

Corporate governance and Works Councils: a Dutch perspective

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1. Introduction

Corporate governance mainly focuses on the relationships and interactions between capital, management and labour (Aguilera and Jackson, 2003). Developments in the field of capital, management and labour determine the stakeholders' involvement and commitment. Literature shows for instance, that organizing coalitions can enhance employees' influence in strategic decision-making.

The relationships and interactions between the parties involved, take place in the institutional context of the company, characterized by ongoing internationalization, an increasing Anglo-Saxon influence and shareholders' pressure on European companies' business and culture, etcetera.

In 2008, the Dutch Social and Economic Council (SER) concluded that the increased shareholders' influence had led to a certain unbalanced relative power at the corporate level of Dutch companies. The managements' power and responsibility to decide upon the company's policy should be restored in some degree. But the employee representatives (such as the Works Councils) were looked upon as having sufficient legal possibilities to influence the decision making but not making fully use of these possibilities (SER-Advice, 2008).

Last year, we were invited by the Department of Social Affairs to conduct research on this so-called 'under use'. Research question was in which fields WC's don't make sufficiently use of their (strategic) legal rights/possibilities and what the main reasons for that under-use could be.

This particular research in the field of corporate governance has focused on large Dutch companies (the so-called structure corporations, $n = 250$) and on twelve strategic WC's rights/possibilities based on legislation (the Dutch and the European Works Council Act, the Dutch Civil Act). The rights and possibilities for the WC's include the right of advising on important financial and organizational decisions, the right to recommend Supervisory Board members and to build up relationships with these members, the right to go to Court when the management doesn't take into account the WC's advice, the possibilities to attend the Annual General Meeting and to express the WC's opinions or concerns, the right of inquiry (in cooperation with the unions) in cases of assumed mismanagement etcetera.

First of all, we did extensive desk research. Then we set up a questionnaire to investigate the WC's opinions (response 35%) and finally we did seven case studies to further explore the (under)use of rights and the WC's reasons for that.

In this article, we describe the research findings. These findings should be considered in the broader perspective of (the link between) corporate governance and labour relations (compare Goodijk, 2008). Shareholder value maximization for instance, can lead to losses for other stakeholders. On the other hand, employee representation on board level can

provide a better balance between the capital and the labour interests. Informal networking, however, is highly dependent on the attitude and capabilities of the parties involved. So, before describing the research findings (in chapter 3), we explore the relationship between corporate governance issues and labour management/industrial relations in order to get a better in-depth insight in this dynamic.

2. Corporate governance and labour relations

2.1 Definitions and theories

The actual corporate governance debate, caused by corporate collapses and criticism on the quality and the integrity of governance, is mainly focusing on the functioning, the quality and transparency of the board(s) and their accountability to share- and stakeholders.

Traditionally, corporate governance has focused on ways in which investors/shareholders assure themselves of getting return on investment.

Nowadays, there are differences in definitions and approaches between regions and countries. In the *Anglo-Saxon oriented countries* (like USA and UK) the focus is rather narrow on shareholder value maximization, based on the agency approach: the board represents the shareholders and monitors/controls the management on behalf of the shareholders only, with the aim to maximize shareholder value.

In the *European context*, especially in the Rhineland countries (such as Germany and The Netherlands) most emphasis has been put on improving the relationship with and the involvement of the share- as well as the stakeholders (the broad vision), based on the stakeholder theory: a relatively high attention is paid to both share- and stakeholders and the so-called balancing act (see par. 2.3).

Academic authors like Sharp (1994), Lane (1995), Whitley (1999) and Gospel and Pendleton (2005) already argued that there are relationships between corporate governance characteristics, labour management and industrial relations; for instance, the impact of financial markets and capital structures on systems of employment or employee representation.

This is in line with the *institutional theory* and the contingency approach. The institutional context of a company highly determines the strategy, the organization and the labour management of that company. That's why labour management and employees' rights cannot be studied isolated from the process of internationalization, the pressures from financial markets, the ownership structures and the boards' functioning. The fact that company's shareholder value maximization can lead to losses for other stakeholders as enhancing shareholder value will often be accompanied by short term perspectives and measures to reduce workforce is generally endorsed. For instance, UK's market-outsider system and ownership dispersion, being two important corporate governance characteristics, seem to be highly associated with shorter employee tenures and less employment security (Colley et al., 2003; Solomon and Solomon, 2004; Kim and Nofsinger, 2007; Mallin, 2007). On the other hand, it is considered that in countries like Germany, relational insider systems and direct representation of both shareholders and employees in board structures provide a better balance between the capital and the labour interests (Charkham, 1994; Wymeersch, 1998; Van den Berghe, 2002).

Many disciplines have influenced the development of corporate governance and the theories that have fed into it are quite varied.

In this article, we just give a short summary of the main theories which have affected that development.

Agency- and stakeholder approaches.

The agency theory, within the context of the principal-agent framework (Jensen and Meckling, 1976; Fama and Jensen, 1983), identifies the agency relationship where one party,

the principal/owner, delegates work to another party, the agent/management. The company's management is considered to operate on behalf of the principals, but the agent may not always act in the best interests of the principal. The so-called theory of transaction cost economics (Williamson, 1975 and 1984) is closely related to the agency theory, but focuses on the company as a governance structure and on undertaking transactions (such as cost reductions) internally.

In juxtaposition to the agency theory is the stakeholder theory (Wheeler and Sillanpää, 1997; Goodijk, 2003) which takes account of a wider group of constituents instead of focusing on shareholders only. Management is challenged to make the 'balancing act', to meet the pluralistic claims of all the different share- and stakeholders. Other relevant theories are the stewardship theory (directors are regarded as the stewards of the company's assets, acting in the best interest of the shareholders) or the resource dependence theory (taking into account the environmental dependencies and uncertainties).

