.[108]

An exception to the right of collective action is the duty of peace. Article 6 (4) of the ESC does not give workers the right to collective action if agreements have already been made about the dispute in a valid collective labour agreement. In this case, there is a duty of peace between employer and workers.

[107] Supreme Court 30 May 1986, *NJ* 1986/688, ECLI:NL:PHR:1986:AC9402 *(NS).*
[108] Heerma van Voss in: Asser 2015, nr. 582.

Chapter 6: Protection of workers' representatives

To be able to do your work as a workers' representative, some level of independence and self-governance must be guaranteed. Furthermore, an individual workers' representative is in need of protection against the entrepreneur, since he also fulfills the role of worker. The first paragraph focuses on the protection of the independence and self-governance of Dutch forms of workers' representation (paragraph 6.1). The second paragraph sketches an image of the way in which individual workers' representatives are protected against the entrepreneur (paragraph 6.2).

6.1 Protection of independence and self-governance

6.1.1 Concerning trade unions

When it comes to independence and self-governance regarding trade unions, not much can be found in Dutch law. Very briefly, some provisions about associations can be found in the second book of the Dutch Civil Code. The independence and self-governance of trade unions is mainly protected by the recognition of the freedom of association laid down in the Dutch Constitution in general terms, not specifically for trade unions, as in many constitutions is the case.[109] Furthermore, the independence and self-governance of trade unions is protected by international conventions, such as article 5 ESC, article 22 ICCPR or ILO convention number 87. The freedom of association for trade unions is almost unlimited. The limit it does have is that fundamental rights cannot be violated. For example, a trade union is not allowed to discriminate against a worker who wants to become a member of a trade union. Direct or indirect discrimination on the grounds of among others sex, race, religion, sexual orientation is forbidden. If this does happen, the regulation of the trade union can be annulled.

Overall, the Dutch employer refrains himself from hindering the activities of trade unions. The employer does not benefit from infringing the independence and self-governance of trade unions. When he does so, he will only weaken his own bargaining position. Dutch employers prefer to enter into consultation with the trade unions and thus try to reach agreements together

6.1.2 Concerning the Works Council

According to article 8 WCA the Works Council can adopt their own regulation in which the internal organization and the way of functioning are regulated.[110] The Works Council is authorized to establish, change and complete the regulation. This authority can not be transferred to others. The Works Council does not need permission of the entrepreneur to make or change the regulation. However, the Works Council must give the employer the opportunity to give his opinion on the regulation, before the regulation is established by the Works Council. There are some compulsory parts which must be included in the regulation, such as the

[109] Article 8 Dutch Constitution.
[110] Sprengers, Hampsink & Stege, van der 2014, par. 2.5.

nomination of candidates, the elections, the procedure for interim vacancies and more.[111] Besides that, the Works Council is permitted to include other subjects in the regulation on a voluntary basis. Examples are the length of the membership or the use of electoral groups. The regulation drafted by the Works Council protects the independence and self-governance of this council. The entrepreneur must refrain from interference with the Works Council.

6.2 Protection of individual workers' representatives

In his capacity as member of the Works Council he or she can have multiple roles within the enterprise. It is important to determine the role of the worker. In this way, the employer and the worker both know what their places are within the enterprise. The individual workers' representatives can, however, be confronted with disadvantages due to their role as a representative. How are workers' representatives protected against discriminatory actions based on their representative status and activities in the Netherlands? What remedies exist? This paragraph gives an answer to these questions.

6.2.1 Concerning the members of trade unions

Members of trade unions may also be disadvantaged by their employer. They can be discriminated against compared to other workers who are employed by the enterprise. In Dutch law, regulation is rare when it comes to protection of trade union members. However, the Dutch Civil Code contains one article that protects trade union members. Article 7:670 (5) of the Dutch Civil Code states that the employer may not terminate the employment agreement because of the membership of the worker of an association of workers which has the objective to protect the interests of the members as a worker. The employer also can not terminate the employment agreement because of the performance of or participation in activities in such an association, unless those activities were performed in the workers' working hours without the employer's permission. However, in general, workers cannot be dismissed just because of their membership or participation in activities of the association.

