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Twenty Years of *European Company Law*

European Company Law Series

VOLUME 20

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Introduction

The European Company Law Series is closely linked to the bimonthly journal European Company Law, also published by Kluwer Law International.

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Developments and Challenges in European Company Law

Edited by

Bastiaan Kemp

Mieke Olaerts

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CHAPTER 4

EU Law under Construction: Sustainability, Stakeholders and the Relevance of Employee Consultation

Harm-Jan de Kluiver & Joti Roest

Stakeholder consultation is rapidly becoming a buzzword in recent EU legislation including the CSDDD. This concept is often described in rather broad terms and therefore it is left to companies how this can best be realised. In this chapter, we examine various ways to realise stakeholder consultation and how to arrange such consultation. We argue that even where stakeholder consultation is to be understood broadly, the consultative structures and whistleblowing mechanisms that are already available for workers' consultation can play a crucial role. Workers, whether employed by the company, its subsidiaries or its business partners, are often the first to become aware of potential adverse impacts in terms of sustainability, human rights or the environment and are the eyes and ears on the ground. Therefore, it is important to ensure that all workers in the chain of activities, not only those employed by the company but also by its subsidiaries and business partners, will have access to consultation platforms and at least be able to share relevant information with worker representatives. The European Works Council (EWC) offers an example in point of such a representative forum which can play a significant role in this regard. As the European Works Council Directive (EWC Directive) is currently under review, this is a good time to make necessary changes to reflect the above. Some examples of national law are discussed to illustrate potential amendments which could be made to the Directive. Perhaps the most important takeaway from our analysis is that workers are not only a vital category of stakeholders in their

own right but also can play a crucial role through already existing mechanisms and platforms in ensuring that human and environmental rights of others are respected.

§4.01 INTRODUCTION

Sustainable long-term value creation has become a key term in corporate circles nowadays. This is primarily an issue and a challenge for companies and their shareholders. However, actions by companies are almost by definition affecting related parties like employees, suppliers and customers as well as unrelated third parties, including communities where the company has set up production facilities, who sustain adverse environmental or social consequences of company actions. Generally, this wide group is denoted *as 'stakeholders'*. Parallel to the realisation that third parties are being affected by company actions, there is increasingly the notion that such stakeholders also in some way should have a say, or at least should be heard, when the policies of companies are being determined.

However, even if one subscribes to the abstract idea of consulting stakeholders, it is not easy to put this idea into practice. How should the company identify its stakeholders and how should those stakeholders be consulted? The sheer number of stakeholders makes it impossible to consult with all of them in person. This may mean that generally consultation partners will be representative organisations. But by what criteria should the company decide which persons or organisations can be deemed representative and is this really the best approach to get a clear picture of the interests of the various stakeholders?

Above we already referred to employees as an important segment of stakeholders. In relation to engaging with employees, the organisational challenges are easier to overcome. First, they can be more easily identified as there will be a formal relationship with the company, its subsidiaries, or suppliers.[1] Second, in many countries, structures have been developed and institutionalised that facilitate consultation of employees in works councils and the like which bodies are in a position to influence corporate policies. Hereafter, we will explore whether and to what extent one can draw on the rules, structures and traditions related to workers' involvement to bring stakeholder concerns to the fore and improve due diligence policies and practices and thereby minimise human rights violations and environmental adverse impacts.

1. Of course we acknowledge that employees of suppliers do not have a direct relationship with the group and/or group companies which are being supplied, and therefore under current law are not represented in consultative bodies such as a European Works Council (*see hereafter* 'paragraph 11'). Having said that however, workers of suppliers certainly may qualify as identifiable stakeholders for group companies that are being supplied and may be very important in identifying violations of human rights and/or the environment for example through whistleblowing mechanisms (*see infra* §4.05).

§4.02 CATEGORIES OF 'STAKEHOLDERS' DISTINGUISHED

In an increasing number of corporate law instruments, stakeholders are being referred to as a relevant category that should be included in corporate decision-making. At the same time, it is far from clear who actually are deemed to be stakeholders. This is further complicated by the various fundamentally different categories of stakeholders that can be distinguished and the aims that stakeholder consultation is supposed to achieve. A distinction can be made along the lines of legal or factual proximity to the company. In view of the latter, relevant elements may be whether there is a specific legal duty of the company towards the stakeholders or whether from a legal point of view the legal position is more open.

The first category of stakeholders are the employees of a company, which we understand broadly and for our purposes; it also includes employees of group companies and other companies that are closely related to the company in question (e.g., established suppliers). In general, one could say that employees, both in physical and legal terms, work in proximity to the company. They tend to work at sites owned by the company, live near its premises and have close legal ties in terms of an employment contract with the companies. However, there may also be considerable differences. The person that only works for a company on a temporary basis on a digital assignment from home will likely experience a greater distance to the company than the person who is not an employee of the company but happens to live near its premises and experiences hindrance caused by the company. In Part. II of this paper, we will focus on whether and how these differences between the various categories of employees are taken into account and which lessons may be drawn from that. Clearly, employees may also fall into various categories, e.g., if they live near company operations and sustain hindrance of such operations.

The second category of stakeholders with a clear (factual) proximity to the company is local residents living in the vicinity of its production and/or other facilities. Although there is no legal relation with the company, they may be directly affected by the company, for example, if the company releases hazardous substances or causes noise or other hindrances or facilitates such hindrance. An example is to set up a consultative council to be consulted by a company that operates an airport. Since 1 July 2023, Amsterdam Schiphol Airport has established such a body consisting of and elected by local residents, representatives of organisations and experts.[2] In this category, one could also think of plans to develop new production facilities or close existing ones (which may also include the transfer of operations to other locations in the EU or abroad).

The *third category of stakeholders* is customers of the company. They may not be affected by the operation of the company as such, but may experience detrimental effects caused by the products of the company. In principle, they may rely on their legal position as a contracting party of the company – and the ensuing contractual claims –

2. *See* https://maatschappelijkeraadschiphol.nl. This council does not have formal decision powers but may advise the company and the relevant ministry of infrastructure. The minister is bound to at least respond if advice is rendered.

and the relatively well-developed principles of product liability. Over the last few years, there have been many examples to choose from, but from a sustainability perspective, maybe the 'Dieselgate' claims against German automakers (including Volkswagen and Mercedes) stand out the most.

The fourth category of stakeholders is the wider group of persons that are affected by company operations without being in proximity to the company. One may think of situations in which actions by the company only cause a negative effect at a distance from the company operations. An example is pollution of a river which only affects the environment at downstream locations many miles away. Another example is the disproportionate emission of CO_2, methane or other greenhouse gasses which may have consequences in places far from business locations. In relation to this category, it will generally not be possible to organise direct consultation. In this case, there may be a role to play for non-governmental organisations that focus on protecting human rights and the environment.

