De reikwijdte van medezeggenschap
Zaal, I.

Link to publication

Citation for published version (APA):
Zaal, I. (2014). De reikwijdte van medezeggenschap

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
HOOFDSTUK 8

Summary and conclusions

The scope of co-determination: tensions, limitations and possibilities

8.1 Introduction: “co-determination follows decision-making”

It is a generally accepted fact in the Netherlands that employees must have a say in the decision-making within the enterprise. That involvement is based on two pillars. On the one hand employees must be able in a democratic society to influence decisions that significantly affect them. That is the participation notion, which is aimed at a better development of employees in the enterprise in which they work. Another pillar of co-determination is the notion that a company benefits from its employees’ influence. Decisions are more broadly supported and can be implemented faster and more easily if the employee representatives are involved in those decisions. In the history of co-determination law, the latter objective initially came first. The participation notion was added at a later stage. Both objectives can be found in Section 2 of the Wet op de ondernemingsraden (Works Councils Act).

Co-determination is also embedded as a fundamental right in the Dutch Constitution and in European regulations. The implementation of that constitutional right can be found in several Acts. There is not one single co-determination act; rather, the influence of employee representatives can be found in a wide range of acts and areas of the law. The main Act regulating employee co-determination is the Works Councils Act, which gives employees the right to be informed, the right to be consulted, and the right of consent. The Works Councils Act applies to all enterprises, irrespective of the legal form in which they are conducted and irrespective of whether they have a profit motive. The term “enterprise” is defined as an organisation in which work is performed under employment contracts or on the grounds of an appointment under public law. The enterprise is conducted by an entrepreneur (a legal entity or natural person), represented by the managing director in respect of the obligations under the Works Councils Act.

The works council’s powers under the Works Councils Act are fairly broadly formulated. They are rights to be consulted regarding financial and organisational decisions such as mergers, acquisitions, investments, loans, reorganisations, the appointment of
managing directors and the right of consent regarding social decisions. In principle, decisions must be involved that are made or proposed by the management of the enterprise regarding the enterprise – the labour organisation.

The basic principle in organising the co-determination structure and exercising the powers is "co-determination follows decision-making". For instance, the works council has the right to be consulted or the right of consent only if the entrepreneur makes or proposes a decision. In other words: the works council plays a reactive role. A decision or proposal of the entrepreneur precedes co-determination. The works council itself may make proposals to the entrepreneur, but the entrepreneur cannot be forced in court to follow those proposals. The reason for this is that the entrepreneur has freedom of policy and neither a court nor the works council may step into the entrepreneur's shoes. The entrepreneur makes a decision and that decision is then presented to the works council for its advice or consent. That does justice to the fundamental co-determination right without disproportionately infringing on the entrepreneur's freedom of policy. The organisation of the co-determination structure is also based on the "co-determination follows decision-making" principle. In intragroup relations, for instance, co-determination must be in keeping with the organisational relations.

It is a sound principle that the works council is not dependent on any specific legal form, particularly in light of the objective of spreading co-determination as broadly as possible. In a number of cases, however, the legal definitions used are not in keeping with the organisational structure or legal form in which the enterprise is organised, or with the situation that it is in. It makes no difference to the applicability of the Works Councils Act whether a resolution is adopted or proposed by a company limited by shares or by a one-man business, since they are both entrepreneurs within the meaning of the Works Councils Act. However, the manner of decision-making and the stakeholders involved at a one-man business differ from those at a listed public limited liability company. Unlike one-man businesses and partnerships, private and public limited liability companies have shareholders, for instance, who have special powers as the owners of the company. In intragroup relations the general meeting of shareholders consists of a parent company that has central control over the group policy. In that case the management boards of the subsidiaries implement most of the group policy.

Since co-determination is in keeping with the balance of control, the manner in which the group policy affects the subsidiary's enterprise also has an impact on co-determination. Specific circumstances, such as insolvency or a merger, may also change the balance of control, which has repercussions on the works council's position. In this dissertation I have investigated in what situations the manner in which the balance of control is organised puts pressure on the "co-determination follows decision-making" principle. The situations that I have investigated are companies limited by shares, mergers and acquisitions, group relations, international (group) relations and insolvency. I have investigated in that regard to what extent those situations restrict co-determination and in what manner that is compensated.
by e.g. specific co-determination powers in other Acts or solutions in case law. I have also addressed alternatives available to staff representatives and have made recommendations for changes in the co-determination powers. My main conclusions are presented below.