6.2.2 Concerning the members of the Works Council

Within the enterprise, a member of the Works Council can discuss important decisions intended by the employer and influence the decision making. This means that a member of the Workers Council has to be critical towards the entrepreneur. On the other hand, a member still remains a worker who performs his or her duties. Essentially, the worker is wearing two hats: a hat as a worker and a hat as a workers' representative. These two hats can lead to a vulnerable position for the worker. The possibility exists that members of the Works Council are discriminated against by their employer.[112]

The Works Council Act provides protection against possible discriminatory actions by the employer. Article 21 of the WCA states that the employer ensures that the persons employed in the enterprise who are or were placed on a candidate list as referred to in article 9 of the Act,

[111] Article 10 and 14 WCA.
[112] Vink-Dijkstra, *Loonzaken* 2014/2, p. 23; Wezeman, Winter & Schoonbrood 2017, p. 305-306.

as well as (former) members of the Works Council and members of committees of this council are not disadvantaged in their position in the enterprise. The Works Council, as well as every person employed in the enterprise mentioned in article 21, can request the court to determine that the entrepreneur must comply with the provisions of article 21. In this way, the functioning of the Works Council can be protected and improved.[113]

From article 21 WCA therefore clearly follows a duty of care at the employer's address. The employer must set rules to prevent disadvantage of Works Council members. The basic principle is that they must not suffer any damage to their position as workers as a result of the status they have as a workers' representative or acting as such. The protection a worker has on the basis of his or her capacity as workers' representative consists of two parts: (1) protection within the enterprise against discriminatory measures and (2) protection against dismissal.[114]

6.2.2.1 Protection within the enterprise against discriminatory measures

A worker may not be disadvantaged because he carries out workers' representation activities within the enterprise. This means that the worker should continue to have the same opportunities and possibilities as other workers while performing activities as a workers' representative.[115] The Works Council and the entrepreneur can make joint agreements on several topics of the legal position of the Works Council member. This may include the following, which will be discussed below: retention of wage, division of time, assessing and functioning of the worker and agreements about the relation between the employer and worker after a Works Council membership.

Full wage

A member of the Works Council is entitled to full remuneration, also during the period that this worker carries out his Works Council activities.[116] In addition, agreements can be made about extra compensation if Works Council activities take place outside working hours.[117]

Division of time

The consultation of the Works Council must take place as much as possible during working hours, as follows from articles 17 and 18 WCA. The entrepreneur must give the members of the Works Council the opportunity to do so. In addition, the entrepreneur must also ensure that members of the Works Council can continue to function as workers. The entrepreneur and the member of the Works Council will have to make an agreement about the number of hours that the worker can spend on Works Council activities and the number of hours that the normal position must be fulfilled. All principles are included in article 18 (3) of the WCA. Other deviating agreements can also be made.[118] The activities carried out by a Works Council

[113] Vink-Dijkstra, *Loonzaken* 2014/2, p. 23.
[114] Vink-Dijkstra, *Loonzaken* 2014/2, p. 23.
[115] Vink-Dijkstra, *Loonzaken* 2014/2, p. 24-25.
[116] Article 17 WCA.
[117] Vink-Dijkstra, *Loonzaken* 2014/2, p. 23.
[118] Vink-Dijkstra, *Loonzaken* 2014/2, p. 23-24.

member may not be included in the overall assessment of his functioning. A prohibited criterion is, for example, that a worker does not spend his time well because he is a Works Council member.[119]

After the Works Council membership
When the membership of a member of the Works Council is ending, it is important that the worker is able to fall back on his own or an equivalent position. When the employer does not provide this position, a worker can invoke article 21 WCA which protects workers as (former) members of the Works Council. In some cases, agreements between the entrepreneur and the Works Council are made regarding a return guarantee which provides people to return to their own or equivalent position. [120]

Agreements must also be made in the area of, for example, promotion opportunities, training opportunities, bonus schemes or year-end bonuses. All these agreements and the ones worked out above can be laid down in a business agreement or covenant between the Works Council and the entrepreneur or in social by-laws. However, these are general arrangements and agreements. A member of the Works Council often chooses to make personal agreements with the entrepreneur as an individual member of the Works Council.[121]

6.2.2.2 Protection against dismissal
A member of the Works Council benefits from protection against dismissal based on the Dutch Civil Code. This protection against dismissal is laid down in article 7:670 of the Dutch Civil Code as a prohibition of termination. In the Netherlands, termination of the workers' contract can include (1) giving notice by the employer and (2) dissolution of the contract by the judge (decision of the court to terminate the contract of employment). The next paragraph will discuss the option of dissolution of the employment contract. In this paragraph, the prohibition of termination by giving notice by the employer will be discussed.