The *fifth category of stakeholders,* which may overlap with the other categories, may be distinguished as the category of persons affected by company actions or of its subsidiaries or suppliers, which qualify as *a violation of human rights*. Clear examples are child labour, forced labour in general and evidently unsafe and/or unhealthy working conditions. Other examples include causing pollution which substantially affects the life of people in certain regions like farmers whose lands are being polluted by oil spills from pipelines, as was the case in the well-known *Shell Nigeria* case. In the literature, the latter category is frequently referred to as *'right holders'* with the implication that their position is of a special nature compared to other categories of stakeholders (who may be confronted with adverse effects which do not amount to violations of human rights).[3] Legal cases in relation to this category tend to receive quite some attention from lawyers as well as from the general public. Apart from the *Shell Nigeria* case, well-known examples are the *Kalina and Lokono People v. Suriname* case[4] and the decision of the Columbia Constitutional Court regarding the claim of a local Awá community in view of oil and gas exploration on their stewarded lands.[5] *See also* the case decided by the Constitutional Court of South Africa in *Occupiers of 51 Olivia Road v. Johannesburg*. In this case, the court ruled that the occupiers and the municipality were expected to enter into a meaningful dialogue to resolve the situation.[6]

3. This raises the pertinent question when adverse effects do or do not amount to human rights violations. Sometimes one may get the impression that all adverse effects are deemed human rights violations if such violations are not covered by other legal doctrines (like tort law).
4. IACTHR (2015) Series C, No 309 and *inter alia*, Fergus MacKay, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*, Erasmus Law Review April, 1 (2018).
5. Decision SU-123/18 re the claim of the Awá community "La Cabaña" in view of oil and gas exploration and mandatory prior consultation with indigenous communities in their stewarded lands. *See*: Report of Constitutional Court of Columbia, *Notable Judgements on vulnerable and disadvantaged groups* (2021), www.corteconstitucional.gov.co/english/.
6. [2008] ZACC 1:2008. *See*, *inter alia*, Gustav Muller, *Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership*, Stellenbosch Law Review 22, 3, (2011), 742-758.

In this chapter, we will not analyse and elaborate on these categories and the associated cases further. For what we aim to discuss in this article, it suffices to illustrate that when discussing consultation of stakeholders, there are a variety of categories of stakeholders with different characteristics. All these categories call for a different approach to organizing stakeholder engagement and dialogue. The choice of the instruments may also depend on the objectives of stakeholder consultation.

§4.03 OBJECTIVES OF STAKEHOLDER ENGAGEMENT AND CONSULTATION

Parallel to the categories of stakeholders distinguished above, a relevant question may be what consultation of stakeholders actually aims to achieve.

In the first and second categories distinguished above, the aim of consultation will ideally be to be informed about the negative impacts of company operations and concerns workers and residents may have in that respect. Subsequently, it will be on the company to explain which options it may develop to alleviate such concerns and explain to workers and/or residents what may and may not be feasible. This may take the form of an ongoing and structured consultation, including meetings with (representatives of) workers and residents.

In relation to the third category, customers, the aim will be to become aware of customer satisfaction on the one hand and, on the other hand, make sure that products do not and will not have adverse negative effects. The first aim (information on customer satisfaction) will relate to a vast group and will generally have to rely on surveys, etc. The second objective (product safety) will generally not be something to be assessed by customers, but it will need input from experts. Setting up a structure to facilitate a dialogue with customers will generally not be possible or feasible as customers will generally meet the company in a one-off situation and may be spread all over the globe. If products do have adverse effects, this will generally lead to legal (class) actions led by consumer organisations and legal action. In the previous paragraph, we noted, as an example, the 'Dieselgate' matter.

The fourth and fifth categories seem to have taken front and centre over the last few years and may count on wide public interest. This has strongly been reinforced by fairly recent EU initiatives such as the Company Sustainable Reporting Directive (CSRD)[7] which came into effect on 5 January 2023, and the draft Corporate Sustainability Due Diligence Directive (CSDDD).[8] We will discuss these instruments in the next paragraph. For now, we note that in respect of these categories, it is crucial that the company will be informed of (potential) violations of human rights and (potential) environmental adverse impacts in its supply chain. In case of new projects, this will call for a fairly traditional due diligence effort, i.e., mapping all relevant aspects and

7. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022.
8. Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022) 71 final), 23.02.2022.

consequences of a new business operation including its economic, social, and environmental impact. As far as existing operations are concerned, one may probably have to rely more heavily on information provided by stakeholders.

§4.04 ENVISAGED STAKEHOLDER CONSULTATION IN THE PROPOSED EU CSDD DIRECTIVE AND THE ROLE OF EMPLOYEES

As is well known by now, the EU has embarked on an ambitious journey to promote sustainability in business. As set out in the so-called Green Deal, corporate sustainability is made the subject of two Directives which respectively relate to detailed reporting and due diligence obligations. As noted in the previous paragraph, the reporting obligations have been laid down in the Corporate Sustainability Reporting Directive (CSRD) EU 2022/2464 that is in force since 5 January 2023.[9] As far as due diligence obligations are concerned, the draft Corporate Sustainability Due Diligence Directive has been the subject of difficult negotiations between the EU Council of Ministers and the EU Parliament.[10] Only after several rounds of amended proposals, an agreement between representatives of both bodies was reached on 15 March 2024 which was approved by the EU Parliament (April 2024) and EU Council on 24 May 2024. The EU CSDDD proposal will add a new layer of due diligence obligations related to the operations of EU companies (and other companies in case of a turnover of EUR 450 million or more in the EU), its subsidiaries and specifically suppliers outside the EU if the number of workers employed exceeds 1000.

According to the March 2024 agreement,[11] the CSDDD anticipates intense consultations with stakeholders, specifically employees. Recital 39 and Article 7 (2) provide explicitly: 'The due diligence policy should be developed in prior consultation with the company's employees and their representatives.' And where Article 3(1)(n) CSDDD defines stakeholders, it is no coincidence that employees of the company but also of affected companies are put first: '"stakeholders" means the *company's employees, the employees of its subsidiaries, trade unions and workers' representatives,* consumers; and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business partners, *including the employees of the company's business partners, trade unions and workers' representatives*'. According to a new Article 13(1): 'Member States shall ensure […] effective engagement with

9. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322/60, 16.12.2022.
10. *See further, inter alia*, with many more references to literature, Harm-Jan de Kluiver, *Towards a Framework for Effective Regulatory Supervision of Sustainable Governance in Accordance with the EU CSDDD Directive. A Comparative Study*, ECFR 20(1), (2023), 203-239.
11. *See* Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Analysis of the final compromise text with a view to agreement dated 13 March 2024 no. 7327/1/24 Rev 1, a consolidated text was published 15 April 2024, https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf.

stakeholders, in accordance with this article and in all steps of the due diligence process including (3)(a) to gather the necessary information on actual or potential adverse impacts, […]; (b) the development of prevention and corrective action plans […]; (c) the decision to terminate or suspend a business relationship […]; (d) the adoption of appropriate measures to remediate adverse impacts […].' And in addition to the above, Recital 65 provides: 'effective engagement should cover providing consulted stakeholders with relevant and comprehensive information, as well as ongoing consultation that allows for genuine interaction and dialogue at the appropriate level, such as project or site level and with appropriate periodicity'.

§4.05 ON THE OVERRIDING IMPORTANCE OF EMPLOYEE CONSULTATION: WHISTLEBLOWING AS AN EXAMPLE

Although the position of distinguished stakeholder groups are quite different, the objectives of stakeholder engagement and consultation are pretty straightforward and unequivocal. The main objective, as illustrated in Article 8d, will always be to gather information about potential and actual negative impacts on human rights and the environment. In gathering such information, different tools may be used, depending on the characteristics of the various categories of stakeholders discussed above.

However, there is generally one group of stakeholders involved in one way or another, i.e., workers employed either by the company, its subsidiaries or its suppliers. All actions undertaken by these entities will either be instigated or at least witnessed by employees. They are also best placed to note whether adverse effects on human rights and environmental policies occur. An example in point goes back to the tragic Rana Plaza disaster which has played a significant role in devising stricter legislation and increased awareness of detrimental practices offered by the Bangladesh Accord for Fire and Building Safety between companies and trade unions to further a fair and safe textile industry. After the collapse of the Rana Plaza Building, this agreement has set out specific steps to prevent such disasters from happening again and improve working conditions in the textile industry. To oversee the efforts and monitor that the goals are being achieved, a steering committee is set up in which companies and *worker organisations* are represented *in equal numbers* and worker organisations have a crucial say in setting policies and deciding on measures to be taken.[12] Obviously, worker organisations will be able to rely on information they receive from employees all over the industry.

