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## Implementation of the Takeover Bids Directive in the Netherlands

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*Published in:*

Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive

*Publication date:*

2016

*Document Version*

Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*

Cremers, J., & van Het Kaar, R. H. (2016). Implementation of the Takeover Bids Directive in the Netherlands: Chapter 12. In J. Cremers, & S. Vitols (Eds.), *Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive* (pp. 181-193). [12] (Workers' rights in company law). ETUI.

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# Chapter 12

## Implementation of the Takeover Bids Directive in the Netherlands

Robbert van het Kaar and Jan Cremers

### 1. Introduction

The Dutch case is particularly interesting because of the strong position of works councils within Dutch companies, including in restructuring situations. Implementation of the Takeover Bids Directive in the Netherlands did not lead to new worker rights above and beyond what was required. However, the general legislation on workers' involvement – the Works Council Act (WOR) – includes several articles relevant to takeover situations. The WOR prescribes that companies – a target company and the bidder, if Dutch – have to seek the advice of the works council in relation to major corporate decisions, such as entering into a transaction. For decisions regarding a change of control over the company a mandatory advice procedure applies (WOR, Article 25). The works council is bound by confidentiality. If a works council is not consulted in accordance with the WOR rules, this can endanger or delay the execution of the decision. If a management's decision conflicts with the works council's advice or if the management has not properly informed it, a works council can ask the Enterprise Chamber of the Amsterdam court to block the decision (Article 26).

Usually, the central management of a target company will inform the works council and look for its support for a deal. Similarly, the trade unions are notified in case of acquisitions as prescribed by the so-called 'merger code'. Once an offer is launched the workers' representatives (including the trade unions) have to be informed and consulted about the offer. An examination of the case of Stork, which was the target of two takeover bids, shows that works councils in the Netherlands can have a substantial influence on the outcome of such bids.

## 2. Key elements of Dutch takeover regulations

Up until the 2000s public offers were dealt with on the basis of self-regulation with supervision by a non-statutory regulator. In 2001 a statutory body responsible for the supervision of public offers was created, the Authority for the Financial Markets (AFM). Its main responsibilities are the review and approval of offer documents and the monitoring of compliance with the rules. The AFM is supposed to ensure that public offers are publicly announced in good time.

The Takeover Bids Directive has been implemented in a number of different acts, including the Companies Act (Book 2 of the Civil Code) and the Securities Act (Financial Supervision Act, FSA, and the Decree on Public Offers). Implementation has not led to changes in the existing laws on worker involvement. The legislation entered into force on 28 October 2007. Implementation brought the previous rules in line with the minimum requirements of the Directive. The position of the AFM, as the supervisor of the offer process, was confirmed and strengthened.

Other important provisions were already to be found in the Decree on Public Offers, the Works Council Act (WOR) and the SER merger code (SER-*fusiegedragsregels*). Both the WOR and the merger code contain clauses on confidentiality: works council members and union officials are obliged to keep the information they are given confidential. The standard rules in securities legislation (Articles 10 and 27 of the Decree on Public Offers) stipulate that employee representatives may be informed only when the offer is made public. Target companies with a registered seat in the Netherlands are supposed to communicate their intention to issue an offer to the employee representatives, or if there are none, to the employees, as soon as this intention has been made public. This is too late for employee representatives to be able to have meaningful influence and therefore contradicts the general Dutch worker involvement legislation, which requires that employees be informed and consulted at an early stage.

It has been debated whether securities law, more specifically the rules on insider information and insider trading, is violated when employee representatives receive information before the intention to issue an offer is made public. The majority view before the securities legislation entered into force was that securities law allows persons that, pursuant to their function, are involved in the bidding process to be informed earlier than the general public, on condition that they keep this information

confidential. Because works councils definitely have a role in the bidding process, they are entitled to timely information (as required in the WOR and the merger code). However, the transposition of the takeover Directive unambiguously contradicts this: employees may receive the information only when the (intention to) bid is made public. It can be argued that the postponement of information and consultation until the moment the offer is made public is a violation of Article 14 of the takeover Directive, which states that the Directive shall be without prejudice to existing worker rights.