Prohibition of termination by giving notice
It is not possible for the employer to unilaterally terminate the employment contract with a member of the Works Council by giving notice. In the Netherlands, in certain cases it is possible to apply for a dismissal permit by the Social Security Agency (UWV) to be allowed to dismiss a worker. However, this is not possible when the worker is a member of the Works Council.[122] This prohibition of termination applies to different types of individual workers' representatives: members of the Works Council, Central Works Council, a standing committee or subcommittee of the Works Council. If the entrepreneur nevertheless terminates the contract, the worker can invoke the nullity of this termination. The worker has a right of appeal two months after termination of the contract.[123]

[119] Vink-Dijkstra, *Loonzaken* 2014/2, p. 24.
[120] Vink-Dijkstra, *Loonzaken* 2014/2, p. 24.
[121] Vink-Dijkstra, *Loonzaken* 2014/2, p. 24.
[122] Article 7:671a (11) Dutch Civil Code.
[123] Vink-Dijkstra, *Loonzaken* 2014/2, p. 24.

The prohibition of termination by giving notice in article 7:670 (4) of the Dutch Civil Code only applies during the membership of a member of the Works Council. To also protect workers who in any way have dealt with workers' participation within the enterprise, there is a prohibition of termination by giving notice as described in art. 7:670 (10) of the Dutch Civil Code.

Nevertheless, in some cases it is possible for the employer to give notice to the worker. When it comes to a summary dismissal of a (former) member of the Works Council, the prohibition of termination does not apply.[124] The employer is also allowed to give notice to the worker when the termination is related to the loss of jobs or for business reasons.[125]

Dissolution of the employment contract

A possibility which remains open under Dutch Law is to request the sub district court to terminate the employment contract, also known as the dissolution of the employment contract.[126] This also applies to members of the Works Council. In addition, the sub district judge must examine whether a prohibition of termination applies, and if so, the judge can not terminate the employment contract unless there are special additional circumstances.[127] Another exemption however is that the judge can terminate the contract when there is a prohibition of termination under art. 7:670 Dutch Civil Code when the request of the employer is not related to circumstances which are related to prohibition of termination of Works Council members.[128] One of the reasonable grounds for termination must apply, for example sickness of the worker, a disrupted employment relationship, culpable act or omission of the worker, the workers' incapacity to perform the stipulated work, et cetera.[129]

A last comment which must be made regarding this subject, is that a Dutch employer will generally tend to avoid disadvantaging a worker who also fulfills a workers' representative function within or outside the enterprise. Because these workers enjoy protection under the Dutch Civil Code and the Workers Council Act, -often strengthened by an arrangement between the employer and the member of the Works Council- the employer will generally refrain from any possible discriminatory action towards the worker.

[124] Article 7:670a (2) (c) Dutch Civil Code.
[125] Article 7:670a (2) (d) and art. 7:670a (3) (c) Dutch Civil Code.
[126] Article 7:671b Dutch Civil Code.
[127] Article 7:671b (2) Dutch Civil Code.
[128] Article 7:671b (6) Dutch Civil Code.
[129] Article 7:669 (3) (b)-(h) Dutch Civil Code.

Chapter 7: The small enterprise

There are a lot of ways to determine whether an enterprise is to be considered a small enterprise. For this part of our report, we concentrate solely on the number of workers who are active in an enterprise. Small usually means a limited number of workers varying from one to fifty.

7.1 Trade unions and collective agreements

As mentioned in chapter 3, trade unions have the power to close collective agreements with the employer's association. Since these collective agreements are concluded on sectoral level small enterprises are bound by them regardless the number of workers employed in the enterprise. The trade unions will look after the interest of all the workers, in the bigger and the smaller enterprises.

