

# EMPLOYEE PARTICIPATION

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## **Introduction**

Employee participation is the process whereby employees or their representatives can influence the decision-making process of the company they work for. In the Netherlands employees have a legal right to participate.

As a foreign entrepreneur in the Netherlands it is important to know which types of employee participation exist, how you have to involve employees in the decision-making process of your company and what their powers are. There are two types of employee participation. The first one is direct participation by employees within a specific company or group of companies and the second one is indirect participation through a union. Unions usually represent employees of several companies within a specific branch of industry.

Both types of participation can exist together for the same group of employees. In general, the unions are occupied with primary labour conditions (wages, holiday-day, working hours) and the bodies of direct participation are occupied with secondary labour conditions (company rules, pension scheme).

This article will first discuss direct participation by employees within the company and subsequently, indirect participation through unions.

## **Works Council**

Participation allows the employees to protect their interests within the company. The idea behind employee participation is that it benefits both the employee and employer. It provides the employer with a tool through which he can obtain broader support for his decisions and it allows the employees to influence the decision-making process of the company.

There are several forms of direct employee participation within companies. The form of participation depends on the number of employees that work within the company under an employment contract.

The entrepreneur who has 50 or more employees is obliged to establish an Ondernemingsraad (Works Council). If he has more than 10 but less than 50 employees, he can establish a

Personeelsvertegenwoordiging (employee representation). In addition, an entrepreneur is also obliged to set up an employee representation when a majority of the employees so request. The members of both bodies of participation are appointed from among the employees by the employees.

If, in case of a smaller company, the entrepreneur does not (voluntarily) institute a Works Council or an employee representation, the law guarantees a minimum level of participation. The entrepreneur has to meet with his employees at least twice a year with regard to business affairs which according to him and/or his employees should be discussed.

### *Rights and competences*

The Works Council is the most powerful body of employee participation within a company. According to the law it has the following rights:

- right to render advice;
- right of approval;
- right to information, consultation and initiative.

### Right to render advice

One of the most important rights of the Works Council is the right to advise on proposed decisions of the entrepreneur regarding the legal, economic and organisational state of the company. The law determines which proposed decisions are subject to the right to render advice. These are, among others, the transfer of (a majority of) the control within the company, the reduction of activities, the expansion or change of activities of the company or the raise of an important credit.

The entrepreneur is obliged to make a written request for advice on a proposed decision, accompanied by a summary of the grounds for the decision, the possible consequences of the decision for the employees and measures to deal with these consequences. The entrepreneur must request the advice at a point in time on which the advice of the Works Council can still influence his final decision. The entrepreneur has to send the final decision to the Works Council in writing. If he does not (or only partially) follow the Works Council's advice, he must inform it about the reasons for not doing so. The entrepreneur has to postpone the implementation of his final decision until one month after notification of the Works Council.

### Right of approval

The Works Council has the right of approval for proposed decisions of the entrepreneur concerning social policies within the company, such as regulations with regard to a pension insurance scheme, illness and working hours and holiday days.

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The entrepreneur has to submit his proposed decision to the Works Council in writing with a summary of his reasons and an overview of the expected consequences for the employees. After the mandatory consultation meeting, the Works Council will notify the entrepreneur of its decision and its underlying arguments as soon as possible. Subsequently, the entrepreneur should inform the Works Council of his final decision and the date upon which it will enter into force. The refusal of the Works Council to approve the decision in principle leads to the nullity of the final decision of the entrepreneur.

However, if the final decision concerns regulations that are already laid down in a collective agreement, the Works Council does not have the right of approval with regard to these regulations.

### Right to information, consultation and initiative

The Works Council has the right to be informed with regard to the financial, economic and social situation of the company. At all times the Works Council has the right to request the entrepreneur to supply information that it reasonably needs for the proper execution of its tasks.

Both the Works Council and the entrepreneur must comply with the request of the other party to organize a meeting. All social, organisational, financial and economic issues which regard the company can be discussed in Works Council meetings.

The Works Council also has the right of initiative. It may present its proposals regarding all aspects of the company to the entrepreneur during the consultation meetings or by means of a motivated notice in writing.