The Rana Plaza situation is, of course, not unique. In many, if not all situations, workers, either employed by the company, its subsidiaries or suppliers, will be involved or at least have knowledge of actions or situations which may be threatening human rights or the environment. In general, this will be the case in relation to all rules and regulations applicable to companies.

12. *See* https://internationalaccord.org/updates-overview/ for all information up to now as well as reports of its Secretariat. On 24 April 2023 the Rana Plaza disaster was officially commemorated by this organisation. *See* https://internationalaccord.org/10-years-rana-plaza-bangladesh-accord/.

This is exactly why, over the last twenty years, whistleblowing procedures have been promoted and have become mandatory in various EU Member States. In 2019, EU Directive 2019/1937[13] (as amended[14]) mandated that in all EU Member States, whistleblowing statutes will have to be introduced. The principal aim thereof (according to Article 1 of the Directive) is 'to enhance the enforcement of Union law' and 'policies in specific areas' which include product safety, consumer protection and protection of the environment.

According to Article 4, the Directive applies 'to persons working in the private or public sector who acquired information on breaches in a work-related context'. This definition includes persons with a 'self-employed status' and 'any persons working under the supervision and direction of contractors, subcontractors and suppliers' (Article 4(1)(b) and (d)) as well as (Article 4(4)) third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons and legal entities that the reporting persons own, *work for or are otherwise connected within a work-related context.* Article 4(3) Directive extends the scope to persons whose work-based relationship is yet to begin in cases 'where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations'. Every company (Article 8) will have to 'establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law'.

If the CSDDD comes into force, *compliance with the CSDDD will fall under the scope of the Whistleblower Directive* as Article 32 of the CSDDD provides for an Amendment to that effect to the Directive (EU) 2019/1937. In Point E.2 of Part I of the Annex to Directive (EU) 2019/1937 ('Rules on the environment and climate'), the CSDDD will be explicitly designated as one of the statutory instruments which will be covered by the Whistleblower Directive. Although it is somewhat curious that in defining the material scope (Article 2 of Directive 2019/1937), the area of the protection of human rights is not mentioned, we think there is little doubt that also the CSDDD obligations to respect human rights are covered by the Directive.

§4.06 STAKEHOLDER CONSULTATION IN THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The CSDDD can be regarded as a culmination point of the development of the due diligence concept introduced and elaborated in the UN Guiding Principles on Business

13. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019.
14. *See* Regulations EU 2020/1503 of 7 October, 2022/1925 of 14 September 2022 and 2024/573 0f 7 Februari 2024 and for the Consolidated version: www.eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02019L1937-20240311.

and Human Rights (2011), hereafter 'UNGP',[15] and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (most recently updated on 8 June 2023) hereafter 'OECD Guidelines'.

The UNGP Principle 18 requires, 'in order to gauge human rights risks', that business enterprises 'should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships'. This assessment should: (a) 'draw on internal and/or independent external human rights expertise' and (b) '*involve meaningful consultation* with potentially affected groups and other relevant stakeholders, as *appropriate to the size of the business enterprise and the nature and context of the operation*' (italics added).

The Commentary to this Principle, as well as the UN Guiding Principles Reporting Framework,[16] underlines that an important aim of due diligence as envisaged by the UNGP should be 'to enable business enterprises to assess their human rights impacts accurately'. In order to achieve this, 'business enterprises should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society'.

The overriding goal that can be inferred from the commentary is that consultation of stakeholders is meant to obtain a better understanding of whether and which human rights may be at stake. In other words, a consultation is not primarily aiming to reach an agreement on how a company should conduct its business but to gather information on whether human rights might be infringed and therefore provide an opportunity to remediate the situation. In the Reporting Framework (p. 59), the 'supporting guidance' puts it even more strongly, noting that 'a key purpose of engagement with stakeholders is *to ensure a full understanding* of how the company's actions and decisions can affect individuals and groups'. As we already noted in paragraph 2 of this Chapter, this may include specific actions as well as more 'permanent arrangements' ('e.g., dialogue tables, stakeholder advisory councils, consultative groups').

UNGP Principle 16 provides that a company should embed its intentions in 'a statement of policy' that is 'reflected in operational policies and procedures'. In the Reporting Framework (2015) p. 57, it is explained that relevant information for the company to formulate such policies may come from 'any internal or external consultative processes' including 'who is expected to implement the policy/policies (e.g., employees, contractors, suppliers)' and 'whose human rights the policy/policies relate to (e.g., employees, contract workers, communities, consumers)'. Such implementation is obviously crucial in realizing the overriding goals of identifying, mitigating and terminating human rights violations.

15. *See* www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.
16. *See* www.ungpreporting.org.

That raises the question of who actually would be on the frontline to implement such policies. The Reporting Framework (2015) p. 58 is quite clear that an important role in this respect in any case is to be played by '*employees, contract workers,* suppliers, business customers, joint venture partners'. These parties will also be very important in assessing the effectiveness of the policies in mitigating human rights violations. By way of example, the UNGP Reporting Framework p. 65 refers to 'an engagement with a business partner to mitigate a risk of impacts *in light of feedback from employees*' or a decision 'not to proceed with a project based on inputs from communities and relevant experts'.

§4.07 THE (2023) OECD GUIDELINES AND THE (2018) OECD DUE DILIGENCE GUIDANCE

A relevant push for stakeholder consultation over the last 20 years has been given by the *OECD*. The most recent version of the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023)*, hereafter 'OECD Guidelines', was adopted on 8 June 2023.[17] Chapter II of the OECD Guidelines emphasises the importance of respecting general policies applicable in the countries in which they operate but also to 'consider the views of other *stakeholders*' and '*engage meaningfully with relevant stakeholders* or their legitimate representatives' (sub A.15). The commentary explicitly refers to OECD Due Diligence Guidance for Responsible Business Conduct (2018) and summarises the OECD position on p. 20 (sub 28) where it reads:

> *Meaningful stakeholder engagement* is a key component of the due diligence process. In some cases, stakeholder engagement may also be a right in and of itself. Stakeholder engagement involves interactive processes of engagement with relevant stakeholders through, for example, meetings, hearings or consultation proceedings. Relevant stakeholders are persons or groups, or their legitimate representatives, who have rights or interests related to the matters covered by the Guidelines that are or could be affected by adverse impacts associated with the enterprise's operations, products or services. Enterprises can prioritise the most severely impacted or potentially impacted stakeholders for engagement. The degree of impact on stakeholders may inform the degree of engagement.

Meaningful stakeholder engagement refers to ongoing engagement with stakeholders that is a two way process conducted in good faith by the participants on both sides and responsive to stakeholders' views. To ensure that stakeholder engagement is meaningful and effective, it is important that it is timely, accessible, appropriate and safe for stakeholders to participate, as well as identify and remove potential barriers to engaging with stakeholders in positions of vulnerability or marginalisation. Moreover, it is emphasised that companies should provide 'the public, *workers, and other relevant stakeholders with adequate, measurable, verifiable [..] and timely information*' (p. 34).

17. *See* https://read.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en#page1.

These general notions in respect of stakeholder engagement are further elaborated on in the OECD Due Diligence Guidance for Responsible Business Conduct (2018)[18] which also underlines that companies should strive to realise 'meaningful stakeholder engagement'. On p. 18, it is stipulated that Due Diligence should be informed by engagement with stakeholders, i.e., 'persons or groups who have interests that could be affected by an enterprise's activities' including '*workers, workers' representatives, trade unions (including Global Unions)* community members, civil society organisations, investors and professional industry and trade associations'. Annex Q8 distinguishes between *impacted stakeholders (workers, communities, consumers*) and '*relevant stakeholders*' (NGOs, human rights defenders, business partners, governments, investors/shareholders). The Guidelines note that '*not all interests are of equal importance and it is not necessary to treat all stakeholders in the same way*. Where the interest is individual human rights or collective rights […] the stakeholders whose human rights are or may be affected can be referred to as *"rightsholders"*'. In situations where these amount to a vast number, 'an enterprise may engage with credible stakeholder representatives'. 'Enterprises can prioritise the most severely impacted or potentially impacted stakeholders or rightsholders for engagement. The degree of impact on stakeholders or rightsholders may inform the degree of engagement.'