Most company practices, however, are based upon aspects of different governance theories. In terms of 'good governance' it is questioned how to improve the corporate board structure, how to manage share- and stakeholder involvement, how to balance the interests and how to achieve a well-balanced decision making.

Outsider versus insider systems

The corporate governance literature describes the Anglo-Saxon market-oriented or outsider system versus the more European or Rhineland network-oriented or insider system of governance. The outsider system emphasizes free market operation where the company is primarily an instrument for achieving the maximization of shareholder value. In this system, shares are widely dispersed among many (anonymous) shareholders. The board has a one-tier structure, integrating executives as well as non-executive directors. On the other hand, in the insider system companies have a more concentrated ownership structure. The importance of networking between controlling blockholders explains why this model is also referred to as the network-oriented system. Continental European countries are systematically classified in this category (Van den Berghe, 2002).

Corporate board structures

The corporate governance debate on board structures encompasses the function of the board and its sub-committees (in general the audit, the remuneration and the selection/nomination committee), the roles, duties and responsibilities of the directors, the attributes and the contributions of the non-executive (outside) directors and the relationship with and the accountability to the share- and the stakeholders including also unions and works councils.

Main issues in this debate are the (dis)advantages of the unitary (one-tier) board versus the dual (two-tiered) board, the selection and remuneration of the (best) CEO, the so-called CEO-duality (whether or not splitting up the roles of the CEO and the chairman in the one-tier board) and the countervailing powers, the quality and the independence of the non-executives, the boards' responsibilities (compare Fama and Jensen, 1983; Tricker, 1984 and 1995), the boards' dynamics (what precisely happens within the board, the importance of personal behavior) and the relationships between the parties involved.

2.2 Developments: legislation and codes

Corporate collapses, criticism on the quality, transparency and accountability of governance and increasing shareholder activism have put pressure on countries to introduce more detailed legislation. In the USA, for instance, the Sarbanes Oxley Act (Sox) was introduced in 2002. And in The Netherlands, the regime of so-called large structured corporations changed in 2004 (see further in chapter 3).

However, the European countries principally prefer self-regulation and diversity (not 'one size fits all' but tailor made solutions) by introducing and further developing *codes*, including

principles and best practice recommendations for companies to stimulate better corporate governance.

Since the *UK Cadbury Code* (1992), many countries in Europe but also world wide, have introduced and revised principal-based corporate governance codes, with recommendations regarding the structure of and the behavior within the board, the information disclosure, transparency and accountability issues, the selection and remuneration of the directors and the relationships with share- and stakeholders.

The UK Cadbury Code and the Combined Codes (in 2003 and 2006) especially point out the importance of splitting up the roles of the CEO and the chairman (the question of the CEO-duality), the independence of the NED's and the financial disclosure.

The Report and Action Plan of the *EU High Level Group of Company Law Experts* (in 2002) also emphasized the importance of diversity and tailor made solutions and recommended other issues such as the introduction of separate and specific codes for each European country, the requirement for companies to publish an annual corporate governance statement in their accounts and on their websites, and to take account of both the share- and the stakeholders.

Despite all diversity, the various (Northwest-) European codes (such as the Danish Norby Report in 2001, the German Cromme Code in 2002, the French Bouton Report in 2002, the Belgian Lippens Code in 2003 or the Dutch Tabaksblat Code in 2003), represented certain common characteristics that are considered fundamental for good corporate governance. Although the attention paid to stakeholders was relatively low up to then, there is not only in the European context but world wide, a growing awareness of the importance of stakeholders' involvement for the companies' performance. Also the current OECD Principles (since 2004) include as one of their principles, the role of stakeholders in corporate governance.

In the corporate governance literature, most authors compare the advantages and the disadvantages of both the Anglo-Saxon and the Northwest European (Rhineland) model. Generally, the main differences between the Anglo-Saxon and the European approach are considered to be the view on the company, the focus on the share- and/or stakeholders, the short or longer term perspective of the company etcetera (figure 1). Although recent literature (Van den Berghe, 2002) argues that there is an increasing trend towards more convergence on corporate governance issues.

- * View: the company being an instrumental or an institutional firm
- * Focus on shareholder value maximization versus the stakeholder approach
- * Market-orientation (with independent shareholders) or network-oriented (interlocking)
- * Dispersed share-ownership versus high ownership concentration (having institutional investors or banks as shareholders)
- * Outsider versus insider system
- * The preference for dominant leadership or a countervailing power system
- * Culture of 'gaming' versus 'debating'
- * The (juridical) conflict model versus the consensus orientation
- * Short term versus longer term results and relationships/commitment
- * Rules-based versus principle-based solutions
- * Direct employee involvement or indirect representative employee participation

Figure 1: Differences between the Anglo-Saxon and the Northwest European (Rhineland) approach

In short, corporate governance in – especially Northwest – Europe can be characterized by companies considered as being institutional firms, taking account of all the different

stakeholder interests (the balancing act, see par. 2.3), having a relatively high ownership concentration (institutional investors, banks), preferring a well-balanced governance model with countervailing powers (including employee participation), principle based codes (with the comply or explain formula), diversity and tailor made solutions (not 'one size fits all').

2.3 Stakeholder involvement

Stakeholders have a 'stake' in the company. In the so-called broad view on stakeholders, the term 'stakeholder' includes any individual, group or institution that can affect (the 'input-side') or can be affected by (the 'output-side') the achievement of the organizations' objectives.

In the Anglo-Saxon shareholder approach, shareholders are considered to be the (only) owners of the company. Main purpose of the (board of the) company is to maximize shareholder value. The other stakeholders are only considered as being 'contracting parties'.

On the other hand, the European stakeholder approach focuses on:

- * the importance of having good relationships with all the relevant stakeholders
- * the boards' responsibility to monitoring the management on behalf of all the relevant stakeholders: the board has to balance all the pluralistic claims
- * the alignment of interests: serving the stakeholders' interests and performing a 'balancing act' also serves the interests of the shareholders and the management (compare the stewardship theory)
- * the stakeholder value creation: good relationships between the board and the stakeholders are beneficial for the business performance, in terms of gaining trust, mobilizing input, getting commitment etcetera.

