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In the management structure of global companies the de facto management of the Dutch company may in practice be in the hands of the (ultimate) shareholder. This business practice is often part of a matrix organization, in which the decision-making process is determined by the specific business activity, irrespective of the location or country.

Certain decisions made by a shareholder, even if they are not made as such by the management of the subsidiary for which a works council has been set up, may nevertheless be deemed to have been made by that subsidiary. A clear understanding of the effective decision-making process in global organizations and the effect on requirements in the field of employee participation is key for steering that process in the right legal direction; and therefore for the General Counsel who provide for the legal guidance of management.

Attribution and co-management

In Dutch employee consultation processes the concepts of “attribution” and “co-management” are distinguished. Both concepts refer to intergroup relations.

The concept of attribution does not directly relate to the employee participation/works council structure at a Dutch company. Attribution of shareholders’ decisions relates to the management of the subsidiary and the de facto interference by the shareholder in the Dutch business activities.

The concept of attribution applies to a situation in which the decision that has been made by a group company interferes in such a way with the business of the Dutch subsidiary for which the works council has been set up that – for the purpose of employee consultation rights – it is deemed to have been made by the subsidiary. In that case the subsidiary is required under the Dutch Works Councils Act to present the proposed decision to the works council for its advice or consent.

The concept of co-management applies to a situation in which the group company has in practice a systematic (ongoing) influence on the decision-making process regarding the business of the Dutch subsidiary in such a way that it can be deemed to co-manage the company. In the case of co-management the works council may claim its right to be informed and its right to be consulted at both the co-managing company and the Dutch company. Please also note that case law on this concept often relates to circumstances in which the Dutch management has been involved in the decision-making process to a certain extent. But legal authors generally assume that the works council can claim its right to be consulted even if the Dutch management was not involved in the decision-making process. In that case the shareholder and the company must jointly present the proposed decision to the works council for advice or consent.

Intergroup relations

In business practice there are no agreements between works councils and the management of shareholders of the companies for which they have been installed that create the right of advice or consent for the works council regarding decisions that are made or proposed by the shareholder but are nevertheless attributed to the subsidiary. It is of course possible to enter into a discussion with the shareholder in an attempt to reach an agreement within the meaning of Section 32 of the Works Councils Act and to agree that certain proposed decisions will be presented to the works council for (i) its advice (Section 25 of the Works Councils Act) or (ii) its consent (Section 27 of the Works Councils Act). If so, the shareholders agree that certain decisions they make that affect the Dutch subsidiaries will be attributed to the Dutch subsidiaries and will be subject to the Works Councils Act.

Works council's rights in the case of attribution or co-management

Case laws shows that, in practice, works councils do claim attribution of shareholders' decisions to the company for which they were set up – and therefore the right of advice or consent.

Claiming this right starts with a letter to the shareholder that the works council is aware of a proposed decision that in its view is subject to its advice or consent. The works council may state that its advice must be (or should have been) requested at such a time that it can substantively influence the decision that will ultimately be made. If so, the request for advice must include the reasons for the intended decision, the anticipated consequences for the employees of the Dutch business, and the proposed measures in light of those consequences. Before the works council gives its advice, at least one consultation meeting must take place. After the works council's advice has been given, the board may make a final decision. The board must notify the works council of its decision in writing and, if applicable, must explain why it has not followed all or part of the works council's advice.

If the shareholder refuses to observe these rights, the works council may take legal action, in which case the following applies.

If the decision is made without the works council's advice being requested in accordance with Section 25 of the Works Councils Act, the works council may inform the shareholder in writing that:

- The shareholder's proposed decision to be and imposed on the Dutch subsidiary is subject to the works council's advice and cannot be implemented.
- If the shareholder denies the works council its rights, the works council may apply to the court within a period of one month from the day on which it was informed of or become aware of the decision.
- The court procedure implies that the works council may appeal the board's decision with the Enterprise Court at the Amsterdam Court of Appeal. The Enterprise Court then determines whether the shareholder's decision is indeed attributable to the Dutch company or whether co-management by a group company is involved, and whether the decision is manifestly unreasonable. A distinction is generally made between procedural requirements and the merits of the decision itself. The procedural requirements are tested strictly, but with regard to the merits of the decision, due to the managerial prerogative, injunctions will follow only if the decision is manifestly unreasonable.
- If the decision is considered manifestly unreasonable, the Enterprise Court may order the company to withdraw its decision in whole or in part or may prohibit the company from implementing its decision and impose a penalty in the event of non-compliance. In the case of co-management, the Dutch company and the co-managing group company are both subject to the court order.

Is a decision subject to Section 27 of the Works Council Act and taken without the consent of the works council, the

decision is null and void if the works council invokes this nullity within one month after being notified or aware of such decision.

Conclusion

Under Dutch law the consequences of non-compliance with the rules on employee participation may be drastic and may include the obligation to withdraw a company's decision in whole or in part or a ban on implementing such a decision – quite a unique outcome in the global legal landscape. It is worthwhile to keep a close eye on the effective decision-making process in group structures and to address any discussions related to employee participation at an early stage. Transparency and effective communication are key. The General Counsel will play an important role in steering this process in the right legal direction.

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