As indicated above, 'meaningful stakeholder engagement' is deemed a key component of the due diligence process (p. 50). What does 'meaningful stakeholder engagement' entail? Annex Q9 on p. 49 identifies as relevant elements that it is an '*interactive process*' ('through meetings, hearings or consultation proceedings'), 'two-way communication' (which presupposes to be able to 'freely express opinions', 'share perspectives' and 'listen to alternative viewpoints' as well as providing timely information needed by stakeholders 'to be able to make an informed decision' on 'possible adverse impacts') and 'good faith of the participants on both sides' (which should include a 'genuine intention to understand' and the enterprise being 'prepared to address adverse impacts' and that stakeholders 'honestly represent their interests, intentions and concerns'), 'responsive and on-going' and, in principle, 'before decisions have been made'. It also means that 'relevant stakeholders' have the opportunity to design engagement activities themselves' and that there is 'follow-through on implementation of agreed commitments'. For employees, stakeholder engagement or consultation may even be deemed closely related to the fundamental right to form or join trade unions and their right to bargain collectively. That is an additional argument why it '*is important to engage with trade unions or workers' representatives*' when engaging with workers on these issues. Moreover, it is noted that already in itself 'industrial relations is a form of stakeholder engagement'.

18. *See* www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm.

§4.08 REGULATION OF 'STAKEHOLDER CONSULTATION' ON THE NATIONAL LEVEL IN STATUTORY PROVISIONS

When compared to the non-binding instruments devised by international organisations discussed above, the role of stakeholder engagement and consultation on the national level, and the question of whether any duties for companies exist, becomes more blurred. As far as there is relevant regulation, the national approaches are formulated in general terms and are rather unspecific.

An example is the French *Loi de Vigilance*, Article L. 225-102-4.[19] The law requires French companies (of a certain size) to draw up a 'vigilance plan' which should include 'measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks'. The statutory provision holds that the plan shall be drafted '*in association with the company stakeholders* involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level'. However, no further guidelines are provided on how that 'involvement of stakeholders' should be organised and what it actually would entail. A notable exception is that some form of 'alert mechanism' should be developed 'in *working partnership with the trade union* organizations representatives'. In light of our earlier analysis, this once again underlines that when discussing the role of stakeholders, *workers/employees actually play a much more important role* than sometimes is anticipated.

Also, the probably most detailed human rights/environmental due diligence Act to date, the German *Lieferkettensorgfaltspflichtengesetz*, does not explicitly provide for a mechanism of stakeholder consultation.[20] What it does provide for – in section 11 of the German Act – is that any person claiming to have been violated in a legal position pursuant to section 2(1) of that Act 'may authorise a *domestic trade union or non-governmental organisation* to bring proceedings to enforce his or her rights in its own capacity' provided the trade union or non-governmental organisation maintains a permanent presence of its own and is not engaged commercially and not only temporarily in the realisation of human rights or corresponding rights in the national law of a state. However, this role in proceedings on behalf of stakeholders obviously is very different from stakeholders being *consulted prior* to the development of business policies.

Even the far-reaching Proposal for a Dutch Act on responsible business conduct,[21] although acknowledging the relevance of stakeholder consultation (Article 2.2.1), only requires companies to draw up *a policy document* in which it commits to due diligence obligations set out in the draft Bill and the OECD Guidelines for multinational companies, '*in consultation with, in any case, stakeholders*, experts and business relations'. Stakeholders also should be consulted when prioritising which

19. Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/.
20. www.gesetze-im-internet.de/lksg/.
21. *See* Dutch parliamentary papers: *Kamerstukken II* 2022/23, 35 761 no. 9.

situations should be addressed in which order (Article 2.3.1(4)(b)). How this consultation should take place is, however, not addressed. The parliamentary papers (no. 10 p. 21) only note it should be 'meaningful' ('betekenisvol') and that consultation could take place in round table meetings, symposia or expert meetings (p. 72). As far as monitoring of its policy is concerned, it is mentioned that consultation may take place through meetings or surveys (p. 86). Again, it is interesting that in defining the principal stakeholders (Article 1.1(b)) *employees explicitly* are named as such. And in mapping (potential) adverse effects on human rights and the environment, the company is explicitly expected to take account of information provided by 'representatives of employees' and 'trade-unions' (Article 2.3.1 (c)).

All in all, we may conclude that the level of regulation of 'stakeholder engagement' and 'stakeholder consultation' in national (binding) statutory law in relation to human rights and adverse environmental impacts is limited. Where statutory provisions have been enacted, such provisions are very general in nature and mainly indicate that companies are expected to develop policies in relation thereto which basically echo the OECD Guidance discussed above. Of course, this is not surprising. It is one thing to set out broad obligations in a *non-binding instrument* and something else to enshrine such obligations in *binding legislation*. Therefore, it might be interesting to see how ideas around stakeholder engagement and consultation have fared in other non-binding instruments, such as national corporate governance codes.

§4.09 REGULATION IN NATIONAL CORPORATE GOVERNANCE CODES

Where statutory binding law, understandably, does not provide much guidance in relation to stakeholder engagement and stakeholder consultation, another layer of regulation which may shed light on what stakeholder engagement and consultation may entail is constituted by national governance codes. These codes have over time come to include much broader notions of sustainability and the role of and responsibility vis-à-vis stakeholders. Specifically, after the 2008 financial crisis, the code movement has gained momentum in this respect. After a short wave of documents which were dubbed 'Stewardship Codes',[22] the attention has shifted to growing concerns in respect of sustainability, ESG and climate change in particular, and the importance of integrating this in business strategies and policies. This is reflected in many national corporate governance codes.

An example is offered by the Dutch Corporate Governance Code. In the first 2003 version of that Code, the key principle was that the management board was responsible 'for achieving the company's aims, strategy and policy, and results'. The board was expected to also consider 'the interests of the company's stakeholders' (provision II.1), but the emphasis was on compliance, risk management, etc. According to its most

22. *See* Harm-Jan de Kluiver, *An unresolved issue: the role and responsibility of institutional investors in view of ESG matters in corporate governance and stewardship codes*, *in*: *De beursvennootschap en de institutionele belegger: naar een nieuwe balans*, 21-54 (Rients Abma et al. eds, 2023).

recent revision, the Dutch Corporate Governance Code in 2022,[23] the basic principle has become '*sustainable* long-term value creation' (principle 1.1 and provision 1.1.1), and to achieve this, the company should take into account (principle 1.1) 'the impact the actions of the company and its affiliated enterprise have on people and the environment and *to that end weighs the stakeholder interests* that are relevant in this context'. Code provision 1.1.5 prescribes that 'to ensure that *the interests of the relevant stakeholders* of the company are considered', the company should draw up a 'policy for effective dialogue with those *stakeholders*'. The company should publish the policy on its website. 'Subsequently, the company (Provision 1.1.4 of the *Dutch Code*) is expected to report 'how the interests of stakeholders have been considered'. For our current purposes, it is important to note that the Explanatory Notes to the Dutch Code emphasise that the 'consultation policy' in any case should describe how *'the company's employee participation body forms part of this* [stakeholder; HJdK/JR] *dialogue* and how this relates to the other *consultations between the management board, the supervisory board and the employee participation body'*. Once again, this emphasises the special position of employees and employee participation when discussing stakeholder consultation.