Especially Freeman (1984), one of the founding fathers of the stakeholder approach, emphasized the strategic value creation of stakeholder management: the importance of becoming a so-called stakeholder-inclusive company and focusing on longer term profits, the strategic value of reputation and corporate brand value. He argued that companies should make more use of the stakeholders' input as an innovative source. Sethi (1975) described the different management attitudes towards stakeholder involvement, varying from 'social obligation' or 'compliance' to 'social responsiveness' or 'engaged' stakeholdership. Since the eighties of the last century, other authors such as Jones (1995) or Wheeler and Sillanpää (1997), join the 'school' of stakeholder management. They also argue that stakeholder management could really improve the company's competitiveness.

Stakeholder management as an integrated business process, includes several stages (compare Goodijk, 2006):

- * First of all, the stakeholder identification: the process of identifying and becoming aware of 'who and what really counts'. This process includes the *mapping*: identifying the target stakeholders and their specific claims. Mitchell et al. (1997) linked the stakeholder identification to 'salience': stakeholder salience will be high where all three of the stakeholder attributes (power, legitimacy and urgency of the claim) are perceived to be present.
- * Then the stage of *mobilizing* the stakeholders and make (challenge) them to become more actively involved. Instruments for mobilizing stakeholders are: information disclosure, communication systems or participation instruments.
- * And finally, the management has to make the balancing act (taking into account all the various stakeholder interests), to decide which decision should be made and to be accountable to the share- and the stakeholders (*managing* the stakeholder relationships). So, stakeholder-inclusive companies are really making use of the stakeholders' involvement and try to integrate the stakeholder interests into the business strategy and decision making as much as possible.

2.4 Corporate and internal governance

At the corporate company level, board and top management are challenged to improve the transparency and the accountability and to build up relationships with the share- and the

stakeholders. Stakeholder management by providing the share- and the stakeholders with opportunities for involvement and dialogue is, in general, considered to be part of good corporate governance in Europe.

Internal governance however, is focusing on managing the internal organization by policy making, setting goals and targets, adopting plans, allocating funds and mobilizing the employees' involvement. Top management has to stimulate and to organize relationships with and between managers of relatively autonomous divisions or units, to stimulate and to organize employee involvement, bottom-up participation and shared responsibilities. Stakeholder-inclusive organizations are successful in developing good governance and participative leadership from the top and stimulating/mobilizing bottom-up employee participation (figure 2).

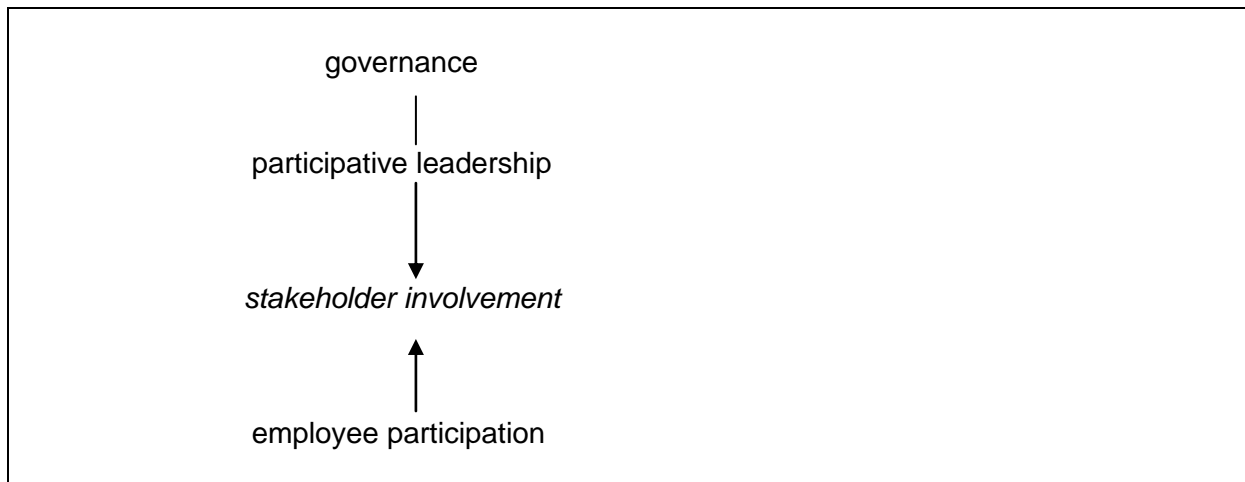


Figure 2: Stakeholder involvement by good governance and bottom-up participation

Management at all the organizational levels is challenged to stimulate and to mobilize the involvement of stakeholder in order to improve their commitment and engagement, by:

- * taking into account the expectations and experiences of the various stakeholders ('what's in it for them?'),
- * stimulating and making use of their inputs (expertises, interests) and
- * providing them with opportunities to participate in the decision making processes.

Several authors (Tricker 1984, Garratt 1990 and 1996, Goodijk 2003) have argued that there is a link between corporate and internal governance. Both corporate and internal governance are focusing on new, more open and transparent ways of governing and on the involvement of stakeholders in the decision making process. Tricker for instance, suggested that that good corporate governance is stimulating the value creation within the organization, while good internal governance is a precondition for improving the corporate governance. So, external and internal governing processes should be linked at the corporate level (compare Sorge and Goodijk, 2010).

3. Corporate governance in The Netherlands

3.1 Some characteristics

In the Netherlands, the corporate governance model is generally based on the two-tier board principle. Large companies, whether or not listed, have two separate boards, the board of directors (the executive management board) and the board of supervisors (the independent non-executives) that meet with each other several times a year.