### *Means of the Works Council*

The Works Council has the right to make use of the facilities that are present in the company, such as conference rooms. The use of these facilities must be in accordance with the tasks of the Works Council. The entrepreneur must allow the members of the Works Council to perform their tasks during working hours and at least five working days a year must be reserved for educational purposes. The Works Council can invite an expert to its meetings, if it considers his presence necessary for the discussion of a particular topic. The costs of experts, meetings, specialist literature and education must be paid by the entrepreneur.

### *Non-compliance and legal remedies*

In general, the employees, the Works Council and the employee representation can demand observance of the law on employee participation by the entrepreneur, by requesting the bedrijfscommissie (joint sectoral committee) to mediate and, if agreement is not reached, by instigating proceedings before the district court within 30 days after the joint sectoral committee has

rendered its advice. Subject of such proceedings could be forcing the entrepreneur to institute a Works Council or an employee representation or to act in accordance with the right to information.

If the entrepreneur decides against the advice of the Works Council, it can start a procedure before the Enterprise Section of the Amsterdam Court of Appeal. The court can forbid the entrepreneur to implement (part of) the decision or order the entrepreneur to cancel the execution of the decision or to undo the consequences of the decision.

When the entrepreneur breaches the Works Council's right of approval, the Works Council must appeal to the nullity of the decision in writing to the entrepreneur within one month to uphold its rights. If the Works Council refuses to give its consent to a decision, the entrepreneur can request the district court to give its consent to said decision.

### *Central and Group Works Council*

If it is in the interest of the employee participation, the entrepreneur who has instituted two or more Works Councils has to institute a *centrale ondernemingsraad* (central works council) for all of his companies or a *groepsondernemingsraad* (group works council) for several of his companies.

In general, the central works council and the group works council have the same rights as the regular Works Council. However, they only have these rights with regard to matters of common interest for all or most of the companies for which they are instituted.

The government has researched the compliance with the rules of employee participation and the influence of the Works Council on the decisionmaking processes in companies. The results were published in April 2004 in the "Trendrapport 2000-2003" (Trend Report 2000-2003). The report concluded that over 70% of the entrepreneurs that are obliged to institute a Works Council have complied with this rule. Another outcome was that the influence of the Works Council on some issues, for example decisions on mergers and the strategy of the company, is inadequate. The Works Councils do not always effectively make use of their rights with respect to these topics. This is due to lack of expertise and lack of time of the members, who have to execute their tasks next to their daily work.

### **The European Works Council**

If a communal company or a communal group has its seat in the Netherlands, the European Works Council Act (EWCA) applies. A delegation of negotiators and the general board will have to reach an agreement on the institution of a European Works Council.

The general board is obliged to institute a European Works Council in case it does not comply with the employees' request to institute a special delegation of negotiators within six months after the request or in case the delegation and the general board do not reach an agreement within three years.

The competence and the organization of the European Works Council are determined by the abovementioned agreement. If no agreement is reached and the general board is obliged to institute a European Works Council, its competence and organization are determined by law. In that case the European Works Council is limited by law to the right of information and the right to advise with regard to issues that are of importance to the entire company or group company with a communal dimension or to at least two companies of the group in different Member States.

### **Employee participation through unions**

#### *General*

Collective agreements are agreements between employers or employers' organizations and employees' organizations. According to the Sociaal Economische Raad (SER; Social Economic Council) approximately 84% of the employees are governed by collective agreements. Many aspects of the employment, such as wages, working hours, overtime, holidays, pension schemes and rules on health and safety, are governed by a collective agreement

#### *Employers' and employees' organizations*

The employees' organizations can be divided into three groups: the trade union federations, the non-affiliated (craft) unions and the company unions.

The three most important trade union federations are *Federatie Nederlandse Vakbeweging* (FNV; Dutch Trade Union Federation), *Christelijk Nationaal Vakverbond* (CNV; Christian Trade Union Federation) and *Vakcentrale voor middengroepen en hoger personeel* (MHP; Federation of Managerial and Professional Staff Unions).

*The Vereniging VNO-NCW*, (VNO-NCW; Confederation of Netherlands Industry and Employers VNO-NCW) is the largest body of representation of employers. This is the umbrella organization of a large number of employers' organizations that have been instituted according to branch of industry or ideology and the major companies. The (associations of) medium and smaller companies are organized in MKB-Nederland (Dutch Federation of Small and Medium-Sized Enterprises) and the agricultural sector in LTO-Nederland (Dutch Confederation of Agriculture and Horticulture).