Although the Dutch Code still leaves open many questions on how employee engagement and consultation in practice may be designed, almost all corporate governance codes in EU Member States do even give less guidance than the Dutch Code. The Danish and Spanish Corporate Governance Codes are, apart from the Dutch Code, probably the most extensive in addressing the importance and the aim of stakeholder engagement and stakeholder consultation. The *Danish Code,* officially Recommendations on Corporate Governance (2020),[24] underlines that it is 'important that the *interaction* between management and shareholders, as well as with the company's investors *and other stakeholders, including society, is well-functioning*'. In this respect, it recommends 'openness and transparency' (1.1.1) through 'ongoing dialogue and interaction ensures' with the aim that also 'stakeholders' gain the 'relevant insight into the company's affairs' and that the board has the 'possibility of hearing and including their views'. How this should be achieved is left (*see* 1.1.2) to the company which should, however, adopt '*policies on the company's relationships* with its shareholders, investors and *if relevant other stakeholders*' to ensure that 'the various interests are included in the company's considerations'. In the *Spanish Corporate Governance Code (2020)*,[25] recommendation 12 in Chapter III.3 notes that 'in pursuing the corporate interest', the company should 'strive to reconcile its own interests with the legitimate interests of *its employees*, suppliers, clients and *other stakeholders*, as well as with the impact of its activities *on the broader community* and the natural environment'. Recommendation 54 sub c expects that the board is 'catering, as appropriate, to the legitimate interests of remaining stakeholders'. Recommendation 55 under d refers in that respect to the importance of '*channels for stakeholder*

23. *See* www.mccg.nl/publicaties/codes/2022/12/20/corporate-governance-code-2022.
24. *See* https://corporategovernance.dk/sites/default/files/2023-08/Danish-recommendations-corporate-governance-02122020.pdf.
25. *See* www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CBG_2020_ENen.PDF.

communication, participation and dialogue'. How such channels would look is, however, not elaborated in the *Spanish Code*.

Other national corporate governance codes are even less specific on whether and what is expected in relation to stakeholder engagement and consultation. The *German Corporate Governance Code (2022)*[26] recommends in paragraph A.1 that the management board should 'systematically identify and assess the risks and opportunities associated with social and environmental factors, as well as the ecological and social impacts of the enterprise's activities' but the role of 'stakeholders' in general is not mentioned although employees are. According to Recommendation A.4: '*Employees* shall be given the opportunity to report, in a protected manner, suspected breaches of the law within the enterprise.' Although 'third parties should also be given this opportunity', it is telling that only employees are explicitly mentioned. The recent *Portuguese Corporate Governance Code (revised in 2023)*[27] notes in principle 1.C that in its 'decision-making process, the management body' also should consider the interests of '*employees, suppliers and other stakeholders* in the activity of the company', but further guidance is not provided. The *Italian Corporate Governance Code (2020*)[28] is somewhat more specific in adding the element of 'dialogue' in principle IV, prescribing that: 'The board of directors *promotes dialogue* with shareholders *and other stakeholders which are relevant for the company*, in the most appropriate way.' The *Swiss Code of Best Practice for Corporate Governance (2023)*[29] in paragraph 9 acknowledges that the duty of the board of directors is to 'also take account of the interests of *employees,* business partners, customers, *society* and the environment'. Under 12, it is specifically highlighted that '*employees can report the suspected irregularities they have identified in the company*'.

The *French Corporate Governance Code (2022)*[30] only requires that the board establishes 'multi-annual strategic guidelines on social and environmental responsibility' (5.1), as does the S*wedish Corporate Governance Code (2020)*[31] by simply stating in 3.1 that the principal tasks of the board include that it should define 'appropriate guidelines to govern the company's conduct in society'. Finally, the *UK Corporate Governance Code* (revised in 2023[32] and published by the FRC on 22 January 2024[33]) also reflects a limited view on stakeholder consultation. Although section 1 of the Code under D determines that the 'board should ensure effective engagement with, and encourage participation from' shareholders and stakeholders, Provision 5 provides very little guidance in relation to stakeholders other than stipulating that the board

26. *See* www.dcgk.de/en/home.html.
27. *See* https://www.ecgi.global/node/10556.
28. *See* www.borsaitaliana.it/comitato-corporate-governance/codice/2020eng.en.pdf.
29. *See* https://economiesuisse.ch/en/publications/swiss-code-best-practice-corporate-governance.
30. *See* https://hcge.fr/wp-content/uploads/2022/12/Code_AFEP_MEDEF_decembre_2022.pdf.
31. *See* www.bolagsstyrning.se/Userfiles/Koden/Dokument/Eng/SvenskKodBolagsstyrn_justerad_ENG_211220.pdf. We note that the Swedish Code is under revision. Proposed changes have been made in October 2023. *See* https://www.bolagsstyrning.se/news/proposed-changes-to-the-code-submitted-f__439.
32. *See* https://www.frc.org.uk/consultations/corporate-governance-code-consultation/.
33. www.frc.org.uk/library/standards-codes-policy/corporate-governance/uk-corporate-governance-code/.

'should understand the views of the company's key stakeholders and describe in the annual report how these and the matters set out in section 172 of the Companies Act 2006 have been considered in board discussions and decision-making'. As far as the engagement with the workforce is concerned, the company is, according to the Corporate Governance Code, not required to do more than either: (i) have a director appointed from the workforce, or (ii) institute a 'formal workforce advisory panel', or (iii) have a 'designated non-executive director'. The company may even decide: (iv) not to make a choice from these options provided it clarifies what alternative arrangements are in place 'and why it considers that they are effective'.

To be fair, of course, the limited references to workers' participation in the various corporate governance codes should not be taken as evidence that employee participation as such is of limited importance. In many countries, employee participation has a statutory basis and/or has evolved in established practices. Therefore, the above should not be understood as making the point that the regulation of worker participation in itself would be unsatisfactory. *The point that we do want to make* is that *employee participation does not yet seem to be regarded as a crucial instrument to gather the relevant information in relation to negative impacts of company actions and policies in relation to stakeholders*, including potential and actual environmental and human rights violations.

§4.10 EMPLOYEE INVOLVEMENT AND STAKEHOLDER ENGAGEMENT

All in all, we can conclude that in abstract terms, there is a broad consensus in the EU that when determining the policies of the company, the board and management thereof should take account of all relevant interests, including the interests of a broad spectrum of stakeholders. It is, however, less clear what that actually should imply and how that is to be achieved.

What is clear is that to take account of other stakeholder interests, the company will need to start by gathering relevant information on the negative impacts of company policies on the various stakeholders. In relation to certain categories of stakeholders, as distinguished in paragraph 9 above, it is feasible to realise some form of engagement and hear directly or at least indirectly from stakeholders what they experience and what their concerns may be; however, in respect of other categories that will be difficult to organise. Moreover, even if stakeholder engagement and consultation are taking place, it may not necessarily be so that, for example, the impact and seriousness of environmental adverse effects are fully appreciated by stakeholders. It may require considerably more 'inside knowledge' to really assess such impact.

To really become aware of the negative impacts of company actions, the most reliable source of knowledge will be the workers employed by the company, its subsidiaries or its suppliers, who will necessarily, in both a legal and a practical sense, operate in close proximity to the relevant company. Reflecting on stakeholder engagement and stakeholder consultation, we therefore conclude that it is fundamental to optimise the engagement with and consultation of workers in the company, its subsidiaries and/or companies in the supply chain. Hereafter, we therefore will explore

whether current mechanisms of worker consultation as established in EU and national law already facilitate such consultation and whether, and if so, how such structures and mechanisms can be improved.

§4.11 EMPLOYEE INVOLVEMENT: THE EU PERSPECTIVE

Various types of participation rights are distinguished in the European context. The umbrella term 'involvement of employees' is defined as: 'any mechanism, including information, consultation and participation, through which employees' representatives may exercise influence on decisions to be taken within the company'.[34] *Information and consultation rights* are usually exercised (at the national or European level) by a body representing employees (such as a [European] Works Council).