8.2 Companies limited by shares

Since the concept underlying the Work Councils Act is “enterprise” (the labour organisation), it is not dependent on any specific legal form. For the purposes of the law it is irrelevant whether the entrepreneur runs his enterprise in the legal form of a one-man business or as a listed public limited liability company. However, the control structure is entirely different in these two legal forms. In a one-man business one natural person is regarded as the entrepreneur, while in the case of a company limited by shares the legal entity runs the enterprise. In the latter case the decisions are made by the legal entity’s bodies. That applies not only to decisions within the enterprise, which are regulated by the Works Councils Act, but also to decisions under corporate law, such as amendments to the articles of association, winding up, the appointment, removal from office and remuneration of managing directors, and profit appropriation. Strictly speaking, those decisions do not fall within the scope of Section 25 of the Works Councils Act, but they may nevertheless have serious consequences for the enterprise with which the works council is affiliated. An amendment to the articles of association or a change of the legal structure may affect the works council’s powers, for instance, and winding up of the company will often result in termination of the enterprise.

Moreover, these are decisions that are usually made by the general meeting of shareholders, whereas the Works Councils Act is based on the assumption that the obligations under the Works Councils Act are performed by the managing director within the meaning of the Works Councils Act. Does the works council’s right to be consulted extend to decisions of the shareholders’ meeting? The (ultimate) right of shareholders to organise the company in accordance with their own wishes and to decide on its continued existence is at odds with the employees’ co-determination right.

During the parliamentary discussion of the amendments to the Works Councils Act in 1998, the Minister took the position that corporate law (and insolvency law) and employees’ co-determination rights are strictly separate. The debate related to the question whether works councils should be given the right to be consulted regarding the profit appropriation. Such a strict approach would mean that the works council does not have the right to be consulted regarding decisions related to the company. However, the Enterprise Section has devised an “artifice” in its case law that nevertheless gives works councils the right to be consulted in the event of a decision related to the corporate organisation. In the Intergas judgment the Enterprise Section ruled that a separation between co-determination law and corporate law must be considered artificial. If a decision of a body of the company has a direct impact on the
enterprise, such a decision (the Intergas case involved an amendments to the articles of association) is a decision in which the works council’s advice must be sought.

This pragmatic approach of the Enterprise Section does justice to the interest of co-determination, but is not necessarily in keeping with the system of the Works Councils Act. It is unclear, for instance, who must request advice in such a case: the company’s management board or the body that proposes or adopts the resolution, in many cases the shareholders’ meeting? Although Section 25 of the Works Councils Act does not preclude that the advice must be requested by the shareholders’ meeting (since the entrepreneur must seek the works council’s advice and the shareholders’ meeting can be deemed to represent the entrepreneur (in the case of a private limited liability company) in respect of resolutions concerning the company), the works council’s right to be consulted in respect of shareholders’ resolutions is at odds with the system of the Works Councils Act. At the consultation meeting, for instance, it is the managing director who addresses the meeting on behalf of the entrepreneur. Moreover, the measures that the Enterprise Section can impose under Section 26(5) of the Works Councils Act are inappropriate in the case of shareholders’ resolution, since the management board cannot have a resolution to amend the articles of association withdrawn; that requires a new shareholders’ resolution. Or could a measure under Section 26(5) of the Works Councils Act mean that the shareholders’ meeting must adopt a new resolution, which would mean that the majority of the shareholders must vote in a certain manner? In my opinion that is not the case. It is possible in inquiry proceedings, for instance, but in that case mismanagement must be involved, which is a stricter test than that under Section 26 of the Works Councils Act. Moreover, the right to institute an inquiry expressly provides what measures can be taken in relation to the shareholders’ meeting, in any event in respect of the final arrangements. Another relevant difference with inquiry proceedings is that shareholders can join such proceedings and can independently claim remedies. My conclusion is therefore that the measures under Section 26 of the Works Councils Act cannot be effective in relation to the shareholders’ meeting. As the resolutions cannot be altered by measures imposed by the Enterprise Section, the right to be consulted is ineffective with regard to corporate law decisions.

