Chapter 8
SEs in the Netherlands

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1. Introduction

The emergence of the SE has not had a major impact on the Dutch corporate landscape or industrial relations, even though one of the first SEs was established in the Netherlands and the country ranks fourth in the list of countries with the most SEs. Nevertheless, it is worth taking a closer look at the Dutch situation. After a glance at the main relevant features of company law (2.1), and worker involvement (2.2 and 2.3) and the not very exciting process of implementing the SE Statute and Directive (3) we take a closer look at the 33 Dutch SEs (4). In Section 5 we present the case of one of them, Equens SE, where participation was an issue during the negotiation process.

Remarkably, the Netherlands was involved in almost one-third of all the transfers of SE seats in the EEA countries. This is the subject of Section 6. Since 2009 there has been a serious alternative to the SE in the form of the cross-border merger (CBM). For the Netherlands we have created a database of all CBMs since this instrument was introduced up to July 2012. In Section 7 we take a closer look at some of the characteristics of the almost 400 CBMs that have taken place, and compare these with the SEs. Section 8 contains some concluding remarks on the relevance of SEs for the Netherlands.

2. The context

This section contains a sketch of the features of Dutch legislation that are relevant for an analysis of the SE. In Section 2.1 we describe the rather peculiar two-tier system in Dutch company law. In Sections 2.2 and 2.3 we look at worker involvement. Compared to countries such as Germany, Sweden and Austria, the Netherlands stands out with a very strong

system of information and consultation (Section 2.2) in combination with a rather weak system of board-level representation and participation (Section 2.3).

2.1 Company law

Dutch company law is traditionally based on the two-tier system. As of 1 January 2013, the one-tier system was introduced, however. But it should be mentioned that some of the largest companies – Unilever, Royal Dutch Shell, formerly also Fortis Bank – have already been using the one-tier system for many years.

Only large public and private limited companies are obliged to establish a supervisory board. The same is true for large cooperatives and mutual associations. The threshold is threefold: assets in excess of 16 million euros, at least 100 employees and a works council. When these requirements are met, after a waiting period of three years, the establishment of a supervisory board is mandatory. The board appoints and dismisses the managing (executive) directors and has veto power with regard to major strategic decisions. The appointment of the supervisory board lies with the general meeting of shareholders (GMS). The GMS also has the right to dismiss the supervisory board. This is the so-called structure law (structuurregime; see Dorresteijn and van het Kaar 2012: Chapter 8.5); these companies are called structure companies (*structuurvennootschappen*).

In (groups of) companies in which more than half of the employees work outside the Netherlands, the powers of the supervisory board are more restricted. In those companies the general meeting of shareholders appoints and dismisses the managing directors. This so-called mitigated regime applies to virtually all large Dutch companies and to the Dutch subsidiaries of foreign groups. Moreover, the requirement to establish a supervisory board does not apply to the top level of (Dutch-based) international groups, but only to the level below. The consequence is that there exists no system of board-level representation at the top level of the largest Dutch companies.

The works council has certain powers – albeit weak – with regard to the composition of the supervisory board. We will come back to this issue in Section 2.3.

With regard to the relevance of the different legal forms, the data are somewhat confusing, especially as far as structure companies – and therefore worker participation – are concerned. According to the Commercial Register (Handelsregister), on 1 January 2012, the total number of undertakings stood at 2,357,949. This figure includes a large number of firms without legal personality. For the purpose of this chapter, the following forms are relevant (see Table 1).

Table 1 **Number of companies in the Netherlands, by company type**

Company type	Number of companies
Public limited companies (NV)	5,552
Public limited companies under structure law	328
Private limited companies (BV)	849,895*
Private limited companies under structure law	1,138
Cooperatives	6,367
Cooperatives under structure law	694
Mutual associations (OWM)	481
Mutual associations under structure law	5
European companies (SE)	36
Foreign legal forms with their HQ in the Netherlands	47
Foreign legal forms with establishments in the Netherlands	7,727

Note: * This figure includes many companies without employees (for example, for pension purposes).
Source: Handelsregister; own calculations.

According to these figures, there were 2165 companies under structure law. In all probability, this figure is far too high, the main reason being that the different branches of one company are all counted separately. According to Statistics Netherlands (CBS), the total number of companies stood at only 863,840, just over 36 per cent of the figure presented by the Commercial Register. Unfortunately, the CBS gives no details on structure law. The inclusion of branches probably also explains the number of 36 SEs (three more than in the SEEurope-database).