### **3. The role of employee representatives**

#### **3.1 General information and consultation rights related to takeovers**

Every undertaking with 50 employees or more is obliged to set up a works council with a range of information and consultation rights. The WOR provides the works council with three main types of rights: information rights, consultation rights and approval rights. Management must consult the works council on all major issues, including plans to sell all or part of the company or to take over other companies. On these issues the employer must seek the views of the works council and delay taking action for at least a month if the works council disagrees with the proposal. During this period the works council can appeal to the Enterprise Chamber (*Ondernemingskamer*) of the Court of Appeal in Amsterdam. When the employer has neglected their information and consultation duties, or has taken insufficient account of the interests of the employees, the court may block the decision and even undo the steps taken to implement the decision. There are several examples of mergers and takeovers that were blocked in this way (however, none of these involved listed companies).

Since 2010, the right of the works council to speak at the general meeting of shareholders of public limited companies (both listed and unlisted) on some major management decisions, including mergers, takeovers and divestment, either taken by or to be approved by the general meeting, has been enshrined in the Civil Code. However, there are no sanctions against non-observance and the general meeting of shareholders is completely free to ignore the expressed views. It is unclear to what extent works councils make use of this right.

In large companies a supervisory board appoints and dismisses management and approves major management decisions. Works councils have special nominating rights for one-third of the seats of supervisory boards. Members of the supervisory board are supposed to act in the interest of the company and the undertaking as a whole (also in case of mergers and takeovers). They may not act as representatives of partial interests, be it the interests of shareholders, banks or employees. As neither employees of the company nor trade unionists dealing with the company can be nominated, and nominees are often not familiar with employees' day-to-day concerns, this indirect representation of employees at supervisory board level is not always effective.

### 3.2 Trade unions: merger code and right of inquiry

In the case of acquisitions (or mergers) that involve at least 50 employees, the SER merger code applies. This code is not hard law, but rather a code of conduct (soft law). At an early stage of the negotiations, trade unions must be informed and consulted, both on the decision as such and on the foreseen consequences for the employees. When the employer concerned does not comply with their information and consultation obligations, the unions can lodge a complaint with the SER Merger Conflicts Committee (*Geschillencommissie Fusiegedragsregels*).

In addition, both shareholders and unions can request the court to order an investigation into companies when there are serious doubts about the soundness of their policies. The arrangement covers both public and private limited companies. The first step is to complain to the board (executive and supervisory board) about the policy of the company and give them a reasonable amount of time to change it. When there is no change in policy – which is usually the case – a request to start an investigation can be filed at the Enterprise Chamber of the Amsterdam Court. When the request is granted, the court appoints one or more investigators, depending on the complexity of the issue. The request – and the court's assignment to the investigators – can refer to all or part of company policy, for a longer or shorter period. When requested, the investigator's assignment can also cover related companies (subsidiaries, parent company and so on).

Since the revision of the law in 1994, the court can – if a request is made to that end – take far-reaching measures to correct the state of affairs in

the company, even before an investigation has started. These measures may include dismissal of one or more members of the executive board or the supervisory board; temporary appointment of one or more members of the executive or supervisory board; temporary deviation from the articles of association; and declaring certain decisions of the executive board void. The report of the investigators is the basis for the verdict of the court, whether there was mismanagement in the company or not. In case of mismanagement, the court can – but is not obliged to – take several measures, including the ones mentioned.

Most of the cases involve small private limited companies. However, from the end of the 1990s, the right of inquiry was applied to another type of conflict, namely those involving issues of corporate governance. In one such case, a listed real estate company defended itself against a hostile takeover by an Australian company. The court ruled that the defensive measure taken was a case of mismanagement. Although part of the ruling was nullified by the Supreme Court, this court agreed that the lavish golden parachute created by the management of the real estate company for its own members could be considered mismanagement. Although this case was started by shareholders, it might also have been initiated by the unions. Other important cases were Stork (see section D) and ABN AMRO. In the Stork case (in early 2007), the court on the one hand forbade the use of defensive measures by the executive board against hedge funds and on the other hand rejected the supervisory board dismissal demanded by these hedge funds. In the ABN AMRO case, the court made the controversial ruling that, once the executive board has publicly stated that the company is open to a public bid, it should try to maximise shareholder value. The Supreme Court later overruled this verdict and stressed that in all circumstances the stakeholder approach has to be followed. In both cases the unions and the works council successfully requested from the court that they be considered an interested party.