In addition to the general right to be consulted, the works council also has a number of specific powers related to corporate law decision-making, both under the Works Councils Act and under corporate law. For instance, the works council of a legal entity has the right to be informed with regard to the financial statements under Section 31a(2) of the Works Councils Act. Section 31d of the Works Councils Act furthermore provides that the works council has the right to be informed of the remuneration (and the amounts involved) of the legal entity’s management board and supervisory body. Unlike the rest of the Works Councils Act, both of those sections are dependent on the legal form and relate to resolutions that concern the legal entity, not the enterprise. Section 30 of the Works Councils Act differs slightly from the rights to be informed referred to above, since it relates expressly to the managing director of the enterprise, but in many cases the managing director of the enterprise is also the managing director of the legal entity. The problems described above regarding the system of the
Works Councils Act and shareholders’ resolutions also apply to these powers. Since only rights to be informed and a right to be consulted without appeal are involved, these problems are not very relevant in practice.

Other co-determination powers regarding corporate law decision-making can be found in Book 2 of the Civil Code. The works council’s role in respect of resolutions concerning the company is twofold: under the Works Councils Act and under Book 2 of the Civil Code. Co-determination under corporate law arose in the 1970s. The reason was that employees, as important stakeholders, must be able to influence the composition of the company’s bodies. That influence detracts from the shareholders’ powers. The introduction of co-determination under corporate law gave employees formal powers, as well as embedding their interest in the corporate interest. The works council of a large (two-tier board) company has the right, for instance, to recommend supervisory directors; the works council of a public limited liability company is given the opportunity to inform the shareholders’ meeting of its views on the appointment and removal from office of managing directors and supervisory directors, the remuneration of managing directors and important decisions. The right to institute an inquiry allows employees to request the Enterprise Section to rule on the decision-making in the company if in their opinion there is valid reason to doubt a correct policy. These powers of employees are closely in keeping with the manner in which co-determination has been designed. In other words, co-determination under the Works Councils Act puts pressure on the principle of “co-determination follows decision-making”, but co-determination under corporate law does not. The right to be heard, for instance, creates a dialogue between the works council and the shareholders’ meeting, the body that is also authorised to adopt the resolutions in question.

Co-determination under corporate law is therefore in keeping with the balance of control in a company limited by shares, but also in this case potentially conflicts with shareholders’ rights. Any influence of employees limits the shareholders’ powers. The co-determination regime in the two-tier board regime, for instance, limits the shareholders’ right to appoint the supervisory directors. In the 1970s the idea was that the labour factor and the capital factor should have equal powers regarding the composition of the supervisory board. The equality between labour and capital can also be found in the right to institute an inquiry, since both the capital factor (shareholders) and the labour factor (trade unions) have the right to request the Enterprise Section to rule on the company’s policy and course of business.

In 2004, however, the equality was removed from the structure regime. The aim in doing so was to further strengthen the position of shareholders in the company. Although the works council’s position did not deteriorate as a result of the change in 2004, the significant strengthening of the shareholders’ position put an end to the equality between the parties. Six years ago the position of employees was strengthened again in relation to the shareholders’ meeting by the introduction of the right to be heard. The works council is also playing an increasingly important role with
regard to the right to institute an inquiry, which is restoring the balance between shareholders and employees in practice.

Debate occasionally flares up on the question whether the co-determination regime in Book 2 of the Civil Code should be abolished, so that all the works council’s co-determination rights are regulated under the Works Councils Act. In my opinion the validity of co-determination under corporate law is not in dispute. I have already concluded above that co-determination under corporate law is systematically much better in keeping with decision-making under corporate law than the right to be consulted under Section 25 of the Works Councils Act. Moreover, this form of co-determination is an important aspect of the actual (stakeholder) system. The interest of employees is embedded in the corporate interest that the management board and the supervisory board must take into account in the decision-making process. Employees furthermore have specific powers that strengthen their position (as important stakeholders). Those co-determination powers guarantee that the employees’ interest is actually taken into account in the decision-making process. The Works Councils Act and co-determination under corporate law are communicating vessels. The question is also whether the legislature could even abolish co-determination under corporate law, in light of Section 19 of the Constitution, which protects employees against the withdrawal of co-determination.

An expansion of co-determination powers under corporate law would seem the more obvious approach, since, as stated above, that would be in keeping with the balance of control. I have proposed expanding the works council’s right to be heard to also include other resolutions of the shareholders’ meeting, such as amendments to the articles of association, winding up, profit appropriation and adoption of the financial statements. In that case it is important that the sanction of annulment can be imposed on violation of the right to be heard, as in the case of violation of the right to be heard under Sections 2:161a/271a of the Civil Code. Expansion of the right to be heard to include private limited liability companies is also desirable, since there is no reason whatsoever in this regard to distinguish between private and public limited liability companies.