Employee participation refers to the influence of employee representatives in the composition of the supervisory board (two-tier governance structure) or administrative body (one-tier model). Employee participation, also referred to as board-level employee representation (BLER), should thus be clearly distinguished from other forms of co-determination.[35] Obviously, through representation in the (supervisory) board of the company, employees can influence the corporate sustainability policy of the company since the strategy and policy in this respect are determined by the management board (and supervisory board). Because this contribution focuses on mechanisms for employee consultation, employee *participation is less relevant* and will therefore not be addressed in this chapter.

In this chapter, we focus on employee *consultation*. Particularly important in that respect is, at the European level, the European Works Council Directive ('EWC Directive'), as adopted in 1994 and amended in 2009 ('Recast Directive).[36] The objective of the EWC Directive is 'to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings' (Article 1(1)). The scope of the directive includes transnational undertakings and groups with at least 1,000 employees within the European Union while at least 150 employees are employed in at least two Member States.[37]

To clarify the distinction between the competences of national representative bodies of employees (hereinafter: 'works council') and the European Works Council (EWC), Article 1(3) stipulates that information and consultation of employees must

34. Article 2(h) SE Directive.
35. *See further*: Joti Roest, *Corporate Mobility – The Involvement of Employees*, ECFR 16(1-2), § 2 (2019). Protection of existing employee participation rights is particularly relevant when establishing European legal persons such as a European Company and in cross-border restructurings.
36. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30.09.1994, reenacted by Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122, 16.05.2009.
37. In the following we will refer to the 'undertaking' as 'company'.

occur at the relevant level of management and representation; in order to achieve that, the competence of the EWC and the scope of the information and consultation is therefore limited to transnational issues. Matters are considered to be transnational where they concern the transnational company as a whole or at least two companies/establishments of the transnational company in two different Member States (Article 1(4) EWC Directive). In our opinion, the transnational company's obligations under the CSDDD qualify as transnational matters, so the EWC has a competence therein.

The framework of the EWC Directive has been referred to as a system of 'regulated self-regulation'.[38] The establishment of an ECW (or an alternative system of information and consultation) is to be negotiated 'in good spirit' (Article 6(1)) between the management of the transnational company and a special negotiating body (SNB) consisting of employee representatives from the transnational company or group. The management of the transnational company is responsible for establishing the SNB.

The EWC Directive gives the negotiating parties considerable freedom as to the content of the agreement to be concluded so that it can be tailored to the company or group in question, but Article 6(2) includes specific topics that must be included in the agreement. Subjects to be covered are, for example, the composition of the EWC, the powers of the EWC, the relationship of the EWC to national employee representative bodies, frequency and location of the EWC's meetings, its financial and material resources, and the term of the agreement and rules for adjustment, termination or renegotiation. If the management and the SNB fail to reach an agreement on transnational participation of employees within three years, then so-called Subsidiary Requirements (Article 7) apply, which are attached as Annex I to the Directive.[39] In practice, these binding requirements obviously have a major impact on the outcome of negotiations.

§4.12 INFORMATION AND CONSULTATION RIGHTS AND THE EWC

In principle, the remit of the EWC is to facilitate consultation of employees on matters with 'transnational character' that could have an impact on jobs and working conditions of the workforce in Europe. More especially, '[t]he information and *consultation of the EWC* shall relate in particular to the situation and probable trend of *employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies*' (1(a) Subsidiary Requirements).

The EWC meets with the management of the transnational company at least annually to be informed and consulted on the basis of a report prepared by the

38. Stan De Spiegelaere, *Too Little, Too Late? Evaluating the European Works Councils Recast Directive*, ETUI Report 138 (2016), 15.
39. These requirements also apply if management and SNB so decide or if management refuses to initiate negotiations within a period of 6 months after a request to do so (Art. 7(1) EWC Directive).

management containing information on the progress of the business and its prospects (1(2) Subsidiary Requirements). In case of exceptional circumstances or if decisions are being considered that may have far-reaching consequences for employees (e.g., relocations, plant closures or collective dismissals), the EWC may form from among its members a 'select committee' consisting of five members. The select committee (or the EWC if no committee has been established) has the right to meet in session and express an opinion on a management report in which the contemplated decision is explained.

Although a diverging EWC opinion does not affect the prerogatives of central management (1(3) Subsidiary Requirements), Article 11(2) EWC Directive stipulates that the Member States shall provide for appropriate administrative or judicial procedures in the event the management of the transnational company or group does not comply with the provisions of the Directive. In the Netherlands, the Enterprise Chamber of the Amsterdam Court of Appeal is the competent court (Article 5 Dutch European Works Council Act).

The Commission published a report in 2018 on the implementation of the 2009 EWC Recast Directive and an accompanying Evaluation Report.[40] One of the findings is that it is estimated that half of all eligible companies have not yet established an EWC. The Commission further concluded that the requirement that matters should have a 'transnational' character should be better defined in Article 1(4) of the Recast Directive as the interpretation of this requirement has proven to be difficult in practice. In our opinion, in the case human rights or the environment in third countries are not respected, such issues will, in light of the CSDDD proposal, have a 'transnational' character. The evaluation also observed that the lack of dedicated means for the EWCs to enforce their rights and the lack of dissuasive and proportionate sanctions are a barrier to the effectiveness of the EWC Directive.[41]

The European Parliament adopted a resolution in February 2023 calling on the Commission to carry out the long-awaited revision of the EWC Directive.[42] The resolution contains concrete recommendations for revising the Directive; in the context of this contribution, the following recommendations are particularly important. The Directive should ensure 'timely and meaningful consultation' as 'EWC's still face major difficulties to enforce their rights, especially on timely information and prior and effective consultation on matters of transnational character that could have an impact on jobs and working conditions of the workforce in Europe, *including changes deriving from the green and digital transitions'* [italics added].[43] The European Parliament also recommends that the concept of the 'transnational character of a matter' should be clarified: the definition needs to be precise and comprehensive and the scope of

40. Implementation Report EWC 2018 (SWD(2018) 187 final). The Implementation Report is accompanied by a Commission staff working document 'Evaluation' (COM(2018) 292 final).
41. *See* for more details: Evaluation (COM(2018) 292 final), 45-46.
42. P9_TA(2023)0028, European Parliament resolution of February 2, 2023 with recommendations to the Commission on Revision of European Work Councils Directive (2019/2183 (INL)).
43. *Supra* n. 42, at 9.

possible effects as well as the relevant level of management and representation it involves need to be considered.[44]

Following the EP's resolution, the Commission launched a first-stage consultation with the European social partners on the revision of the EWC Directive in April 2023. After reviewing the replies, a second stage consultation on a revision of the Directive followed from July to October 2023.[45] On 24 January 2024, the Commission presented its Proposal for the amended Directive.[46] The Proposal clarifies the definition of 'transnational matters' to ensure legal certainty for both management and employee representatives (Article 1(4)). A matter shall be considered transnational not only when the measures considered are expected to affect workers in undertakings or establishments in more than one Member State but also when the envisaged measures affect workers in one Member State while workers in another Member State can expected to be affected by the *consequences* of such measures. The preamble under 18 considers that this extension of the definition is necessary as proposed measures (such as collective redundancies) may be targeted at establishments in one Member State but nevertheless can be expected to have effects on workers in other Member States due to, for instance, changes in the cross-border supply chain or production activities. The Proposal aims to strengthen the position of the EWC by specifying that consultation of the EWC shall take place at such time, in such fashion and with such content that it enables the EWC to express an opinion and is entitled to a written response by the management prior to the adaption of the decision by the management (Article 9).