According to the Social and Economic Council, on 1 January 1999 the total number of structure companies stood at 393. This figure seems far more realistic than the figure presented by the Commercial Register.

2.2 Worker involvement – Information and consultation

The main form of employee representation in Dutch enterprises is the works council (*ondernemingsraad*). This is a body made up solely of employee representatives that must be set up in enterprises with more than 50 employees and has extensive information and consultation rights and some decision-making powers. In enterprises with between 10 and 50 employees, a personnel representation body (*personeelsvertegenwoordiging*) with less extensive information and consultation rights may be set up voluntarily by the employer and must be set up at the request of a majority of the workforce.

Works councils have extensive rights to information. In general, on request, the employer must provide the works council – in a timely fashion – with all the information and data it might reasonably require to perform its duties. The employer must also, at least twice a year, provide the works council with general information concerning the enterprise's activities and financial results, including the issues on which the works council has 'advice' rights (see below), and also the company's prospects in these areas. It must provide information annually on employment levels and personnel policy. The council must also be informed on matters such as long-term plans, environmental reporting and senior management remuneration.

When the company leadership is contemplating decisions on a range of strategic matters, it must seek the works council's advice at a time when the council's view can still significantly affect the decision. These matters include:

- business transfers;
- takeovers and divestments;
- termination of the enterprise's operations or a significant part thereof;
- significant reduction, expansion or other change in the enterprise's activities;
- major investments and loans; and
- the introduction of significant new technology, or changes in this area.

When its advice is sought, the works council must be given a summary of the grounds for the decision, its expected consequences for employees and the measures proposed for dealing with such consequences.

If the works council's advice is not followed or followed only partially, the works council must be informed of the reasons for this. In such cases, the employer must postpone implementation of the decision for one month, unless the works council agrees to waive this. The works council may lodge an appeal in court against decisions taken contrary to its advice within this one-month period. If it rules in the works council's favour, the court may order the employer to rescind its decision in whole or in part, and to reverse specified consequences of the decision, or prohibit the employer from performing specified actions.

On a range of HR decisions, the works council must give its consent.

In public limited companies, the works council has a right to express its views at the general meeting of shareholders on: the appointment and dismissal of members of the management and supervisory boards, strategic decisions and remuneration policy for board members.

If an SE has more than 50 employees, the above also applies to the works council which, on the basis of the Works Council Act, has to be installed in the SE. This works council therefore in all probability has stronger rights than the SE Works Council which exists alongside its Dutch counterpart. However, one should realise that foreign employees are not represented in the Dutch works council.

2.3 Worker participation

In companies with capital of more than 16 million euros, at least 100 employees and a works council (see above), employees are represented, although indirectly, on the supervisory board. In the two-tier board structure applying to such companies, the supervisory board appoints, dismisses and oversees the company's executive management board and approves major decisions.

Supervisory board members are nominated by the supervisory board itself and appointed by the general meeting of company shareholders. The general meeting can reject the supervisory board's nominations (in which case, the board must nominate new candidates). The company works council has the right to nominate supervisory board members and has an 'enhanced' nomination right with regard to up to one-third of these members ('enhanced' means that the board is supposed to accept

these nominations). The works council makes these nominations via the supervisory board to the shareholders meeting. The supervisory board must accept the works council's nominations unless there are good reasons for rejecting them, for example because the person nominated is unfit or because the appointment would make the board unbalanced. If the supervisory board objects, it should attempt to resolve the matter with the works council, failing which the issue is referred to the courts for a decision.

With regard to candidates nominated by the works council, as for other supervisory board nominees, the final decision on appointment is made by the general meeting of shareholders, which can reject the nominations originating from the works council (in which case, the procedure starts again).

Works council nominees on supervisory boards are not employee representatives as such. They may not be employees of the company or of a trade union engaging in collective bargaining with the company. Supervisory board members should act in the interest of the company as a whole, rather than representing specific interests.

In companies with a one-tier structure (introduced in Dutch company law on 1 January 2013) the works council rights will apply to the non-executive members of the board.