I have also argued in favour of a statutory right for the works council to institute an inquiry, in addition to the trade unions’ right to do so. A combination of the right to be heard at the front of the decision-making process and the possibility of having the policy repressively assessed if there are valid reasons for doubt constitutes a balanced system of co-determination. These powers do justice to the balance of control at companies limited by shares, without detracting too greatly from shareholders’ powers, since the right to be heard is aimed at consultation only, while the right to institute an inquiry can be exercised only if there is valid reason to doubt the policy. If Book 2 of the Civil Code offers the works council sufficient possibilities to influence the decisions of the shareholders’ meeting, “artifices” of the Enterprise Section are no longer necessary.
In addition to the influence that can be exercised by means of the right to be heard under the Works Councils Act and the corporate law co-determination under Book 2 of the Civil Code, a number of other proceedings are also available to staff representatives that allow them to influence corporate law decision-making. They are proceedings that were not drawn up specifically for staff representatives, but that may be instituted by all the stakeholders. For instance, the works council can use the proceedings under Sections 2:14–2:16 of the Civil Code to annul a decision of a body of the legal entity and in certain circumstances the works council is a stakeholder in financial statements proceedings. As I have noted above, the works council can use the right to institute an inquiry (although there is no statutory basis for that right) by joining a legal action as an interested party under Section 282 of the Dutch Code of Civil Procedure, for instance, or may agree with the management board that it has the right to institute an inquiry. Attention can also be drawn to the possibility for employees to purchase shares in a public limited liability company. That gives them the right to address the shareholders’ meeting regarding all resolutions that fall within its competence. That right is similar to the right to be heard and offers the additional advantages that it applies to all decisions of the shareholders’ meeting and that voting rights are also attached to share ownership.

8.3 Mergers and acquisitions

Legal entities, in particular companies limited by shares, can merge in three different ways:

(i) by means of an assets/liabilities transaction, also known as a transfer of business;
(ii) by means of a legal merger; or
(iii) by transferring a majority of the shares, known as a transfer of shares.

In the case of a transfer of business only the enterprise is transferred, not the legal entity. The resolution in question is proposed or adopted by the management board. It therefore presents no specific problems with regard to the works council’s right to be consulted under Section 25(1)(a) and (b). Because transfer of the entire enterprise can have major consequences for the shareholders in a company limited by shares (since the legal entity in which they are shareholders will then no longer carry out any enterprise), Section 2:107a of the Civil Code gives the shareholders’ meeting of a public limited liability company a right of consent. The works council has a right to be heard in respect of that right of consent. Also in this regard co-determination is in keeping with control (the right of consent).

The same applies to a legal merger. The ultimate decision to merge is made by the shareholders’ meeting, but is preceded by a proposal from the management board. The proposal may be made subject to the right to be consulted under Section 25 of the Works Councils Act. The works council’s powers in respect of the transfer or acquisition of control in the case of a transfer of business transfer or a legal merger therefore present no problems. However, problems under co-determination law may occur once the enterprise or the legal entity has been transferred, because in that case the control over the activities of the enterprise has changed. The employees have entered
the employment of a different entrepreneur and the question is whether the works council (of the transferring party) has any right of existence after the transfer.

In the case of a transfer of undertaking within the meaning of Sections 7:662 et seq. of the Civil Code, Article 6 of the Directive on transfers of undertakings provides that the works council continues to exist if the enterprise has continued to exist “as an entity” after the transfer. If that is not the case, member states must take measures to ensure that the employees who were represented before the transfer are still represented also after the transfer. The Works Councils Act does not provide for such measures; co-determination rights of employees are therefore lost after a transfer of the enterprise. Although it is assumed in Dutch case law that the works council of the acquiring party in that case also represents the employees of the transferring party, that is not in accordance with the Directive in my opinion. Dutch legislature has yet to implement Article 6 of the Directive.

Unlike in the case of a transfer of business or a legal merger, in case of a transfer of share the shares in the legal entity are transferred and acquired, not the enterprise. Strictly speaking, such a merger is therefore not subject to the right to be consulted under Section 25 of the Works Councils Act, which refers to transfer or acquisition of an enterprise. The “Intergas doctrine” addressed above might solve that problem: when a legal entity is transferred, the enterprise is also indirectly transferred. However, a transfer of shares presents an additional problem: the merger decision is not made by the management board or by another body of the legal entity, but rather by the individual shareholders. Except in the case of joint entrepreneurship, which is rare, although not impossible in respect of a shareholder other than a parent company, no resolution or proposal of the entrepreneur is therefore involved.