In the specifically Dutch system of labour relations with its strong focus on consensus, trust and the involvement of stakeholders, the boards have traditionally had a rather exceptional

position and responsibility, that of policy making, monitoring and control not only on behalf of the shareholders but on behalf of the company as a whole. The management board must take into account all the share- and the stakeholder interests and the supervisory board has to control the board of directors in the best interests of the company, operating independently from all the shareholders and stakeholders.

Last decade, the Dutch corporate governance model has become under high shareholders' pressure to provide them with more information and powers to influence the company's policy making. One of the large Dutch companies' characteristics is the relatively high share-ownership of foreign investors. In the nineties, Dutch investors/investment funds little by little reduced their investments and share-ownership in the Dutch companies. Last few years foreign investors, especially private equity funds (such as US Kohlberg Kravis Roberts or UK Cinven) and hedgefunds (such as UK Centaurus and US Paulson) have substantially increased their share-ownership in the large Dutch AEX-listed companies. At the moment foreign investors possess about 85% of the large Dutch listed companies' shares.

Since the nineties several codes have been developed (in 2003 the most well known Tabaksblat Code), not only for the profit companies but also for the not for profit sector (for instance the health care sector). The main issues in the corporate governance debate include the improvement of the information flow to the (minority) shareholders, the functioning and the accountability of the management board and especially the composition of the Supervisory Board.

Under Dutch rules, the supervisory board very recently - until October 2004 – had the right to appoint its own members (the so-called co-option model), being independent of the management and the shareholders and stakeholders, striving for homogeneity and acting consensus oriented. Both the shareholders' meeting and the works council had the right to propose candidates and to object to the appointment of particular candidates.

In 2004, however, the Dutch Parliament decided - in line with the proposal of the government advisory body, the Social Economic Council SER (SER, 2001) - to change the co-option system by giving the shareholders the right to formally appoint the members who have been recommended by the board, and – on the other hand - by giving the works council the right to select and nominate – at most - a third of the board members. This change in legislation might lead to a substantial transformation of power towards shareholders. And it is questionable whether and under which conditions the new one-third formula for works councils will, in comparison with the old situation, really mean an improvement in favour of the employees' representatives.

3.2 Law and regulation: the Dutch structure regime

Since 1971, the board structure of Dutch companies has been regulated by Book 2 of the Civil Act (the so-called Structure Act). The Civil Act makes a distinction between private companies with only registered shares that can not be transferred, and public companies that can freely transfer registered shares, and provides different regimes for various types of companies.

In general, the rules of the common regime are applicable to small and medium sized companies.

This regime gives the companies the choice between a governance model with only a managing board or a two-tier system.

The key issue of the Civil Act, however, is the structure regime for companies that meet certain criteria related to the number of employees in The Netherlands (at least 100) and the amount of subscribed capital (16 million Euro at the moment). The structure regime provides a mandatory two-tier board structure with a board of directors (a management board) and a supervisory board composed entirely of supervisory directors.

Under the rules of that structure regime it is not the shareholders' meeting but the supervisory board that has the legal right to appoint and dismiss the managing directors and

to approve important decisions concerning mergers, acquisitions, investments or reorganizations. The shareholders' meeting is only meant as a forum for shareholders to be informed by the management board, to be given explanation of the company policy and to call the management to account: this forum has the legal right to finally declare the annual report, or to withdraw/revoke ones' confidence.

The Civil Act also provides regimes for other and smaller companies. The 'mitigated' structure regime and the 'exempted' regime are mostly of importance to multinationals and local companies that are part of a foreign holding structure or to companies that have more than half of the employees working abroad. Under the rules of these regimes the supervisory board still has the right to ratify important management decisions, but the shareholders have the right to appoint or dismiss the managing directors. The 'common' regime is applicable to small and medium-sized companies, giving them the choice between a governance model with a board of managing directors only or the two-tier board model.

Until 2004, the shareholders' meeting did not even have the formal power to substantially influence the composition of the supervisory board. However, considering the relatively high ownership-concentration in the Netherlands and the traditionally important role of large financial institutions such as pension funds, banks, insurance companies etcetera in corporate ownership, the shareholders did have some power to influence the strategic management board decisions, for instance by using their voice-option at the shareholders' meeting, by not approving the annual report, by using their right of inquiry into mismanagement or by the exit-option.

When vacancies arose, the supervisory board appointed its own directors through the system of controlled co-option. The co-option system has been a very specific characteristic of Dutch board member (s)election. As mentioned above, both the shareholders' meeting and the works council had the right to propose candidates and to object to the appointment of candidates nominated by the board.

The right to raise objections to the appointment of a supervisory board member could be based on three grounds (Book 2, art. 168/278, Dutch Civil Act):

- * The procedures have not been diligently adhered to by the parties involved: parties must have the opportunity to select and propose their own 'independent' candidates after being formally informed of upcoming vacancies at an early stage of the decision-making process.
- * The proposed candidate is found to be unqualified to fill up the board position: parties can judge that the candidate is not sufficiently qualified considering his or her knowledge, skills or experience.
- * The appointment would not result in a balanced composition of the supervisory board: the board has to be made up of members with a broad range of knowledge, skills, network contacts and backgrounds.

If an objection were to be made, the supervisory board would require the permission of the Enterprise Chamber of the Court of Appeal in Amsterdam in order to get the candidate appointed nevertheless.

A few years ago however, the SER proposed to strengthen the legal position of shareholders in the decision-making process, to change the co-option model and to give shareholders the right to formally appoint the board members (SER, 2001). The works councils on the other hand, should be given the right to select and nominate – at most - a third of the board members. In October 2004, the SER's proposals were accepted by the Dutch Parliament and the Structure Act of 1971 has been amended.