The Proposal furthermore includes provisions on financial and material resources allocated to the EWC, strengthening gender balance in the composition of the EWC and/or the SNB (Article 6 (2a)), confidentiality of information (Articles 8, 8a) and effective enforcement of the Directive through sanctions and access to justice (Article 11).

§4.13 THE ROLE OF THE EWC IN IDENTIFYING HUMAN RIGHTS AND ENVIRONMENTAL VIOLATIONS AS MEANT BY THE CSDDD

For our current purposes, it is important to note that although the Commission's Proposal to amend the EWC Directive does not specifically address the role of the EWC as a 'stakeholder' in the context of corporate sustainability and the duty to address and mitigate human rights and environmental violations, the Explanatory Memorandum to

44. *Supra* n. 42, at 10. The EP further recommends, *inter alia*, to strengthen the Subsidiary Requirements, clarify the scope of confidentiality of information, introduce effective and proportionate penalties for non-compliance with the Directive and ensure EWC's access to justice.
45. The relevant documents COM(2023) 2330 final (Consultation Document) and COM(2023) 5054 final (the Accompanying Analytical Document dated 26 July 2023) can be accessed at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3922.
46. Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/38/EC as regards the establishment and functioning of European Works Councils and the effective enforcement of transnational information and consultation rights, COM(2024) 14 final, *see* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2024:14:FIN ('Proposal').

the Proposal does explicitly address the role of employees and their representatives. First, this Document underlines that the focus on sustainability will inevitably have substantial consequences for society, including how the world of work will develop and how social dialogue will evolve:

> In the ongoing *transformation* of the world of work driven by environmental, economic and social *sustainability* and the deployment of new technologies, *a meaningful involvement of workers and their representatives at all levels* can help *anticipate and manage change*, diminish job losses, maintain employability, and ease effects on social welfare systems and related adjustment costs. In multinational undertakings or groups, the information and consultation of employees at transnational level can make an important contribution to such involvement.[47] [italics added]

Second, it is recognised that although the scope of information and consultation of EWCs under the Directive only relates to 'transnational matters', the subject matter is not limited to specific topics or issues and may include various EU policies including sustainability, human rights and environmental issues as the Commission sets out in its Explanatory Memorandum:[48]

> Transnational matters are not defined by reference to specific topics or issues, but rather their ability to affect employees in several Member States. EWCs thus have the potential to enhance the implementation of various EU policies in multinational companies, by providing a forum for dialogue between central management and employee representatives. *Synergies can thus occur between this initiative and any EU policy field that stands to benefit from the effective involvement of EWCs, in particular in the context of the twin transitions*. [italics added][49]

Although the Explanatory Memorandum does not explicitly refer to the role the EWC can play in channelling information on potential and actual violations of human rights and environmental adverse impacts as covered by the CSDDD, the Commission did emphasise this role earlier in the *Analytical Document* (to the second stage consultation in 2023):

> *the Commission's proposal for a Directive on Corporate Sustainable Due Diligence (CSDDD), adopted in February 2022, provides that, where relevant, companies should also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts.* In this context, EWCs could be informed and consulted on the due diligence policy and other due diligence actions of multinational corporations.

47. Explanatory Memorandum to the Proposal, p. 1, Impact Assessment Report (SWD(2024) 10 final), at 1.
48. *Supra* n. 45, at 4.
49. *See also* the Impact Assessment Report (*supra* n. 47) at 22: 'The proposed Directive on Corporate Sustainable Due Diligence (CSDDD) is likely to be adopted during the baseline period. It would set out obligations for large companies regarding the information and consultation of employees in relation to adverse environmental and human rights impacts in their global value chains. The CSDDD has the potential to achieve synergies with the Directive, as EWCs' opinions can contribute to the development and dissemination of the due diligence policy of multinational corporations. However, that Directive would not affect the legal framework for the operation of EWCs.'

> *EWCs' opinions on transnational matters relating to corporate due diligence* can potentially help central management to *identify and mitigate adverse impacts on workers' rights, other fundamental rights and the environment.* Furthermore, EWCs can play an important role in *disseminating information about sustainability due diligence matters amongst the employees they represent* and can *submit complaints using the complaints procedures under the proposed CSDDD*.[50]

In light of the foregoing, we fully subscribe to these views expressed by the Commission. We do agree that the EWC, as a 'transnational' representative body of employees, could and should play a fundamental role in corporate sustainability issues.[51]

It is clear that the proposed revision of the EWC Directive will strengthen its role. In order to ensure that decisions of a transnational company on corporate sustainability, human rights and environmental impacts are recognised as 'transnational issues', we would strongly recommend that in the Directive (or its preamble and recitals) this is made explicit. Furthermore, we would suggest that the requirements outlined in Annex I be amended to align with this objective.

It is worth noting in this respect that the list of matters in which the EWC has competence (notably nos 1(a) and 3 of the Subsidiary Requirements) dates back to its inception in 1994. Thirty years later, it certainly is about time to update this catalogue with topics which have become of great importance and will remain so in decades to come. Corporate sustainability and addressing adverse impacts on human rights and the environment certainly are such topics.

§4.14 EMPLOYEE INVOLVEMENT ON THE NATIONAL LEVEL: THE DUTCH WORKS COUNCIL BY WAY OF EXAMPLE

At the national level, Member States' co-determination law is harmonised only to a very limited extent. The Directive on Information and Consultation of Employees in the EU, created in 2002, only requires Member States to provide legislation giving employees specific information and consultation rights in various areas.[52] These rights concern general developments of the company and the economic situation, (a threat to) employment and (intended) decisions of the company leading to substantial

50. *Supra* n. 45, at 14.
51. We note that in the view of the European Trade Union Confederation (ETUC) the consultation on the EWC missed an opportunity to specify the role of EWCs in the due diligence process: 'The ETUC strongly believes that involvement of workers' and trade unions representatives are necessary for the company to build a strong and effective due diligence process. Thus EWCs must be fully involved in all steps of companies' due diligence plans and policies. This includes the involvement in mapping potential risks on human rights and the environment across the company operations as well as its supply and subcontracting chains, *see* https://www.etuc.org/en/document/etuc-reply-first-phase-social-partner-consultation-possible-revision-european-works, *see also* the Impact Assessment Report (*supra* n. 47), at 59.
52. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L80, 23.03.2002.

changes in work organisation or in contractual relations. In the national laws of the Member States, these information and consultation rights may be granted to works councils or to trade unions.

For the Netherlands, this Directive did not require substantial legislative changes because the Works Councils Act (Wet op de Ondernemingsraden (WOR)) already grants participation rights to the works council on these matters,[53] such as a right to information (Article 31 WOR) and a consultation and initiative right (Article 23 WOR). These rights offer the works council the opportunity to obtain information about the company's corporate sustainability initiatives and to discuss them with the management. These rights also are a stepping stone for the works council to discuss any policy concerns or related developments.

The right to render a (written) advice (Article 25 WOR) on certain (proposed) board decisions of the company is one of the most powerful participation rights of the Works Council. Article 25(1) WOR contains an exhaustive list of company resolutions that are subject to the (prior) advisory right of the works council. Such resolutions include, *inter alia*, mergers, acquisitions, major investments of the company and raising substantial financing for the benefit of the company. For the purpose of the advice being sought, the works council must be furnished with a summary of the reasons for the decision. If the decision of the company is not in accordance with the advice of the works council, the works council may lodge an appeal against the decision with the Enterprise Chamber of the Amsterdam Court on the ground that the decision is evidently unreasonable. If the Enterprise Chamber grants the appeal, it can order the company to rescind its decision in whole or in part (Article 26(5) WOR).