In the case of a friendly takeover this problem is solved in practice by following the management board’s positive recommendation to the shareholders. The decision to transfer the shares is then allocated, as it were, to the management board, since giving a positive recommendation in itself does not come under the exhaustive list in Section 25 of the Works Councils Act. In the event of an unfriendly (hostile) takeover, this artifice is of no avail, since there is no positive recommendation from the management board in that case. In the case of a hostile takeover the works council therefore does not have the right to be consulted, in principle, but in that case the trade unions can exercise all their powers under the Merger Code.

The Merger Code includes a specific provision on hostile takeovers. In such cases the acquiring party must inform the target company’s management board of the acquisition, to enable it to consult the trade unions involved. It remains to be seen whether such a provision is tenable in the event of a public bid that comes under the Financial Supervision Act and the Public Takeover Bids (Financial Supervision Act) Decree, since those regulations make it possible to make a bid without prior notice. Fully applying Section 5 of the Merger Code would put an end to that possibility, which would be a violation of the rights of investors, who are protected by those regulations. A similar
provision in the Works Councils Act or a similar approach in case law would give rise to the same conflict of interest. The fact that the employees’ interest in co-determination sometimes gives way to the shareholders’ interest (protected by securities law) becomes apparent when information or advice is provided. Trade unions, for instance, are informed under Section 3 of the Merger Code at a later stage about an imminent merger if the merger comes under a securities law regime, such as the Financial Supervision Act. During the parliamentary discussion of the implementation of the Thirteenth Directive, the Minister took the position that in the case of a public (friendly) bid the works council’s right to be consulted moves to the background. That is a substantially different approach than in the other types of mergers, of which I had in fact concluded that the works council must be consulted at an early stage, sometimes before a letter of intent is signed.

In sum, employees’ co-determination rights are limited in the event of a public bid, which in my opinion applies to any public takeover. This is due on the one hand to the manner of decision-making and on the other hand to the investors’ interests. However, the regulations on public bids also create new rights to be informed, which relate specifically to this type of acquisition. In the final section I have investigated whether the regulations on insider trading in general oppose co-determination of employees in the event of a public takeover. That is not the case in my opinion, in light of the possibility of imposing a duty of confidentiality. However, I have noted in that regard that the duty of confidentiality under the Merger Code relates only to the powers under Section 4 of the Merger Code, not to the statement under Section 3 of the Merger Code.

In the chapter on mergers and acquisitions I have also paid attention to the special possibility of using (financial) co-determination as an anti-takeover mechanism in the event of a hostile bid. By issuing shares to employees in the context of an employee participation scheme, the shareholding of the (hostile) acquiring party can be diluted. That way an acquisition can be avoided. There is a risk that the Enterprise Section will conclude in inquiry proceedings (possibly instituted by shareholders) that there are valid reasons to doubt a correct policy or to issue a mismanagement ruling, on the grounds that employee co-determination is being used for a purpose other than that for which it is intended (abuse of power; Section 3:13 of the Civil Code). The question whether abuse of power is involved depends on the extent to which employees actually participate and obtain any financial gain, and on the purpose of the scheme. If the company can prove that it had intended for some time already to allow employees to financially participate in the company, abuse of power is less likely to be assumed.

8.4 Group relations

The principle of “co-determination follows decision-making” is also under pressure in group relations. The policy is usually developed at a higher level in group relations than at the level at which the co-determination bodies operate. When strategic decisions must be implemented by the subsidiary’s management board, the works
council’s right to be consulted is reduced to input regarding the implementation, rather than essential influence over all the decision-making aspects, as intended in Section 25 of the Works Councils Act. The same applies to decisions with an immediate effect (which the parent company usually makes on the grounds of its shareholding). The erosion of co-determination in group relations is compensated to some extent by the obligation to set up group co-determination bodies (which must do justice to the organisational structure) and the doctrines of attribution and joint entrepreneurship developed in case law, which mean in exceptional situations, described in sections 4.4.5 to 4.4.10, that a decision or proposal of the parent company must nevertheless be presented to the subsidiary’s works council. This does more justice to the notion that co-determination follows decision-making.

The co-determination regulations in Book 2 of the Civil Code include a specific group provision. With regard to both the two-tier board regime and the right to be heard the powers in group relations are exercised at the level of the parent company, which is in keeping with the balance of control. Those powers are exercised by the works councils of the subsidiaries (dependent companies), unless a central works council has been set up. In the latter case the power passes to the central works council. The right to institute an inquiry does not include a statutory possibility of filing an application for an inquiry with a parent company or other group company, but that possibility is assumed in case law.