### 3.3 Information and consultation of works councils with regard to public offers

As far as the decision to launch a public offer is concerned, at first sight there are no problems with regard to the position of the works council of the bidder. If the bidder is based in the Netherlands the advice of the works council must be sought. Information and consultation should take place before the public announcement of the offer. We have already noted

that, according to the FSA and the Decree on Public Offers, the information may be given no earlier than the moment the offer is made public. In the legislative process, the government has tried to solve the tension between securities law and worker involvement rights by stating that the validity of the offer should depend on a meaningful consultation process with the works council. This would, according to the government, result in sufficiently meaningful consultation, albeit at a somewhat later stage than in the case of types of mergers and takeovers other than public offers.

The position of the works council in the target company is fundamentally different. The main problem is that the decision to accept or refuse the offer is not taken by the (executive board of the) company itself, but by individual shareholders. There is in principle no legal right for the works council to block decisions of these shareholders, or a right to be informed and/or consulted on their intentions: information and consultation rights can be implemented only vis-à-vis the executive board. Only in very special circumstances is it conceivable that a major shareholder will have information and consultation obligations (there is one court ruling to this effect). Although this is first and foremost true for mergers that take place through share transactions – as opposed to transfers of undertaking or legal mergers – the problem is especially present in case of public offers, due to the dispersed ownership of shares (with the added complication that some 80 per cent of the shares in Dutch listed companies are held by parties outside the Netherlands).

The question remains what the rights of the works council are with regard to the position the executive board of the target company takes towards the bidder. There appears to be a consensus that the works council has the right of advice whatever the opinion of the executive board of the target company is (support, opposition or neutrality). This would imply that decisions of the executive board of the target company may be challenged in court by the works council. It remains to be seen what the effect of a court decision in favour of the works council would be: the court decision only affects the stance of the executive board, not the decision of the shareholders to transfer their shares. A court ruling in favour of the works council will have much more effect when the bidder has made the offer conditional on the support of the executive board of the target company; then the works council of the target company effectively influences the continuation of the bidding process itself. In practice, a works council usually sides with its own management.

### 3.4 Information and consultation of works councils with regard to a hostile public offer

The central issue in case of a hostile public offer is whether the executive board of the target company takes defensive measures against the bid (such as suspending voting rights for shareholders or issuing new shares). In principle, the works council of the target company has the right of advice with regard to measures taken by the executive board to have an effect on the transfer of ownership of the company. This includes the use of defensive measures in case of a hostile takeover. Thus the works council of the target company may either support or oppose defensive measures taken by the executive board (or choose to be neutral). The main example is the issuing of new shares to a 'white knight' in such an amount that the white knight actually gains control. In practice, the works council usually supports the defensive measures, joining forces with the management and supervisory board of the target company. This happened in 2007 at Stork. A recent example is KPN, where defensive measures were taken to fend off the Mexican tycoon Carlos Slim.

The SER merger code explicitly takes account of hostile public offers (that is, a public offer without the consent of the executive board of the target company). The bidder shall uphold the information and consultation rights of the trade unions in case of a hostile offer in the same way as in the case of non-hostile offers. According to the Code (Articles 5.2 end 5.3), the bidder must notify the target company of the intention to launch the offer at least 15 days ahead of the actual offer and the executive board of the target company has to inform and consult the unions in the same way as in other types of mergers. Again, these provisions are in violation of the securities legislation that implements the takeover Directive and will be abolished in the near future.

The SER merger code specifically takes account of takeovers by way of the gradual acquisition of shares. Article 6 stipulates that the information and consultation procedures should as much as possible be conducted as in the case of a 'normal' merger, takeover or acquisition.

Mention should be made of the duty to notify the crossing (both ways) of a number of thresholds of shareholding (3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent, see Article 5:39 Wft) to the Financial Markets Authority. As this information is made public, employees, works councils and unions are able to get information on the build-up of portfolios of shares by parties at an early stage.



## **4. The Stork case – a plaything for 'activist' funds**

### 4.1 Some basic information

Stork N.V. machinery was founded in 1865 and was long seen as one of the most innovative and progressive firms in the Netherlands. As early as 1881 the firm started a company pension fund and two years later an early type of workers' representation (a *kern*). In the late 1960s a period of restructuring started as heavy industry declined, at national and global level; total employment decreased from 26,000 in 1968 to 12,000 in 1983. The firm made a remarkable come-back by shifting to 'light' industrial production: engineering and supply for aviation and space travel, as well as food systems and technical services. By 2007 the group had evolved into a large company with over 80 subsidiaries. The total workforce reached 13,300 employees spread over four divisions (textile print machinery, chicken slaughter machinery, aviation technology and technical services). Although the Stork group had a strong decentralised company culture, with four divisions that could not be placed under the same common denominator, the whole group functioned with one 'identity' with a long entrepreneurial history and tradition.