3.3 Codes of good corporate governance

The SER's proposal to strengthen the position of the shareholders has to be seen in the broader context of the corporate governance debate in the Netherlands. For

several years now there has been growing criticism that the Dutch corporate governance system is limiting the power of the shareholders far too much. The shareholders, in particular the foreign investment funds, criticize especially the functioning of the supervisory board which in general, does not ask enough critical questions and is too much of a continuation of the management and the CEO. In the Netherlands, this criticism has for instance been made of the supervisory board of Ahold. It seemed that the board did not accept its full responsibility in accordance with its roles and obligations.

In 1997, the Peters Corporate Governance Committee presented forty recommendations to strengthen the role of the shareholders and especially to improve the functioning of the supervisory board.

Among these recommendations were:

- * more information and transparency should be provided to shareholders by improving the quality of annual reports and general meetings.
- * the supervisory board should draw up a profile and adjust it from time to time,
- * the board should be composed in such a way as to enable its members to operate independently,
- * the reappointment of board members must always be carefully considered and should not be an automatism,
- * the board should evaluate its own functioning and performance at least once a year.

Although most shareholders did not fully agree with continuing the specifically Dutch structure regime, and the employee representatives were disappointed that there was a lack of attention paid to the role of works councils, there was a generally positive response from the various shareholders and stakeholders to the recommendations.

Since the committees' report was published, several companies have paid more attention to the functioning of their boards and best practices have also showed some changes in the attitude of supervisors, from a rather passive towards a more active and responsible one. However, the monitoring by the Peters Corporate Governance Monitoring Committee in December 2002, showed that companies still provided insufficient information on how their boards were functioning and that, as yet, there was no real growth in the involvement of the shareholders.

In March 2003, the Tabaksblat Committee was established to formulate a renewed code of best corporate governance practice, based on the recommendations of the Peters Committee. Main issue was how to further improve the shareholders' influence in the Dutch corporate governance system.

At the end of that year the Tabaksblat Committee completed its final report (Tabaksblat Code, 2003) after a period of consultation with several of the parties (shareholders and stakeholders) involved. Regarding the supervisory board, the Committee made several recommendations, not for changing the co-option system as such but for strengthening the independence, the quality and the expertise of the supervisors within the co-option model. It also recommended a limitation on the number of board memberships for supervisors, the limitation on board memberships for executive directors and more frequent contacts between the supervisors and the external accountant.

Most of the recommendations – based on the so called comply-or-explain principle – have been warmly welcomed by both the shareholders and the other stakeholders, although each stakeholder group still has its own arguments and wishes for changes and adjustments to the code.

Last few years, a new Corporate Governance Committee chaired by Frijns, has monitored the implementation of the Tabaksblat's recommendations. Recently, the Frijns Committee suggested some new rules to better protect the top management against too much of aggressive and short term shareholdership. Especially hedgefunds were considered as

having made misuse of the revised structure regime in 2004 which provided the shareholders with more power to influence the policy making.

Since the Peters and the Tabaksblat Codes for listed companies, several other (sector) codes have been developed, such as the Health Care Governance Code or the Pension fund Code. These codes are mainly based on the principles and the best practice recommendations of the Peters and the Tabaksblat codes.

3.4 Basic principles of the Dutch corporate governance

As mentioned before, the Dutch corporate governance model is highly pressured by Anglo-Saxon shareholders' influence. Main differences between the Anglo-Saxon and the Continental European (and Dutch) approach are:

- * The focus on shareholder value maximization versus the European/Dutch stakeholder-orientation.
- * Market-oriented (with independent shareholders) versus network-orientation (the system of 'interlocking' in Europe).
- * Dispersed share-ownership versus relatively high ownership concentration in Europe (having institutional investors, pension funds or banks as shareholders).
- * Considering the company as being an instrumental firm (on behalf of the shareholders) versus institutional firm.
- * The strong leadership culture in the Anglo-Saxon countries versus the more European system of countervailing powers.
- * The conflict versus the more consulting orientation.
- * Short term versus longer term results and relationships.
- * Rules-based versus principle-based solutions (the SOX versus the European codes).

The Dutch model as described above, notwithstanding the changes that have been proposed by the SER and implemented recently, fits into the context of the European (Van den Berghe, 2002) and specifically the Dutch system of labour relations and is based on the principles of co-operation, equivalence, confidence and consensus.

In the Dutch model of corporate governance:

- * The company is considered to be a co-operation of employer and employees with a longer term perspective and having open relationships with shareholders and stakeholders (the so-called institutional firm).
- * The company boards are responsible for balancing all the different shareholder and stakeholder interests and gaining their confidence.
- * Decision making is considered to be consensus-oriented.
- * Furthermore, the Supervisory Board has to meet the requirements of independence, quality and trust in order to monitor and control management decisions on behalf of the entire company.

Although there is a gradual change towards the Anglo-Saxon model (with more shareholders' influence, higher payments and options for the top management, etcetera), the Dutch labour relations are, in general, still dominated by the stakeholder approach and the principle of equivalence.

These principles should be seriously considered and taken into account for explaining the functioning of the Dutch model, the changes needed and the possible position of the employee representatives relative to shareholders.

3.5 Perspective of the Dutch model

The main principle of the Dutch corporate governance model traditionally is the stakeholder approach which assumes that both the boards of the two-tiered system have to function on behalf of the company as a whole and all the relevant stakeholders and should balance pluralistic claims.

In the Dutch model it is widely considered that the stakeholder approach can include the shareholders' interests too. From this standpoint, a good relationship between the management board and the stakeholders (characterized by dialogue, transparency and accountability) is crucial for a well balanced policy-making process and for running the daily business effectively (Goodijk, 2001). Several Dutch companies have already developed their own stakeholder concepts for making the 'balancing act': how to balance all the competing interests of the stakeholders in business practice.

The stakeholder approach has proved to be beneficial to Dutch companies in terms of trust, stability and commitment, although this approach may also have disadvantages, such as the slowness of the decision-making processes if all competing claims of stakeholders have to be considered, or the lack of attention to the shareholder value. Solutions are still being discussed and looked after from the stakeholder perspective, striving for a certain balance in the power of capital and labour. But it is clear that the traditionally developed balance is under considerable pressure now.

