

# The works council's role in mergers and acquisitions

*When acquiring or divesting of a Dutch company with a works council, you need to know when and how to involve the works council in the process. Otherwise, the acquisition or divestment may be delayed or blocked. This article contains an overview of the requirements to take into account.*

## 1) What is a work council?

Every undertaking in the Netherlands with 50 employees or more must establish a works council, a non-corporate body consisting of elected employees of the company. The works council has three type of rights : (i) information rights; (ii) consultation rights; and (iii) approval rights.

## 2) When should the works council be consulted?

The executive board of the company must give the works council the opportunity to render advice on any decision in connection with the transfer of control over (a part of) the company, the take-over or divestment of control of another company, major changes to the organisation or to the distribution of powers within the company, taking out major loans for the company etc. If a board of a company with a works council is involved in the acquisition or divestment, whether of that company itself, or by such company, it needs to consult with the works council. The same applies to acquisitions or divestments by a subsidiary of such company. Advice of the works council should also be requested in case of the appointment of external advisors in relation to the intended transaction. Recent case law has shown that this obligation should be taken seriously and that it involves all advisors in the context of the transaction (such as lawyers, investment bankers, etc.).

## 3) Whose obligation is it to consult with the works council?

In principle, it is the responsibility of the executive board of the company in which the works council is established to consult with the works council. In practice, other parties to a transaction will be required to contribute to the process. Often, their input is needed to provide the works council with a view on the consequences of the acquisition or divestment. For example: the acquirer knows best what it intends to do with the acquired company: if and how it will be integrated and what the consequences for the employees will be.

## 4) When the advice should be requested from the works council?

The executive board must submit its written request for the works council's advice timely before the decision is actually taken and at a time when it can still affect the decision. Any delay of the request will not only prolong the process, but may ultimately lead to an invalid decision as well.



The works council cannot render its advice before the proposed decision has been discussed at least once in a consultation meeting with the works council. There is no set legal timeframe, but in practice, obtaining an advice from the works council takes 1-2 months, but it may take longer if the works council requests additional information or proposes alternatives.

If the executive board submits its request too late, the company's decision will be regarded to be in violation of the relevant statutory provisions and therefore it could be challenged by the works council in court. However, in practice, it is not always easy to determine the right time to request the works council's advice. For example, in case of a public offer, it is debatable when the works council should be consulted, before or after the public announcement of the offer.

### 5) What kind of information needs to be provided for the works council?

The executive board's request must state (i) the (reasons for) the proposed decision; (ii) the likely consequences that would arise for the employees from the proposed decision; and (iii) the proposed measures for dealing with such consequences. Moreover, the works council has the right to ask for further information or further explanation on the proposed decision. In return, the works council is by law bound by confidentiality.

If the executive board provides insufficient information, the works council is unable to thoroughly consider and assess the proposed decision and consequently it will have the right to challenge the final decision in court. For instance, in a case about a proposed merger of two broadcasting companies, the Dutch court ordered one company to revoke its decision and to reverse the consequences of this decision and barred any further execution since no adequate information was provided to the works council. This concerned information on (the measures to address) the consequences for the employees as well as how the works council would be involved in the subsequent decision process regarding the further lay out of the merger.

### 6) What are the legal consequences of not following the works council's advice?

The works council has three options: (i) support the proposed decision; (ii) reject the proposed decision; (iii) support the proposed decision, if certain conditions posed by the works council are met.

If the works council supports the proposed decision, it can be immediately taken by the company. In this case the management's only obligation is to notify the works council in writing about the final decision.

In case the decision is not or not entirely in accordance with the works council's advice or it does not meet the set conditions, the company has a statutory obligation to (i) explain in writing why the decision deviates from the advice and (ii) suspend the implementation of the decision for a one-month period, starting the day after which the management has informed the work council about the final decision. This so-called cooling off period cannot be shortened or disregarded without the consent of the works council. During this period, the works council has the right to lodge an appeal against the decision. In practice, during this period often consultations takes place to see if an understanding can be reached so as to avoid court proceedings.

If the court sustains the works council's claim, it will order the company to (wholly or partly) withdraw the decision and to reverse the consequences of an already implemented decision and/or to prohibit the company from implementing the decision or part thereof.

### 7) The relevance of collective labour agreements

Collective labour agreements applicable in the company may contain different or further provisions regarding the works council's consultation procedure. Therefore, the relevant collective labour agreement always must be taken into consideration before the company carries out its obligation to request the advice of the works council.

### More information

For more information on the counsel's role please contact Els de Wind or Marjolijn Lips.



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