## *Union density*

Union density in the Netherlands is rather low. According to the Social and Economic Council, only 25% of the employees are union members. This low number can be explained by the fact that the work of the unions also benefits those who are not a member.

Numbers are different when it comes to employers. About 90% of the employers are affiliated with an employers' organization.

To compensate the lack of union members, employers or employers' organizations pay a contribution to the unions every year. Some unions refuse these payments because they fear losing their independence.

## *The collective agreement*

The collective agreement is governed by the *Wet op de collectieve arbeidsovereenkomst* (Collective Agreements Act). Collective agreements are concluded by one or more employers or one or more incorporated associations of employers and one or more incorporated associations of employees. Due to the manner in which employers can take part in the negotiations, there are collective agreements on company level as well as on sector level. The agreement comes into effect when it has been submitted to the Ministry of Social Affairs.

Employers and employees are bound to a collective agreement when they are members of the contracting parties (Unions) or, in case of employers, when they are the contracting party. The employer has to implement the terms of the collective agreement into employment contracts with non-member employees that are concluded during the term of the collective agreement. Employees do not have the right of a direct appeal to the collective agreement, because they are not a contracting party. Only the unions can invoke an action against the employer.

The Minister of Social Affairs, according to the *Wet verbindend en onverbindend verklaren CAO* (Collective Agreements (Declaration of Universally Binding and Non-Binding Status) Act), can extend the scope of a collective agreement to an entire business sector. As a consequence, all employers and employees in that particular sector are bound to the agreement, even when neither party to the labour contract is a contracting party to the collective agreement.

The Minister can only extend the collective agreement upon request of one or more employers or one or more incorporated associations of employers or employees that are parties to the collective agreement. He can comply with their request if he is of the opinion that the agreement already applies to an important majority of the employees in the sector in question. The extension can be ordered for a maximum period of two years.

The scope of the collective agreement can also be extended by the rules that govern the rights of employees in case of a takeover. The purchasing company must continue to apply the collective agreement to which the target company was bound. This obligation is terminated by the end of the term of the respective collective agreement or as soon as the purchasing company is bound to a new collective agreement after the takeover.