3. Implementation of the SE Statute and Directive in the Netherlands

There was no major debate during the transposition of the SE Statute and Directive into Dutch law. With regard to participation, there were two contested issues. The first was whether the right of works councils to render advice on the appointment and dismissal of the managing director in charge of employees qualified as a form of participation as defined in the Directive. Following the advice of the Social and Economic Council the answer to this question was negative. The second was whether structure law (as described above) could apply to SEs. Again, the answer was negative, with the consequence that structure law (with its elements of participation) cannot apply to an SE which during its existence crosses the relevant thresholds. In other words, when there is no form of worker participation at the birth of the SE, it will remain participation-free (ex-

cept, of course, when the parties concerned decide otherwise, which is improbable).

4. SEs in the Netherlands

On 15 August 2012, the number of SEs in the Netherlands stood at 33, of which 12 were normal, 13 empty/micro and 8 UFO. Although this is a small number, the Netherlands occupy fourth position in the EEA (after the Czech Republic, Germany and Slovakia). With regard to normal SEs, the Netherlands are even in third place (*ex aequo* with France), after Germany and the Czech Republic. The majority of Dutch SEs are active in financial services.

There are various ways to establish an SE. In most cases, the establishment of Dutch SEs took the form of the creation of a subsidiary (12) or conversion (10).

SEs can choose between a one-tier and a two-tier structure. At first sight, given the two-tier tradition in the Netherlands, it is remarkable that 17 SEs have opted for the one-tier structure, against only 8 for a two-tier structure. However, this may be explained by the fact that small and medium-sized private limited companies (BV) in the Netherlands usually do not have a supervisory board (they are not obliged to establish a supervisory board as long as they do not pass the thresholds mentioned in Section 2.1), which means in practice that they effectively have a one-tier structure (albeit without non-executive members). A more in-depth investigation of the 33 Dutch SEs revealed some interesting findings. We concentrate on a few of the normal SEs.

4.1 ECCO

ECCO EMEA Sales SE is (through ECCO EMEA BV) part of the ECCO group (Denmark). ECCO produces shoes and employed 17,537 employees worldwide on 31 December 2010. In line with the Danish system of participation, there are two employee representatives in the supervisory board of the ECCO Group. ECCO EMEA Sales SE has branches in Austria, the Czech Republic, Denmark, Finland, Slovakia, Sweden, Hungary and Switzerland. Most of these branches were registered as legal entities in their own right, but were transformed into branches by way of cross-

border mergers on 29 June 2011. It is interesting to note that ECCO is in the vanguard of using new legal instruments (both the SE legal form and the cross-border merger).

4.2 Catalis

Catalis converted to an SE in 2008. The group is active in outsourcing. In 2004, there was a separation of Navigator Equity Solutions N.V., which later also converted to an SE. Navigator SE owns Acon SE and the IT Competence Group SE. The total number of employees of the Navigator Group stood at 74 on 31 December 2010. In 2006 and 2007, Catalis had acquired Kuju, which later also converted to an SE. Catalis SE also owns Testronic Laboratories SE. The Catalis group employed 357 employees in 2010. In the case of Catalis and (formerly) related companies we see that the management has become used to the SE instrument.

4.3 Other normal SEs

Other normal SEs include the following:

- TCN Urop SE is active in the real estate business. The group employed 146 employees in 2009-2010, the large majority in the Netherlands.
- ADG Dienstengroep SE is the holding for one of the largest Dutch cleaning companies, employing almost 10,000 employees.
- Profireal Group is active in the field of financial services, mainly in Eastern Europe. In 2007, a Dutch holding SE was established. In 2010, the number of employees of the group as a whole was 557.
- Weleda (HQ in Switzerland) is a pharmaceutical company, with subsidiaries in 20 countries. The group employs 1800 employees. Weleda Benelux SE employs 105 (NL: 80, BE: 25).
- On 8 November 2011, Wibo Holding and Linet Holding announced the establishment of the Linet Group SE, employing some 800 employees worldwide in the health care sector (especially hospital beds). The firm has its origins in the Czech Republic.
- The Jelinek Group SE (alcoholic beverages) also has its origins in Eastern Europe. The group employed some 170 employees in 2010.

It is hard to make general statements on (normal) SEs in the Netherlands; the number is just too low. The Netherlands seems attractive for SE holding companies (ADG, Profireal, Jelinek), probably for fiscal reasons. A second observation is that once a company (or its owners) is familiar with the SE, there might be a habituation effect (ECCO and Catalist).