7.2 The Works Council

As explained in chapter 2, the rights and obligations of the WCA only apply to enterprises with more than 50 workers. However, there are specific articles (articles 35b-35d WCA) in the WCA regarding workers' participation in small enterprises that do not employ that number of workers. In these small enterprises, workers' representation is regulated in different forms. Apart from those that have voluntarily opted for a Works Council for those that have not the WCA provide for specific workers' representations.

7.2.1 Employee representative body

Enterprises with at least 10-50 workers have the possibility to set up a workers' representative body. This body will at least exist of three members who are elected by and from among the workers in the enterprise. If the majority of the workers in an enterprise request to set up such a body, the entrepreneur has to do this.[130] This is not obliged in enterprises with less than 10 workers. It is still possible to voluntarily set up a workers' representative body.[131] The workers' meetings as mentioned in paragraph 6.2.1 are not obliged any longer when a workers' representative body is set up.

The goal of this workers' representative body is similar to the goals of the Works Council. It can be described as a Works Council-light.[132] The workers' representative body will have some rights and obligations similar to the Works Council we will explain next.

If the workers' representative body is set up in an enterprise, certain articles of the WCA will apply mutatis mutandis.[133] Most importantly are articles 17 and 18 WCA which are already explained in chapter 5.3.1.1.

The workers' representative body has a right to consent (as explained in paragraph 3.2.5) with regards to two specific matters, which are regulations regarding working hours and rest periods (article 27 (1) (b) WCA) and regulations regarding working conditions and sick leave or

[130] Article 35c (1) (2) WCA.
[131] Article 35d WCA.
[132] Sprengers, in: *T&C Arbeidsrecht* 2019, art. 35c WOR.
[133] Article 35c (3) WCA.

reintegration (article 27 (1) (d) WCA). The same procedure as when the Works Council has the right to consent applies.[134]

The workers' representative body has the right, with permission of the entrepreneur, to institute committees or invite experts.[135] The rights of article 31 WCA apply to the workers' representative body as well. It is however not obliged for the entrepreneur to give the information and data in writing. It is also allowed to do this orally. Only information about pension as a term of employment will always be provided in writing if this is available to the entrepreneur.[136] Just as the mandatory workers' meeting, the entrepreneur is obliged to consult with the workers' representative body about pension if the representative body makes a reasoned request. [137]

7.2.2 Mandatory workers' meeting

In enterprises in which normally at least 10 and fewer than 50 persons are working and for which no Works Council or workers' representative body has been established, the entrepreneur is obliged to give the Works Council an opportunity of meeting with them at least twice each calendar year.[138] If at least 25% of the workers in the enterprise requests for such a meeting, the entrepreneur shall as well convene a meeting.

These workers' meetings have fewer rights than the ordinary Works Council. All matters concerning the enterprise that the entrepreneur and the workers in the enterprise think are worth discussing may be raised in these meetings. Workers have the right to make proposals and express a point of view.[139] If the entrepreneur is not the manager of the enterprise, the meeting will be with the manager of the enterprise.[140] At least once a year, the meeting will be about the general operation of the enterprise. In preparation for this meeting, the entrepreneur will give the workers some general information about the activities and the results of the enterprise. If the enterprise is obliged to make its annual documents for public inspection, copies of these documents will be discussed with the workers in this meeting.[141]

The workers also have a kind of advisory right with regards to specific topics. The workers get the opportunity to render advice to an intended decision that may lead to a loss of jobs or to major changes in the terms of employment or working conditions of at least a quarter of the persons working in the enterprise. As with the advisory right discussed in chapter 3, the advice has to be sought at a time when it can still significantly affect the decision of the entrepreneur.

[134] Article 35c (4) WCA.
[135] Article 35c (5) WCA.
[136] Article 35c (6) WCA.
[137] Article 35c (7) WCA.
[138] Article 35b WCA.
[139] Article 35b (2) WCA.
[140] Article 35b (3) WCA.
[141] Article 35b (4) WCA.