### **Right to strike**

#### *Actual willingness*

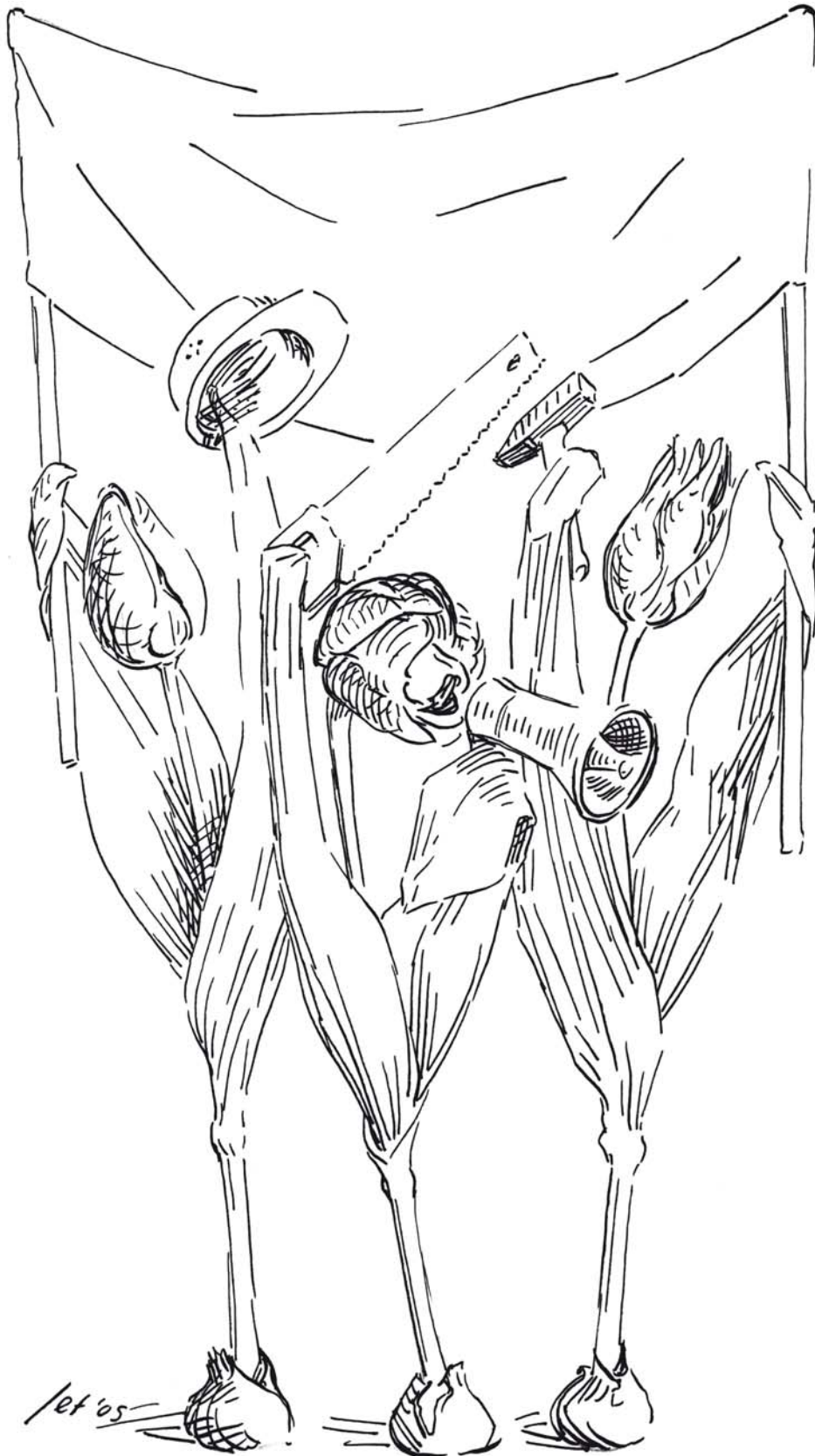
The Netherlands is a consensus-based society in which strikes are not well received. In comparison to other countries the number of strikes is low and the actions that are held usually do not last long. The explanation for this might lie in the fact that Dutch employees and the trade unions have sufficient legal means to protect their rights.

#### *Legal observations*

The right to strike is not established in the Dutch constitution or in any statutory provision. It is however laid down in the *Europees Sociaal Handvest* (European Social Charter) which is directly applicable. The Dutch Supreme Court has decided that a strike is lawful unless major procedural rules have been disregarded and/or considering all circumstances it must be concluded that the trade unions in all reasonableness could not have come to decide to undertake such actions. These rules apply to “normal” strikes against the employer and to other actions of which the specific characteristics give no reason for different or more stringent conditions. Strikes are considered to be an ultimate remedy and can only be lawful when all other less invasive means have been used.

During a lawful strike the employees forfeit their rights to remuneration and social security benefits. If the strike is supported by a union, the members on strike will often receive pay from their union. If a strike is lawful the employer cannot take disciplinary measures against the employees on strike.

The parties to a collective agreement can insert an absolute or relative peace clause into the contract. Due to this clause parties are refrained from taking collective actions in general and from taking collective actions to change the existing terms and conditions of the collective agreement during the term of the contract.



Tulips on strike

## **Conclusion**

If you set up or take over a company in the Netherlands or merge with a Dutch company, you might have to deal with employee participation. Employee participation within companies through a works council or employee representation is mostly geared towards reaching solutions in an amicable way. Nevertheless, in particular the Works Council has extended powers to influence important decisions of your company and has even got the power to stop or to reverse decisions of your company to merge or to sell the company. Therefore, it is important to maintain a good relationship with a works council or employee representation, not only to avoid problems but also to create a broad base of support for important decisions for your company and employees. The same applies to employee participation through unions. Contrary to unions in most other countries, in the Netherlands unions prefer reaching solutions by negotiating, rather than by using strikes. Although union density is relatively low in the Netherlands, the influence of the unions is important seen the fact that the labour conditions of a majority of Dutch employees are governed by collective agreements concluded between the unions and employers or employers' organizations. influenced by EC law.