Stork had a two-tier governance structure with an executive board and a supervisory board. Based on the WOR extensive information and consultation through the works council system was created after the Second World War. The WOR rights, including codetermination, were executed by the central works council for issues involving the entire group, by unit works councils at the level of the strategic business units and by works councils for the individual subsidiaries. The trade unions had a strong position in the company and were recognised as the competent partner that negotiated terms and conditions of employment through well-established collective bargaining processes. The strength of workers' involvement was demonstrated in the 1970s as the closure of two ironworks was successfully blocked by industrial action.

### 4.2 Description of the process

In 2006 the company, which was listed on the Amsterdam Stock Exchange, came under heavy attack from two so-called 'activist' hedge funds that had started with a participating interest in 2004 (Centaurus and Paulson). Centaurus and Paulson demanded the break-up of the

conglomerate. The funds wanted the company to concentrate on aerospace activities and to sell off the other divisions. For all other important stakeholders the idea of splitting up the group and concentrating only on the aerospace operations was seen as a betrayal of the aims of the founding fathers and not in the interest of all stakeholders, including workers and customers.<sup>1</sup> The management decided not to respond to this demand and this decision was backed not only by the supervisory board but also by the works council and the trade unions. But when the demands of the hedge funds were tabled at the extraordinary general meeting of shareholders on 12 October 2006, it became clear that a large majority of the shareholders present did not agree with the position of the board ('no selling of divisions'). Further consultations between Stork management and the two funds failed to result in an agreement. The hedge funds reacted by calling for another extraordinary general meeting of shareholders. One of the points on the agenda that they wanted to table was a vote of no confidence in the leadership of the group. The management response was to issue new preferential shares to a foundation, with the primary goal of preserving the independence and continuity of the company. The hedge funds' response was to call for an inquiry procedure in which they demanded the reversal of the share issue (or at least a ban on any voting rights awarded to the new shares) and the dismissal of the supervisory board that had taken the lead in this action.

In January 2007, the Enterprise Chamber of the Amsterdam Court of Appeal had to rule on the dispute between the two hedge funds and the Stork group. The hedge funds asked the court to deprive the Foundation (the owner of the preferential shares that had been established as a defence wall) of its voting rights. Stork's works council and the trade unions sided with management in defending the company against a takeover that would probably lead to a break-up. The works council asked the court to suspend the voting rights of the hedge funds; the trade unions defended the supervisory board against dismissal.<sup>2</sup>

Neither of the two main parties to the dispute achieved a complete victory; the court granted to a certain extent the request submitted by the hedge funds by reversing the share issue and prohibiting the defensive wall, but the demand to dismiss the supervisory board was rejected. According to the court, this would have been a too radical change in the group's

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1. <http://www.orinformatie.nl/?subject=news&id=126>  
2. Largely based on van het Kaar (2007).

strategy. Instead of a dismissal of the supervisory board, the court added three members to this body with the task of mediating between the conflicting parties through consultations and negotiations. The trade unions and the workers considered that the court's verdict constituted support for the view that defines a company as a community of different stakeholders who all have to be involved in important decisions, and not primarily as a shareholder vehicle. Legal experts and analysts regard the proceedings as a test case in relation to the increased rights of shareholders: 'the Enterprise Chamber intervened with immediate measures mostly to preserve the status quo and allow for an orderly process of debate and conflict resolution' (Beckum *et al.* 2010). Since 2004 the rights of shareholders had been extended to the prerogative to dismiss the supervisory board members; the court made clear that there were certain limits to this right.<sup>3</sup>

Soon after this decision the British investor Candover stepped into the race. A first effort in the summer of 2007 to acquire a majority of the shares failed. One owner of a substantial part of shares (32 per cent, later on extended to 43.5 per cent), the Icelandic food machinery group Marel was interested in the food division and refused to accept the bid. Centaurus and Paulson also evaluated the offered share price as too low. The works council had been informed and had rendered positive advice on the planned transaction as 'a good step to allow Stork to continue with its strategy'.<sup>4</sup> During two months of negotiations with the executive board and the supervisory board, including the three extraordinary supervisory board members appointed by the court, agreement could be reached over a takeover by Candover that was fully and unanimously supported on 28 November 2007. The hedge funds that had raised the level of participation to 33 per cent of the shares backed the intended offer.