Last few years, the shareholders' influence in corporate policy making has substantially increased in the Netherlands. But the structure regime still provides the boards with powers to countervailing their powers. Although many parties are criticizing the shortcomings and failures of the two-tier model and especially the position of the supervisory board within the Dutch system, the Dutch in general are still preferring that model. They argue that in such a model the independence of supervisors can better be guaranteed, especially if the supervisory board has the task and responsibility to operate in the best interest of the company as a whole.

The SER advised the government not to change the mandatory two-tier system yet, although this system is not in line with the internationally more usual one-tier board. So to date, most Dutch companies have the two-tier board system in conformance with legislation. Some internationalized companies such as Shell and Unilever, however, have already used the opportunity – or have the intention to do so - to opt for the one-tier system at the holding level. The motivation for this change is, as far as we know, highly based on perceived financial market requirements and shareholder pressures and the – worldwide – claim for enhanced shareholder control in cases of poor management performance.

Furthermore, many internationally oriented Dutch companies have introduced a dual holding structure consisting of an international holding and a national sub holding. This construction means that – only – the sub holding has to be structured in line with the (mitigated) structure regime.

Conclusion is that the Dutch corporate governance system is, indeed, changing towards a more Anglo-Saxon model, but the basic principles and elements of the structure regime as yet keep going.

4. Dutch Works Councils' involvement in corporate governance

4.1 The research question and methodology

In this chapter we will discuss the most important findings of our research on Dutch Works Councils' position in corporate governance and their actual influence in strategic decision making at the corporate level (Van Beurden et al., 2009).

The Dutch Social and Economic Council concluded one year ago that the increased shareholder' influence had led to a somewhat unbalanced corporate governance system in The Netherlands. The Works Councils were looked upon as making not fully use of there legal rights and possibilities. So we were invited to conduct research on this so-called 'under use'.

Our research was focusing on the question:

To what extent do the WC's of large Dutch 'structure corporations' under use their legal rights and possibilities to influence the strategic decision making at the corporate level, and what are the main reasons for that?

Sub-questions were:

- * Which rights/possibilities do WC's have to influence the strategic decision making?
- * To what extent and in what way do WC's make use of these rights?
- * Is there any question and evidence of 'under use' of rights?
- * If so, what are the reasons for that?
- * What could be done to improve the making use of rights?

Structure corporations have been defined (in the Dutch Civil Act) as companies having a subscribed capital of at least 16 million Euro and employing at least 100 employees in the Netherlands (see par. 3.3). At the Chamber of Commerce there are registered about 250 of such companies

We selected twelve important strategic WC's rights/possibilities, based upon the current Works Council Act (1998), the Civil Act (revised in 2004) and the European Works Council Act (since 1997).

And we precisely defined 'under use' as the situation that 'making use' of the right/possibility might have led to more influence on the decision making. For, 'under use' is not always the same as 'not (fully) making use of'. There can be explanations for the WC not to make (fully) use of a right, for instance: having better alternatives to influence the decision making at that specific moment.

First of all, we did extensive desk research: a study of the relevant literature and the research documents over the last 40 years. This desk research provided us with deeper insight in (the development of) the 'use' of WC's rights up to last year, although the research seemed to be scarcely systematized.

Based on these findings, we set up a questionnaire for the WC's of the structure corporations (n = 250) to investigate the WC's own opinions on the 'under use'. We had a response of 87 WC's (response of 35%). Finally, we did seven case studies (a sample taken ad random from the WC's of the structure corporations) to further exploring the (under)use of rights and the reasons for that.

4.2 Company characteristics

So, we set up a questionnaire for the WC's of the large structure corporations (n = about 250). The 87 companies that have responded to the questionnaire, can be characterized as being rather large (two-third having more than 500 employees), having different ownership-structures (listed and non-listed companies, having dispersed or more concentrated ownership, being either independent Dutch company or subsidiary of a foreign – mostly USA- or UK- headquartered mother company), with various degrees of internationalization, a relatively high centralized and hierarchical leadership but also a high 'consultation culture' ('open' and rather 'informal') (figure 3).

	Amount of companies (n=87)
Employees	
* less than 500	22
* between 500 and 5000	46
* more than 5000	19
Ownership structure	
* listed company with dispersed ownership	29
* listed company with concentrated ownership	8
* subsidiary of a foreign mother company	23

* non-listed	27
Degree of internationalization	
* Dutch company, mainly operating in The Netherlands	16
* Dutch company, internationally operating	26
* Dutch company with an (international) holding structure	22
* Subsidiary of a foreign mother company	23
Average (score 1 to 5)	
Leadership	
* centralized (1) versus decentralized (5) management	2,6
* hierarchical (1) versus participative (5) leadership	2,8
Consultation culture	
* 'open' (1) versus 'closed' (5) corporate culture	1,9
* 'formal' (1) versus 'informal (5) consultation culture	3,4

Figure 3: Company characteristics (n = 87)

Our research shows (and confirms other research findings)) that most of the large Dutch companies are highly influenced by the Anglo-Saxon approach last few years, having got a 'mix' of Dutch ('European') and Anglo-Saxon governance characteristics: a more dispersed ownership structure, a stronger leadership culture but still preferring the consultation culture.

For getting deeper insight in the (under) use, we conducted case study research (7 case studies) by having in depth interviews with the chairman of the Works Council and with all the other relevant strategic partners concerned: the top manager who has to consult with the WC, the HR-manager facilitating the consultation, a member of the supervisory board (in most cases the supervisor recommended by the WC) and one of the union leaders.