5. The case of Equens

In July 2008 Equens BV (NL) and Equens AG (DE) established an SE by way of merger. The main activity of the group is payment services for banks. Equens employs 1,000 employees (800 in the Netherlands and 200 in Germany).

A specific feature of Dutch legislation is that the works council has a right of advice with regard to the intention to transform an existing company into an SE (or participate in the establishment of an SE by way of merger, the creation of a holding SE, or – arguably – the establishment of a subsidiary SE). During this consultation phase, the Equens works council laid down several demands with regard to the creation of the SE and used its (Dutch) right of advice to put pressure on the negotiation process between the SNB and management.

One of the demands pertained to the right of the works council to nominate a member of the supervisory board. In the former structure, there was no such right for the works council, because Equens NV did not qualify (yet) as a structure company (once the relevant thresholds are crossed, there is a waiting period of three years before structure law – including the works council's right to nominate candidates for the supervisory board – is effectively in force). Therefore the Equens CEO refused the works council demand. In exchange, he did grant some extra information and consultation rights to the SNB.

The Equens case draws attention to an interesting question: what is the relative value of information and consultation rights, on one hand, and board-level participation, on the other? The general opinion is that participation rights are more valuable (stronger) than information and consultation rights. This may be true in general, but probably not in the Netherlands. So the negotiation strategy of the Equens SNB (letting participation go for extra information and consultation rights) might very

well have been a good choice, because firstly the SNB had no legal claim to participation rights (see above) and – if granted – these participation rights would probably have taken the weaker Dutch form.

6. Transfer of seat of SEs

The SE Regulation rules in Article 7 that the registered seat and the central board of the SE must be located in the same country. This principle is mainly defended by employee representatives and – to a lesser extent – by countries with a real seat tradition, and under attack from large parts of the business community and also the European Court of Justice (ECJ). The principle does not rule out that an SE can change its seat (see the procedure in Article 8 of the Regulation).

According to the SEEurope database, since 2004 a total number of 66 SEs has transferred its seat. In a relatively large number of cases (19) the Netherlands is involved. The majority concern a movement out of the Netherlands (outbound, 16), only 3 are inbound. With regard to involvement in transfers (total number) Luxembourg has the lead (23); the United Kingdom (15) and Germany (13) follow. The main exporting countries are the Netherlands (16), Luxembourg (13) and Germany (9). The main receiving countries are the United Kingdom (13), Austria and Luxembourg (8), Cyprus and France (6).

There were two clusters of transfers of seat from the Netherlands:

– on 22 and 23 October 2009, six SEs moved their registered seat to France. Four of these were empty; two have (in the meantime?) been liquidated;
– in 2009 (date unknown) four UFOs moved their registered seat to the United Kingdom.

Of the remaining transfers, four were normal:

– In May 2009, Europasta SE moved its seat to the Czech Republic. The company is the largest producer of pasta in the Visegrad Four area (Czech Republic, Hungary, Poland and Slovakia).
– On 15 September 2009, R. Jelinek Group SE moved its seat from the Czech Republic to the Netherlands.
– In 2010, James Hardie International holdings N.V. moved its seat

from the Netherlands to Ireland, transforming itself into an SE, mainly for fiscal reasons. The group, originating in Australia, is the world leader in fibre cement siding and backer board, and has been confronted with the claims of asbestos victims. For more information, see http://en.wikipedia.org/wiki/James_Hardie.
– On 4 April 2011, Bayer Nordic SE moved its seat from the Netherlands to Finland. This SE is responsible for the Bayer Nordic country Group, covering (apart from Finland) the Scandinavian and the Baltic countries.

The overall picture is so diverse and the absolute numbers so low, that it is hazardous to speculate on factors that may be relevant in explaining the different movements. Fiscal reasons might play a role, but more research into this matter (including tax treaties) is needed to warrant any definitive statements. Another explanation might be that the Dutch implementation of the SE Regulation and/or Directive is relatively user friendly, compared to – at least – some other countries. If we look at the Ernst & Young study (European Commission 2009 – for what it's worth), the Netherlands score relatively high on the so-called flexibility index, which arguably makes certain countries more attractive for the establishment of SEs than others. This might indeed be a relevant aspect because both Luxembourg and the Netherlands have a relatively large number of outbound transfers of seat (first using flexibility, and then moving to the preferred country).