8.5 International (group) relations

Decision-making and co-determination vary widely also in international relations. International groups often use the so called Nederland-constructie (also if the senior management is located in the Netherlands), which limits the employees’ co-determination to the Dutch branch of the group and places the strategic decisions made at the level of the top-level holding company beyond the employees’ influence. This erosion of co-determination is partly compensated by the European Works Council regulations with regard to the right to be informed and consulted; only partly, however, because the influence of a European Works Council cannot be compared with that which a Dutch works council can exercise over the decision-making in the Dutch enterprise. The doctrines of joint entrepreneurship and attribution addressed above can also play a part in international groups.

I have concluded above that co-determination under corporate law is in keeping with the balance of control in Dutch groups, but this does not apply to international groups. Because of the use of the Nederland-constructie and the related exemptions, co-determination under corporate law is limited to the Dutch part of the group, but that is usually not the level at which the strategic decisions are made. The regulations regarding the right to be heard are unclear and should be clarified in my opinion. In my opinion the limitation should thereby not be as drastic as in the two-tier board regime, since the rights to be heard have much less impact on the fundamental powers of the shareholders and the shareholders’ meeting. The erosion of the right to
be informed and the right to be consulted is compensated to some extent by European regulations, but that does not apply to co-determination under corporate law. The European directives and regulations in the field of co-determination under corporate law apply only if the entrepreneur opts to conduct his enterprise as a European legal entity or opts for a European restructuring. However, the regulations are expressly not intended to create European co-determination under corporate law, but rather to protect employees' (national) co-determination powers when a European legal entity is incorporated or a European restructuring is implemented. That objective is realised only partly, as demonstrated in Chapter 5. Although many member states provide for a form of co-determination under corporate law, I do not believe that a directive with minimum regulations in the field of co-determination under corporate law is politically feasible, also since that form of co-determination is very closely linked to national corporate law regimes. Moreover, co-determination under corporate law is highly controversial in a number of member states and it is apparent from the directives on European legal entities and European restructurings that such co-determination is very problematic. It is conceivable, however, that corporate law co-determination will become part of the negotiation process with the Special Negotiating Body (SNB) in the context of setting up a European Works Council. In the case of a group with a top-level holding company in the Netherlands it would be desirable, for instance, that the powers under corporate law are exercised by the European Works Council rather than by the central works council. That would also accommodate the legitimacy objections that may be raised in that case, since a European Works Council represents not only the Dutch employees, but all the employees in the various member states.

The limited influence of employees on the decision-making in international groups is due to the principles of territoriality and legitimacy. Dutch co-determination law is limited to the Dutch territory and the Dutch employees do not represent the staff members of the international group who work abroad. Moreover, entrepreneurs have freedom of establishment within the European Union. Co-determination, or in any event co-determination under corporate law, is at odds with that fundamental freedom, since strong forms of co-determination may stand in the way of establishing an enterprise in a specific member state. I have concluded in section 5.9 that it cannot be precluded that the European Court of Justice will rule that imposing Dutch co-determination on foreign legal entities or attaching conditions to an outbound cross-border change of the legal structure or a transfer of the registered office will disproportionally breach the freedom of establishment. This will give rise to a difference (that is unreasonable in my opinion) between forms of cross-border mobility that have been harmonised, such as cross-border mergers and the incorporation of a European legal entity, and cross-border restructurings that are directly based on freedom of establishment. By harmonising cross-border restructurings and linking them to a co-determination regime, it is possible to strike a balance between the fundamental freedoms on the one hand and the co-determination right on the other hand. In my opinion the emphasis is thereby rightly on preserving co-determination and avoiding abuse.
8.6 Insolvency

In Chapter 6 I have addressed the situation in which a entrepreneur is insolvent. Insolvency or a suspension of payment gives rise to a change in control. In the event of insolvency the control over the enterprise is transferred to the trustee; in the event of a suspension of payment the entrepreneur requires the administrator’s permission. Moreover, the decision that the entrepreneur is insolvent is made by a court, not by the entrepreneur himself. The entrepreneur can file an insolvency petition, but that can also be done at the request of creditors. The insolvent entrepreneur comes under insolvency law, the main objective of which is to arrange for the highest possible proceeds of the estate for the creditors of the enterprise. This interest of creditors is at odds with the interest of employee co-determination, which gives rise to delays. Those delays may be caused by the suspension period under Section 25(6) of the Works Councils Act and may give rise to extra costs for the estate.