The selected cases (proportional spread regarding sector, number of employees, ownership structure and degree of internationalization) were:

- * Stork (engineering), a Dutch company that has been under high pressures of foreign hedgefunds and taken over by a British investment fund
- * Nederlandse Spoorwegen (Dutch Railways), being in a process of further internationalizing its activities
- * Oranjewoud (consulting), having a holding structure in the Netherlands with the top manager as the dominant shareholder
- * Rabobank (banking) being a Dutch co-operative firm
- * Electrabel Netherlands (energy), a subsidiary of Electrabel being part of a French multinational
- * MCB (metal industry), a Dutch company developing from family-owned company towards a company having external shareholders
- * Wegener (publishing firm), taken over by a British multinational.

Most of these companies are characterized by having management that is hierarchical headed by (the top management of) a foreign mother company (Stork, Electrabel, Wegener), a holding company (Rabobank) or a director-owner (Oranjewoud). In our research we will investigate the impact of these hierarchical organization structure on the WC's position and influence at the company level in the Netherlands. The European Works Council Act, for instance, might be one of the instruments for the WC to enlarge its influence across borders.

4.3 Strategic Works Council rights: degree of (under) use

As mentioned before, we first of all set up a questionnaire for the Works Councils of the large structure corporations (n = about 250) to investigate the WC's opinions (perceptions) on the so-called 'under use' of their legal rights and possibilities to influence the strategic decision making.

We selected twelve strategic rights, based on:

- * the Works Council Act (WC Act)
- * the Dutch Civil Act (Civil Act)
- * the European Works Council Act (EWC Act).

Figure 4 shows the findings, the scores on the WC's average perceived use of their legal strategic rights and possibilities.

Twelve strategic WC's rights/possibilities	Score (1 – 5)
Advising on important financial and organizational decisions (WC Act)	4,2
-----	-----
Consultation of internal experts (WC Act)	3,4
Strategic discussions with the attendance of Supervisory Board members (WC Act)	3,3
Consultation of external experts (WC Act)	3,1
Recommending members of the Supervisory Board (Civil Act)	3,0
-----	-----
Cooperation with the European WC (EWC Act)	2,6
Inviting members of the Supervisory Board as experts in meetings (WC Act)	2,5
Involvement in drawing up the profile of (the members of) the Supervisory Board (Civil Act)	2,5
Extension of the WC's rights by a specific company agreement (WC Act)	2,4
-----	-----
Right to speak at the Annual General Meeting (Civil Act)	1,4
Right to go to Court (WC Act)	1,1
Setting up an inquiry into mismanagement (in cooperation with the unions (Civil Act)	1,1

Figure 4: WC's (average) use of legal strategic rights and possibilities (n = 87)

Most of the WC's are making use of their right to advice on important financial and organizational issues, such as investments, technological innovations and reorganizations. They also make rather frequently use of their right to consult companies' experts. A smaller percentage is making use of the right to build up relationships with the Supervisory Board and to be involved in drawing up the boards' profile.

Only a few WC's have experienced the use of going to Court or setting up an inquiry into mismanagement.

Our research also shows that WC's of large companies, in general, make more use of their rights and possibilities (for instance, building up relationships with the Supervisory Board) than WC's of smaller companies. And a WC of a subsidiary of a foreign mother company, makes more use of exchanging information with its European WC.

4.4 The research findings on the Works Councils' (under) use

In this paragraph, we present more detailed research findings on the use and the under use of the Works Councils' strategic rights and possibilities, based on the Works Council Act, the Dutch Civil Act and the European Works Council Act.

The Works Council Act

Under the current Works Council Act (1998), Works Councils have various strategic rights and possibilities to influence the corporate decision making process, such as the rights:

- * to advise on important financial and organizational management decisions (article 25, WC Act),
- * to go to Court when the management doesn't take seriously account of the WC's advice (article 26),
- * to be early involved in the (longer term) strategic decision making, in attendance of supervisors (article 23 and 24),
- * to extend the WC's rights, possibilities and facilities by a specific tailor made company agreement (article 32),
- * to consult internal and external experts (article 16).

Our research shows that the WC's really make use of their right to advise on important financial and organizational issues like investments, mergers and reorganizations (average use: 4,2 on a 5-points Likert scale). The actual WC's influence on the strategic decisions, however, seems to be quite different and highly depending on the early stage involvement. An early stage involvement provides the WC with more possibilities to have influence regarding the decisions' content and the alternatives.

Only a small percentage of the WC's (average use: 1,1) decides to go to Court when the management doesn't seriously take account of their advice. Most of them argue that going to Court is not really necessary or not the best way to come to a solution. In general, WC and management prefer to find their own solutions and not to put their relationship under too much pressure. Moreover, the right to go to court as such is considered as being very preventive.

Most WC's also make a fairly good use of their right to have strategic discussions, with the attendance of supervisory board members (average use: 3,3). These meetings can be used to become early informed on and involved in the strategic decision making process. Notable here is the split between WC's (the majority, about 60%) that make quite fully use of this opportunity and most of the other WC's (about 40%) that don't make any use of it. Some WC's of these last group argue that they don't make use of the right to let supervisors attend the meeting, because they prefer alternatives such as having special tripartite meetings with the board members or separate informal meetings with members of the supervisory board. Another right that is rather good used by WC's, is the right to consult internal or external experts to preparing advices (average use: 3,4 and 3,1).

Finally, WC's seem to under use their possibility to extend their rights by a separate company agreement, a tailor made solution provided by the WC Act since 1998.

The relationship with the Supervisory Board

Besides the WC Act, the Dutch Civil Act provides the WC of large structure corporations (having the so-called structure regime, see chapter 3) with specific rights such as:

* to be involved in drawing up the profile of (members of) the supervisory board (article 158,3 Book 2 Civil Act),

* to recommend members of the supervisory board (article 158,5-6).

Our research findings show that at this moment, about 40% of the WC's are really involved in the boards' selection process. These WC's companies can, in general, be characterized as large internationally operating companies headquartered in The Netherlands (compare figure 2). The findings also show that WC's benefits from making use of these rights, include a better relationship with the supervisory board and a stronger strategic network position at the corporate company level.