7. The CBM as a disturbing factor for the SE

It has been argued that SEs lost a lot of their attractiveness after the 10th Directive on cross-border mergers entered into force in 2009. The 10th directive is more flexible with regard to the choice of seat than the SE Statute, and there are no minimum capital requirements (100,000 euros). If this is true, we would tentatively expect a drop in the (relative) number of new SEs since 2009. A search of the Dutch company register revealed the following figures.

First we take a look at the number of SEs established in the Netherlands per year (see Table 2).

Table 2 **Number of SEs founded in the Netherlands, 2004–2012**

Year of establishment	Number of SEs established
2004	2
2005	0
2006	2
2007	5
2008	7
2009	4
2010	5
2011	6
2012 (as of 15 August)	2
Total	33
Foreign legal forms with establishments in the Netherlands	7,727

Source: ETUI (2012).

Table 3 shows the number of CBMs in which a Dutch firm was involved. There appears to be no clear trade-off between the establishment of SEs and the number of CBMs.

Table 3 **Number of CBMs with Dutch involvement, 2009–2012**

Year	Number of CBMs
2009	61
2010	95
2011	108
2012 (as of 10 July)	51

Source: Handelsregister; own calculations.

Another interesting question is whether there are differences with regard to the countries that are involved in either the setting up of an SE or in CBMs. Looking at the SEs, there is no clear pattern with regard to the countries involved in the creation of Dutch SEs. The highest positions are for Belgium and Germany (neighbouring countries, both seven times) and the United Kingdom (six). Remember that the absolute number of SEs is low (33).

CBMs show a much clearer pattern. In Table 4 we list the CBMs according to the home country of the merging partner of the Dutch firms involved (frequency column). We included only the top countries. In the last two columns we distinguish between the situation where the Dutch firm is the acquiring partner or the vanishing partner.

Table 4 **Breakdown of CBMs with Dutch involvement**

Countries involved in CBM with a Dutch company	Frequency	NL acquires	NL vanishes
Italy	81	9	70*
Germany	71	23	47*
Luxembourg	51	10	39*
Belgium	49	28	21
France	25	5	18*
Spain	24	12	12
United Kingdom	16	10	6

Note: * Some cases were not clear, so the total is sometimes higher than the sum of the last two columns.
Source: Handelsregister; own calculation.

In particular, the high number of CBMs with Italian firms is remarkable. Another noteworthy finding is that, in two-thirds of the CBMs, it is the Dutch firm that is acquired, while in only about one-third of the CBMs the Dutch firm is the acquirer, especially in the case of Italy. The exception to this 'rule' is the United Kingdom. Again, more research is needed to explain the above, but it might very well be fiscal motives. One reason could be that the winding up of a Dutch company through a CBM with an Italian firm might be relatively attractive.

8. Concluding remarks

Ten years of SEs have not brought much change to either the business landscape or the system of industrial relations in the Netherlands. The absolute number of Dutch SEs is low, as is the number of employees involved. This is unlikely to change in the years to come. New EU instruments such as the SE and also the CBM just seem to be not very relevant for large companies, at least not for Dutch-based companies.

An outstanding feature of the Dutch system of worker involvement is that the rights of the works council are very strong (stronger than in any other EU country, at least in a formal sense), while the board level representation system – from an employee point of view – is fairly weak. The main channel for employees to influence strategic decisions (including restructuring) is not board level representation, but the works council. One advantage of the Dutch system is that it is not vulnerable to the use of foreign legal forms because the main channel of worker influence is neutral with regard to the choice of a specific legal form: all firms with more than 50 employees (including SEs with their seat in the Netherlands) have to establish a works council. As stated above, the Dutch works council has stronger rights than the SE Works Council, which exists alongside the Dutch council. However, this statement is only valid from a narrow, national point of view. Foreign employees are not represented by the Dutch works council.

Still, from a Dutch employee point of view, both the SE and the CBM seem not to be very relevant, in terms of either opportunities or threats.

For companies, factors other than worker involvement or participation seem more relevant in their choice of SE or the different varieties of CBMs. This seems to be the case not only in the Netherlands, but also in most other EEA countries, with the exception of Germany. The implication for workers and their representatives (including trade unions) is that more attention should be paid to these other factors to be able to judge and influence new developments.

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