If these topics are already regulated in a collective labour agreement or in an arrangement laid down by a body under public law, the obligation to ask for advice does not apply.[142]

Furthermore, the entrepreneur is obliged upon request to provide the workers with all information and data concerning the pension that they need for the meetings with the entrepreneur.[143] The entrepreneur is also obliged to inform the workers about any intended establishment, amendment or withdrawal regarding the Pension Act.[144]

All these obligations that we just discussed only apply to persons who have been working in the enterprise longer than six months.[145]

[142] Article 35b (5) WCA.
[143] Article 35b (6) WCA.
[144] Article 35b (7) WCA.
[145] Article 35b (8) WCA.

Chapter 8: The future

The concept of labour is changing continuously and labour law is trying to keep up with these changes. The same goes more or less for workers' representation. As mentioned in earlier chapters, trade unions are facing declining memberships. But is this a real threat to the collective bargaining process? If so, are Works Councils next in line to take over in the bargaining process with the employers? Finally, the Netherlands has a lot of self employed workers. The question rises what their position will be in the process of representation. These challenges will be highlighted further in this chapter.

8.1 Representation

As already mentioned in the previous chapters, representation of the trade unions is a topic of discussion in the Netherlands. While on average 21% of the workers are a member of one of the trade unions, in some sectors it is far less. This is becoming a problem for trade unions but also for employers, since employers want their contracting partner to represent most of their workers. When the trade union only represents a small number of their workers, employers will start searching for alternatives. The problems for trade unions are different. They lack ways to set pressure on the employer as it is more difficult to for instance call a strike. Also financially it is more difficult to keep up for trade unions as the members pay to be part of the trade unions and therefore are also partly funding the trade unions.

To solve the problem of representation, trade unions also include non-members into their bargaining process. These non-member workers are for instance allowed to be at meetings and share their opinions about the circumstances in the sector. It is not allowed for non-members to vote, but they can have some influence in the bargaining process. This way, the trade unions have a broader sense of who they represent. It is also a way to introduce people to the work of the trade unions. To further extend this, a group of labour law specialists proposed a mandatory referendum in order to get a generally binding collective agreement. This way, all workers in the given sector have to vote before an collective agreement will be generally binding. A negative outcome won't result in general binding. This way, non-members will be more included in the process of collective agreements.[146]

As mentioned, there are no legal criteria for representation in the Dutch system. The Dutch system is not dependent on representation rates because of the working of article 14 Collective Labour Agreement Act. The discussion about representation of trade unions therefore is more a public debate than a serious threat to the system of collective bargaining.

A mandatory referendum in order to get a generally binding collective agreement could include the non-members more to the process.

[146] Jaspers & Baltussen 2011, p. 286; This is not implemented in the Dutch law but just an idea to further include non-members.

8.2 Contracting with the Works Council

As mentioned before, employers also start to search for alternatives in the collective bargaining process. We will discuss two possibilities to involve the Works Council in the process: direct contracting with the Works Council and involving the Works Council with delegation provisions.

8.2.1 Direct contracting with the Works Council

As mentioned in earlier chapters (3.6 and 4.5), the enterprise agreement is an alternative to the collective agreement. The problem of representation is largely solved this way because the Works Council will represent the workers in the given enterprise. This is the theory however. There are some important risks with the bargaining process with the Works Council. First and foremost, the Works Council does not have the history and independence that the trade unions have. The Works Council is part of an enterprise and won't be the specialist on employment conditions nor will they be completely independent from the enterprise. Secondly, the question is how these provisions are incorporated in the employment contract of the workers. More importantly, the Works Council has no right to negotiate.

Employment condition arrangements don't have the power of a collective agreement and therefore cannot rely on the provisions of the Collective Labour Agreement Act. The only way at this moment is that the workers will be bound to the employment condition agreement by consent. If there is a collective agreement applicable to the enterprise, this will still precede.

> Dutch supermarket JUMBO tried to replace their collective agreement with an enterprise agreement in 2017. They had the wish to be closer to the wishes of the workers. However, lots of criticism came from these workers. Also the fact that changes needed to be accepted individually made that JUMBO was not happy with the way the enterprise agreement turned out. At the moment (2020), JUMBO has a new collective agreement closed with the trade unions.