The other (50-60%) of the WC's responded that they don't make any use of these rights. Some of them argue that the complex internationally organized company or the corporate culture (and the keeping off attitude of the management or the supervisory board itself) obstruct the WC's involvement in the boards' selection process. Other WC's mention their unfamiliarity with the structure regime. But notable many WC's impute the under use to their own lack of initiatives.

Our research confirms once again (taking account of other research documents), that most of the Dutch WC's don't make full use of their rights and possibilities to building up relationships with (members of) the supervisory board and to strengthening their corporate position.

The rights to 'speak' and to set up an inquiry into mismanagement

Under the WC Act, a Works Council has the right of initiative to addressing all kinds of issues concerning its own enterprise at the meetings with the management and to receiving a written and motivated management response to that (article 23 WC Act). Since the revision of the structure regime in 2004 (see chapter 3), the WC's of large structure corporations are also provided with the opportunity to 'be heard' at the Shareholders' Meeting in the case shareholders are threatening to collectively dismiss the supervisory board (article 161a Book 2 Civil Act). Only the WC of Stork company experienced this possibility up to now.

Recently (last year), the WC's of public limited companies also got the right to 'speak' (and to give its opinion) at the shareholders' meeting when the shareholders have to decide upon important strategic policies or issues such as the appointment, the dismissal or the remuneration of the top management. However, WC's individual members already had the opportunity to speak at the meeting by buying some shares and becoming a small shareholder.

Since 1970, both the shareholders and the unions have the right to set up an inquiry into supposed mismanagement via the Chamber of Enterprise (article 347 Book 2 Civil Act). So, WC's can make use of this right by working together with the unions and 'joining in' the procedure as a stakeholder. Moreover, the Civil Act also provides the Works Council with the opportunity to get the right to inquiry by developing a special mutual agreement with its management or a regulation in the companies' statute.

Our research shows that WC's still very scarcely make use of these rights to speak at the shareholders' meeting or to join in/set up an inquiry into supposed mismanagement. This is understandable because these rights are hardly developed and rather limited up to now.

The unions also, only sporadically make use of the right to setting up an inquiry.

Reasons mentioned for making not (fully) use of this right, are: the already preventive function of the right, the lack of cooperation between WC's and unions in many situations, mostly the parties involved don't want to put too much pressure on their interrelationships or they prefer alternatives.

Our case studies, however, show that, although the right to speak and to set up an inquiry are not very known to Works Councils up to now, these rights could in some cases, really be beneficial for WC's to strengthen its position in corporate governance.

Participation at the European level

Besides the rights based upon the regular Works Council Act and the special regulations of the structure regime, the WC also has the opportunity to make use of the European WC Act to developing a form of employee participation at the European level and to building up a strategic relationship between the national WC and the EWC (compare the new regulation on that 'link' and 'tuning' since the revision of the European Directive since last year).

Our research shows that up to now, only in half of the companies concerned (50% of the 120 companies) a EWC has been developed and that most of the Dutch Works Council don't make effectively use of the interrelationship. Especially in companies headquartered in The Netherlands, many WC's seem to be not very enthusiastic about creating/having a WC at the European level. Other WC's, however, experienced the beneficial to build up a relationship with their representative body at the European holding level and to fine tune their strategic stakes.

5. Conclusions

In this paper we have argued that our research on the WC's (under) use of strategic rights and possibilities should be considered in the broader perspective of the Dutch corporate governance and labour relations. So first of all, we described some relevant issues in the field of company governance such as stakeholder management and the link between corporate and internal governance, and we explained the specific Dutch context and developments.

In 2008, the Dutch SER concluded that the increased shareholders' influence in the Dutch corporate governance had lead to a certain unbalanced governance. They advised that the management responsibility at the corporate level to decide upon the company's strategy, should be restored. Last year, the Frijns Governance Committee did some recommendations to the government regarding that issue. But there was not a general agreement on the question whether or not to improve the position of the employee representatives, such as the Works Councils.

Our first analysis showed that the Dutch law and consensus culture provide the WC with substantial strategic rights and possibilities to influencing the decision making at the corporate level. But research had to be done on the question to what extend the Dutch WC's are really making use of these rights nowadays. Literature suggested that the successful development of employee participation is, in general, highly dependent on good governance, participative leadership and a (pro-) active attitude of employee representatives.

Our research focused on the WC's of the so-called structure corporations and showed that although the WC's generally experience a substantial influence, most of these WC's do not make fully use of their rights yet.

Most of the WC's do make really use of their right to advise on important financial and organizational issues and argue that the right to go to Court works preventive. Another legal right that is rather good used by the WC, is the right to consult internal or external experts to preparing advices.

But on the other hand, the research findings show that especially WC's opportunities regarding the strategic meetings within the company, the relationship with the Supervisory Board and the right to attend shareholders' meetings and to set up an inquiry into mismanagement (in cooperation with the unions) were not well developed yet. Reasons for this under using of rights seem to be the WC's attitude itself (taking insufficiently own initiatives, being not actively involvement), the relatively ignorance of certain possibilities (such as the relationship with the SB), the complexity of the (internationalized) organizational structure and the lack of management support in several situations. Furthermore, the under use of going to court or setting up an inquiry into mismanagement highly fits into the Dutch consensus culture.

Finally, only in half of the Dutch companies that have to organize a form of participation at the European level, a European WC really has been developed up to now.

The research and especially the case studies have learnt that a Dutch WC could really improve its power in corporate governance by taking more initiatives, building up strategic networks, being more actively involved in the company's policy making and in the process of proposing and selecting supervisory board candidates, etcetera. Furthermore and in a broader perspective, top management is challenged to build up better relationships with the various share- and stakeholders and to give them (especially the works councils) the opportunities for dialogue and involvement, considering 'stakeholder management' and the consultation with the works councils as being important elements of good governance.

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