I have distinguished between the influence prior to the insolvency order or the suspension of payment and the subsequent period, in which the administrator or the trustee has taken over all or part of the control over the enterprise. With regard to the first phase my conclusion is that the works council plays no part during that phase. If creditors file an insolvency petition, the works council plays no part whatsoever. The creditors cannot be regarded as entrepreneurs within the meaning of the Works Councils Act and, unlike in other countries, the employee representatives play no part in the proceedings before the court, except for the possibility to file an objection or appeal against the insolvency order. If the entrepreneur itself files an insolvency petition or a petition for a suspension of payment, the decision or proposal may be subject to a right to be consulted, in any event in the event of insolvency. The insolvency order gives rise to a significant change in the organisation of the enterprise (Section 25(1)(e) of the Works Councils Act), since the enterprise is run by the trustee rather than the entrepreneur after the insolvency order. However, it is apparent from legislative history and case law of the Dutch Supreme Court that a petition in one’s own bankruptcy is not a decision that is subject to the right to be consulted. The reason given by the Minister, as in the case of decision-making under corporate law, is that co-determination rights under the Works Councils Act and under insolvency law are strictly separate. Moreover, in the Minister’s opinion, it is undesirable to make the works council jointly responsible for such a drastic decision.

It is remarkable that the Minister does not refer to the objective of insolvency proceedings and the interests of creditors in the fastest possible liquidation of the estate. The Minister opts for a fundamental argument (separate areas of the law) that is out of date in my opinion; see my comments on this point regarding the separation of corporate law and co-determination law. Moreover the Minister is inconsistent in that regard, because he does believe that after the insolvency order the trustee, as a managing director within the meaning of the Works Councils Act, must comply with all the obligations under the Works Councils Act. The argument that a works council should not be made jointly responsible fails to take into account the works council’s position as a consulting party that does not take part in the decision-making, and the
double purpose of works councils under Section 2 of the Works Councils Act. That argument is also not in keeping with the adult status that the works council currently has. I then investigated whether there are other formal grounds on which not to involve the works council in the decision-making regarding the insolvency petition, such as setting aside the paritas creditorum (equality of creditors). I concluded that that is not the case, but that it is nevertheless not desirable to fully apply the works council’s right to be consulted, in light of the creditors’ interests. Full application of the right to be consulted, including the right of appeal, would cause too much delay, which is also not in the employees’ interest. I therefore went in search of alternatives, which I again attempted to base on the specific situation that the insolvent company is in and on the interests of other stakeholders in such a case. My conclusion is that it is desirable to link a right to be heard to Sections 2:136/246 of the Civil Code and to involve the works council in the judicial insolvency proceedings, as is also the case in other countries. Another option is a right to be heard without a right of appeal, similar to Section 30 of the Works Councils Act, but having the works council heard in court is more in keeping with the manner of response to the decision-making. An additional advantage is that a right of the works council to be heard during the hearing of its own petition can play a part in the early identification of improper use of insolvency law, to which European legislature has also drawn attention. Finally, a stronger position of the works council in filing an insolvency petition is also in keeping with the notion, arising from case law of the Dutch Supreme Court, that the objective in an insolvency is not only to arrange for the highest possible payment to creditors; social interests such as employment also play a part. Trade unions can also play a role in this regard, since they can fully exercise their power to institute an inquiry after the insolvency order or suspension of payment. The fact that employees have been dismissed by the trustee does not detract from the cause of action.

Once a enterprise has been declared insolvent or has been granted a suspension of payment, the co-determination rights under the Works Councils Act apply in full. In the event of a suspension of payment the managing director is still authorised, albeit together with the administrator, and in the event of insolvency the trustee must be regarded as a managing director within the meaning of the Works Councils Act. The specific situation of insolvency and the creditors’ interests do mean, however, that the works council can be expected, for instance, not to use the suspension period and not to incur too many costs chargeable to the estate.