In a joint press release by Stork and the investor it was said that the Stork central works council had been informed and requested to review the intended offer.<sup>5</sup> A guarantee was given that existing rights would remain in place, including employee codetermination, existing social plans and collective agreements, and that there would be no negative employment

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3. <http://www.fnvformaat.nl/jurisprudentie/jurisprudentie-verdieping/enqu%C3%AAAterecht/uitspraak-twijfel-aan-juist-beleid>

4. Intended recommended cash offer of EUR 47 per share for Stork, 26 June 2007, <http://hugin.info/130797/R/1135429/212877.pdf> and recommended cash offer, 10 August 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aZDmtIk.hkoY>

5. Offer for Stork, Candover Investment, press release, 28 November 2007.

consequences. The supervisory board and the executive board spoke of a constructive dialogue that had led to an agreement and recommended the deal to the last shareholder meeting held on 5 January 2008. The central works council delivered a positive opinion on the acquisition that was declared unconditional on 17 January 2008. Soon after, Stork was delisted from the stock market. The chicken slaughter division was sold and the other entities continued as separate companies.<sup>6</sup>

### 4.3 Evaluation

The coalition of the executive board, the supervisory board, the trade unions and the central works council strengthened the involvement of workers' representatives in the whole process before the takeover took place. However, this coalition could not prevent the partial break-up of the group. The trade unions that organised strike actions in September 2007 against a split of the group were satisfied with the fact that there would be no negative employment effects. But, although the 'activist' shareholders did not get their way, the unions together with the founders' family regretted the outcome of a complicated and long fight over the ownership of the group. A spokesperson of the family referred to a wall painting in the old office, which dated back to 1892, that symbolised the start of the social welfare system in the Netherlands with the statement: 'Jointly we act, no struggle, but cooperation'.

The first attacks by the hedge funds were countered with all possible means. The central works council, together with the concerned unions, signed up as interested party in the court case that was initiated by the hedge funds, which was meant to break down the defence wall. The hedge funds realised after this move that the works council was a stakeholder that could not be ignored. The funds approached the works council for an exchange of views as they formulated a vote of no confidence in the executive and the supervisory board. The planned bid by Candover in June 2007 received more positive acceptance from the council. But the threat of a complete break-up remained. Although the implementation of the Thirteenth Directive entered into force on 28 October 2007 and the

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6. The acquisition of Stork Food Systems by Marel received positive advice from the Stork works council in 2008. In 2011 Candover sold the other divisions to the British private equity company Arle Capital that already had shown interest in 2008. The separate divisions are Stork Tech Services, Fokker Technologies and Stork BV.

Dutch legislator had decided not to apply the new legislation to pending cases, the intended offer was presented to the central works council. The legal basis was Article 25 of the Works Council Act. In accordance with the procedure to obtain the central works council's advice on the sale of the food division, Stork and Marel had discussions with the central works council as part of the advice process. The results of the deliberations were laid down in a covenant.

In general terms the consultation rights of workers are too weak to completely block this kind of turbulent hostile activity. However, the solid position of the trade unions and works councils made it possible to influence the process to a more positive outcome than the hedge funds and activist shareholders had in mind. The protests in a broad coalition with the use of all juridical means combined with workers' voice made it possible to counter the attack. In hindsight the works council is happy about the de-listing: it has brought an end to the risks of hostile takeovers. The attacks by the hedge funds led to a complicated fight that demanded all the energy of the works council members ('a lot of fuss that had nothing to do with the core business of the company').<sup>7</sup>

## 5. Concluding remarks

With regard to takeovers and acquisitions in general, the works council in particular has strong information and consultation rights that are enshrined in the Works Council Act. Trade union rights have no legal status, but are contained in a 'soft law' code of conduct (which is presently under revision).

In the case of public offers, the situation is more complicated. After the implementation of the takeover Directive, it is against the law to notify the works council and/or the unions of takeover intentions before the public announcement of these intentions. The legislator did not consider it problematic that these new rules are contrary to the existing legislation on worker involvement because the agreement in principle between the bidder and the target company can be made conditional on the required involvement of the works council and/or the unions. In practice, however, the delay will make information and consultation less effective.

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7. In an interview published in van Lammeren (2009).

Apart from this, the position of the works council of the target company is difficult. However, this is inherent in this type of acquisition, in which not the management of the target, but individual shareholders take the final decision. The work council can wield some influence, due to some statutory influence on the stance the management of the target company takes. This is especially important in the case of hostile takeovers.

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