To further facilitate the possibility of employment conditions arrangements, the law has to change. For example, provisions should be implemented making it possible to negotiate with the Works Council and let the workers vote on it. If for example ⅔ is in favor, the enterprise arrangement will be valid and incorporated in the employment contracts. Further changes to the enterprise agreement will directly work into the employment contract. Second to that, it should for instance be possible to get dispensation for bigger companies to use an enterprise agreement instead of a general collective agreement, just like it is possible with enterprise collective agreements.[147] At this moment though, it is not likely to see such a law be implemented into the Dutch system because of the history of the trade unions in the collective bargaining process.

[147] Zwemmer en Zaal, Ter Visie - Faciliteer de arbeidsvoorwaardenregeling tussen werkgever en ondernemingsraad, Tijdschrift voor Arbeid & Onderneming.

8.2.2 Delegation to the Works Council

The second form of including the Works Council into the negotiations has also been discussed earlier in this paper. This is by using delegation provisions. Trade unions and employers agree that a certain topic will be further elaborated by the Works Council. The individual employer has to negotiate with the Works Council to complete the collective labour agreement.

This sounds like a great way of customization for employers and workers, but there are some risks and difficulties. The biggest risk is, just as with the enterprise agreements, the fact that the Works Council is not always properly equipped to negotiate with the employer. For instance about very technical aspects of labour law. Trade unions have a history of negotiating on these aspects and therefore have a certain experience. This cannot always be said about Work Councils. The risk is that the balance of power will be changed. Also Works Councils are not as independent as trade unions should be. This also makes it easier for the employer to set through regulations which are not in favor of the workers.

The status of decentralization provisions and the outcome of the Works Council is not always clear in our system. The problem is complex, but the solution can be quite simple if changes to the law would be made. Provisions in the WCA or the Collective Labour Agreement Act could open up the possibility for direct and binding effect in the individual employment contracts for the decentralized agreements with the Works Council. To protect workers against unfavorable agreements, the provision can for instance only apply if the agreements exceed the level of employment conditions in the Collective Labour Agreement Act.[148] This way, trade unions still have the primacy in the bargaining process but the agreements can be more tailor made to the specific enterprise. This is already happening when trade unions negotiate with the specific enterprise on a specific matter. For the moment, these provisions are not implemented and the status of delegation provisions largely relies on the way it is formulated. It therefore is very important that it is crystal clear what the subject and boundaries of the delegation provisions are. A change in the law could make this possibility easier and open up the possibility to further tailor made agreements.

8.3. The self employed

According to the Dutch Statistical Bureau (CBS), 12,4% of the working society are self-employed in the Netherlands. This is quite a lot. The question arises what the position of these workers is with regards to collective agreements.

Most collective agreements focus purely on workers and exclude the self employed working in that sector. This makes sense to a certain degree because the self employed choose to work without an employment contract and therefore miss out on the privileges. Also, the Dutch

[148] Rayer & Leeuwen-Scheltema, van 2011.

Competition Authority (ACM) blocked attempts to make agreements on minimum wages for self-employed.[149]

This however changed in 2019.[150] In the collective agreement of the architect sector, a minimum tariff for self employed workers was arranged. This way, self employed workers earned the same as the people doing the same job as a worker.[151] The ACM agreed upon this stating it is no longer prohibited to make price agreements when self employed do the exact same work as workers with an employment contract. With the possibility the ACM opened, we expect to see this can become a more common trend in the future to further protect the self employed against working against very low wages.

Something remarkable for self employed was the strike of the freelance journalist of the Dutch newspaper NRC in February 2020.[152] This was one of the first times the self employed came into action demanding higher wages and more rights because they do the same job as the workers with a labour contract. It is expected that these strikes will be seen in different sectors in the coming year. More recent, there was a strike at the Uber headquarters in Amsterdam by 100 taxi-drivers.[153]

[149] In 2017, the ACM released a statement regarding self-employed workers stating that price agreements were not allowed and violated the cartel prohibition.
[150] Malini Witlox, '*Mijlpaal voor zzp'er: afspraken over tarief opgenomen in cao', RTLZ.nl,* 20 november 2019.
[151] The actual minimum rate is 150%, compensating the self employed in their costs but also their pension scheme;
[152] *'Staking freelancers bij NRC: gaan zzp'ers eindelijk actievoeren?', Volkskrant,* 13 februari 2020.
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