8.7 Final conclusion

I have described a number of situations above in which the co-determination right of employees is not in keeping with the manner in which the decision-making is organised in that situation, even though that is one of the main principles of co-determination law. I have reviewed the works council’s powers under the Works Councils Act and a number of specific powers under Book 2 of the Civil Code, the Merger Code and the Public Takeover Bids (Financial Supervision Act) Decree. That review has specifically shown that the special powers are much better in keeping
with the balance of control than the general powers under the Works Councils Act, which is due to the fact that the Works Councils Act is based on the enterprise concept. As a result of various “artifices” in case law and in practice, decision-making and co-determination are often lumped together. I refer to the Intergas doctrine, as a result of which advice must be sought on decisions that relate to the company, the link to the positive recommendation in the event of a takeover, and the doctrines of attribution, joint entrepreneurship and identification if a decision is made or proposed by an entrepreneur other than the entrepreneur to whose enterprise the works council is linked. This is practicable, and it may therefore not be desirable to change the current system. However, they remain artifices that are not truly in keeping with the system and may mean that co-determination does not have the desired effect, for instance because the measures taken by the Enterprise Section have no effect in relation to the shareholders’ meeting or because certain decisions, such as profit appropriation, fall entirely outside the employee representatives’ sphere of influence.

The special powers under Book 2 of the Civil Code, the Merger Code and the Public Takeover Bids (Financial Supervision Act) Decree were introduced for specific legal forms or specific situations, and are therefore better in keeping with the control ratios in the situations in question. Moreover, the works council and the trade unions have a number of other, more general powers at their disposal, such as proceedings under Sections 2:14-16 of the Civil Code, the right to institute an inquiry, the financial statements proceedings and the objection proceedings in the case of insolvency. Those proceedings offer employee representatives means of strengthening their position. There will nevertheless always be situations in which the employees play a limited role, despite the drastic consequences for the enterprise. To name a few examples: a transfer of business, a profit appropriation decision, a petition in the company’s own insolvency, a hostile takeover of the enterprise, forming part of an international group, and a cross-border change of the legal structure. I have therefore made a number of recommendations in the various chapters to strengthen the position of employee representatives. I have attempted in making those recommendations to base them to the extent possible on the principle of “co-determination follows decision-making” and have taken into account the interests of other stakeholders in the situation in question.

To name a few examples:
- the expansion of the right to be heard to include other decisions that relate to the company, such as amendments to the articles of association, profit appropriation, an insolvency petition and adoption of the financial statements, as well as an expansion to include private limited liability companies;
- a statutory right for the works council to institute an inquiry;
- implementation of Article 6 of the Directive on transfers of undertakings;
- a role for the works council in insolvency proceedings;
- the abolition of the foreign country clause;
- allowing employees of foreign branches to have a seat on the central works council;
– insistence within Europe on inclusion of co-determination under corporate law in the negotiations with the SNB in order to set up a European Works Council and harmonise European restructurings; and
– amendment of the right to be heard in international group relationships.

8.8 On a final note: the new conception of the works council’s responsibilities

Co-determination law is in a constant state of flux. Debate on the abolition of one rule is followed by the addition of new powers. A modern-day works council is involved not only in reorganisations, mergers, working hours and remuneration systems, but also in amendments to the articles of association, price-sensitive public takeovers, the appointment and removal from office of managing directors and supervisory directors, and European restructurings. In addition to protecting the interests of employees and of the enterprise, the works council has also become a guardian of the corporate law interest, the group interest and the interest in a public takeover or the division of an estate taking place as smoothly as possible in the event of insolvency. Whereas the legislative text of and comments on the Works Councils Act sufficed in the past, many works councils must nowadays also have knowledge of Book 2 of the Civil Code, various European Directives, the Financial Supervision Act, the Public Takeover Bids (Financial Supervision Act) Decree and the Insolvency Act in order to optimally and effectively exercise their powers. Works councils not only respond to proposed decisions of the entrepreneur, but also present initiatives and alternatives, negotiate, address the shareholders’ meeting and take legal steps, not only under the Works Councils Act, but also in inquiry cases, financial statements proceedings and proceedings under Sections 2:14–16 BW of the Civil Code. They are no longer only bodies of the enterprise (the industrial organisation), but also of the legal entity, with all the rights and obligations that entails. Moreover, some works council members are no longer only members of the “ordinary” works council, but also of a joint works council, group works council, central works council, SNB, European works council or SE (European Company) works council. That demands great efforts of the works council and its members. An investigation has indeed shown that some powers are put to little use. Their potential is underutilised. In my opinion that is no reason to simply abolish these forms of co-determination. Both in the Netherlands and in Europe co-determination, in all its guises, has proven its worth and has sufficient support. But to give full play to the (fundamental) right of co-determination, works councils must professionalise. Not by engaging professional works council members (the strength of co-determination lies in the involvement of committed employees who are thoroughly familiar with the situation on the shop floor), but by focusing on training in which attention is paid to all forms of co-determination and all the procedures available to the works council, including approaches off the beaten track. That way the legal influence that the works council already has can be converted into actual influence.