In 1998, the advisory right of the Works Council was expanded to include a specific provision dealing with environmental matters. According to Article 25(1)(l), WOR '[t]aking an important measure in connection with the company's concern *for the environment,* including taking or changing a policy, organisational and administrative provision in connection with the environment' is subject to advice of the works council. According to the parliamentary notes, this should be understood in a relatively broad fashion and may include (in our informal translation HJdK/JR):

> drawing up a *company environmental plan* or taking substantial environmental measures, such as installing technical facilities, […] introducing or modifying an environmental care system […], a coherent system of policy, organisational and administrative provisions aimed at […] managing and, where possible, reducing the effects of business operations on the environment. Policy-related provisions may include the establishment of environmental plans and environmental programs [and] […] other important measures relating to the company's responsibility for the environment. One might think of implementing a company transportation plan, a waste collection system, a waste prevention plan, or applying for an Environmental Permit ['Hinderwetvergunning'] with significant environmental consequences (...).[54]

53. Official Gazette of the Kingdom of the Netherlands 2004, 652.
54. *See* Dutch Parliamentary Papers: *Kamerstukken II* 1995/96, 24615, 3, 42.

In academic literature, the position has been taken that policy *objectives*, provided they have a sufficient degree of concreteness in them, would also fall within the scope of the advisory right of Article 25(1)(l) WOR.[55]

In our opinion, the provision included in Article 15 of the CSDDD obliging companies to adopt a climate plan falls within the scope of Article 25 (1)(l) WOR.[56] We note that corporate sustainability due diligence obligations of the company as contained in the CSDDD are 'as such' and are not explicitly covered by the Works Council Act. However, as such obligations are expected to require substantial investments by the company, decision-making to this end may be subject to advice by the works council as such under Article 25(1)(h) WOR (according to which substantial investments are subject to works council advice).

In addition to Article 25(1)(l) WOR, the 1998 amendment of the WOR assigned to the works council a role in monitoring the impact of the company on the environment. Since then, Article 28(4) WOR reads: '[t]he works council shall encourage to the best of its ability that the company discharges its responsibility for the environment, including setting and amending policies, and taking organisational and administrative measures in relation thereto'. The explanatory parliamentary documents emphasise the '*desirability of involving employees in the responsibility for the environment' and provide the works council with the right to use its powers to encourage companies regarding their environmental responsibility*.[57] This article provides the works council with a legal basis to discuss the impact of the company on the environment, the policies of the company in this respect and the right to receive all relevant information pertaining to these matters.[58]

This raises the question of whether corporate sustainability due diligence, within the meaning of the CSDDD, is covered by this provision and therefore subject to the right of advice of the works council. One could argue that the due diligence obligation basically only amounts to a fact-finding exercise. However, in light of the obligations enshrined in the CSDDD to explicitly address any adverse impacts, that would be a very restrictive interpretation and, in our view, certainly too restrictive. This is even more so as setting up an adequate structure to monitor whether human rights and the environment are respected will require substantive investments and, as already explained above, substantial investments themselves are subject to the right of advice of the Works Council (*see* Article 25(1)(h) WOR).[59]

55. Loe Sprengers & Annette Terpstra, *De ondernemingsraad en het adviesrecht over milieumaatregelen: het terra incognita van de WOR*, ArbeidsRecht 10, 27-28 (2023).
56. The proposal for the Responsible and Sustainable International Business Act (in Dutch: Wet verantwoord en duurzaam internationaal ondernemen) includes a similar obligation in Art. 2.4.2.
57. *See* Dutch Parliamentary Papers: *Kamerstukken II* 1995/96, 24615, 3, 44.
58. *See also* Eline Snijders & Margot Hoving, *Het arbeidsrecht kleurt groen*, Tijdschrift Arbeidspraktijk 8 (2022), 17.
59. We note that Art. 27 Works Council Act grants the works council a right of consent relating to proposed decisions regarding the adoption, amendment or repeal of regulations concerning the enterprise's social policy. This includes a regulation on working conditions (Art. 27(1)(d) Works Council Act). Since such regulations are strongly intertwined with Dutch labour law, we believe

A restrictive interpretation would in any case not be in line with the much broader view taken by the Commission in view of the proposed amendments to the EWC Directive (discussed in the previous paragraph). Finally, in light of the nowadays widely accepted view that companies should pursue not only their own interests but also those of all stakeholders, we believe the WOR should be understood as also offering a legal basis for taking into account the interests of not only employees but also other stakeholders and corporate sustainability in general.[60]

Considering all this, we do think it would be good to clarify, for example, at the occasion of the implementation of the CSDD Directive in Dutch law, this issue and amend the WOR to the effect that it explicitly stated that all actions related to the CSDDD, and corporate sustainability, be presented to the works council for advice.

§4.15 CONCLUSION

The purpose of this chapter was to clarify what is actually expected from companies with regard to stakeholder consultation where such consultations are prescribed in statutory law or other legal instruments, without, however, being very clear on what this should comprise. We have noted that in almost all definitions of stakeholders employees and workers in general feature prominently. In this chapter, we have examined the role of workers not only as stakeholders but also as a vital link between companies and their ability to identify and address potential and actual negative adverse impacts on human rights or the environment whether nearby or in remote locations.

Nearly always workers employed by the company or its group companies or suppliers will have knowledge of negative adverse effects. Therefore mechanisms open for all workers, such as whistleblower procedures, which may also be used by employees of suppliers (*see* above §4.04), and mechanisms for employee consultation can be utilised to facilitate the upward flow of information. This can be instrumental in achieving the objective of ensuring that the ultimate parent company and its group companies are well informed and able to take account of a broad array of stakeholder interests, as well as develop specific stakeholder engagement and consultation mechanisms where appropriate.

Such stakeholder consultation mechanisms may take inspiration from employee consultation structures that have been developed over the last few decades both at the EU level (such as the European Works Council; EWC) and in the national arena. This may include setting up regular consultation meetings to discuss sustainability policies and practices of the company and the group as a whole. However, different from consultation in works councils, the membership of broader stakeholder meetings does not have to be fixed, but it could depend on the issues at hand in light of the specifics of the industry. Works councils could however provide inspiration for drawing up rules

section 25 Works Council Act provides a broader basis for the works council's involvement in the context of corporate sustainability due diligence.

60. *See also* Loe Sprengers & Annette Terpstra, *De ondernemingsraad en het adviesrecht over milieumaatregelen: het terra incognita van de WOR*, ArbeidsRecht 10 (2023), 28.

of procedure for stakeholder consultation bodies including who may propose agenda items, how information will be disseminated, the structure of meetings, and which parties may be invited. This will not only enable the company to receive input from relevant organisations but also provide information to them in a structured manner.

Overall, we believe that when it comes to further developing stakeholder consultation as is increasingly mandated by laws and regulations, such as, but not limited to, the CSDDD, there is much to be learned from the development of workers' consultation in recent decades, as discussed in this chapter. One important lesson learned would seem to be that workers are not only a crucial category of stakeholders in their own right but also can play a crucial role in ensuring that human and environmental rights of others are respected.

§4.16 CONGRATULATIONS ON THE TWENTIETH ANNIVERSARY OF THE JOURNAL *EUROPEAN COMPANY LAW*

We are honoured to have the opportunity to contribute to this book on the occasion of the 20th anniversary of the *European Company Law* Journal. The Journal has successfully established itself as a platform for information, analysis and debate on trends and developments in company law in Europe in all its
aspects, both at the EU level and from a comparative perspective. That is quite an accomplishment for all involved. However, it should also be acknowledged that this accomplishment was ultimately made possible thanks to the founder and long-standing editor-in-chief of the Journal, Prof Steef Bartman. He not only had the vision to start the Journal but also the energy and enthusiasm to involve a wide range of scholars and encourage their contributions to the Journal. Among many other things, this book is a token of appreciation and admiration for the work of Steef Bartman and his contribution to European company law both in the Journal and the subject itself.