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A Model Code on Co-determination and CSR, The Netherlands: A Bottom-Up Approach

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1. INTRODUCTION

Co-determination concerns co-determining a company's strategy and policies. The Netherlands has a rich tradition in co-determination – in law, case law, and practice. There is also an active community of members of works councils. They exchange information on co-determination strategies and practices. As corporate social responsibility (CSR) (*People Planet Profit*) becomes increasingly integrated in business strategies, it will be interesting to see how the related role of the works council develops.

Section 2 will analyse the Dutch Corporate Governance Code and Dutch company law in order to establish to what extent CSR can be considered part of corporate strategy. Section 3 will investigate the Dutch Works Council Act (DWCA) with a view to answering the question to what extent it allows or stimulates works councils to exert influence on a company's CSR strategy and policies.

However, CSR is not only about formulating strategy and policies; it is also about living up to them, that is, implementing CSR ambitions throughout the company. As works council members are usually well connected with unions, internal company networks, and other employees, they are in an ideal position to support and guide a company on a daily basis towards becoming a sustainable company. Indeed, most important in this respect is that CSR is understood by all employees and that it is made a part of all the company's activities, that is, that it is incorporated in all divisions and sectors and in all countries where the company has operations.

The 2010 annual conference of *Stichting MNO* (MNO), a foundation that serves as a platform for (central) works councils of multinational companies (MNCs) with a base in the Netherlands,¹ centred on the theme of works councils and CSR.² The discussion revealed that many employees look upon CSR as an important theme but, at the same time, have the feeling that they cannot (sufficiently) put CSR into practice in their daily work. The support among employees for making their company's operations more sustainable generally seems high in the Netherlands, hence it would be prudent and the time would seem ripe to stimulate initiatives in that field. Works councils – as employee representative bodies – could serve as a connection between employee initiatives and the board that is responsible for developing corporate strategies. Works councils could probably also play a constructive role in monitoring the implementation of CSR policies. Consequently, trying to implement a CSR strategy through a top-down approach only, possibly implies that opportunities are being missed.

MNO decided to perform a study exploring best practices in Dutch MNCs in respect of co-determination in the field of CSR.³ The methodology of the study is accounted for in section 4 of this article, and the results are set out in section 5. Part of the study's aim was to test the idea of drafting a 'Model Code on Co-determination and CSR' (hereinafter 'the Model Code' or 'the Code') based on the best practices, which would be revealed by the study. In consultation with the MNO members, a Model Code was indeed drafted at the end of 2010 and presented on 8 February

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1 Members of the *Stichting Multi Nationale Ondernemingsradenoverleg* are (central) works councils of companies that: (1) operate internationally, either on a stand-alone basis or as a part of a group; (2) are subject to the Dutch Works Council Act (DWCA); (3) have at least 1,500 employees in the Netherlands; and (4) have at least two locations in other EU Member States. MNO presently has forty-seven members, covering most of the MNCs in the Netherlands. See for more information, <www.stichting-mno.nl/>.

2 The title of the conference of 27 Jan. 2010 was '*Maatschappelijk verantwoord ondernemen, niet alleen een verantwoordelijkheid van de ondernemer*' [CSR, not only the responsibility of the employer/entrepreneur]. See for a report on the conference, <www.stichting-mno.nl/>, 23 Jan. 2011.

3 The study had a multi-disciplinary approach and can be typified as an 'action research project', that is, performing research in cooperation with the parties that are the subject of the study. The research was performed in 2010 by researchers of the Center for Sustainability of Nyenrode Business University, led by the author of this article in close cooperation with a so-called steering committee comprising board members of MNO and representatives of KLM and the NS. TNT and Philips also actively supported the project as did the Ministry for Economic Affairs, Agriculture & Innovation (EAA&I). A report on the study and the results (in Dutch) can be found at <www.stichting-mno.nl/>.

2011 by MNO to the State Secretary of the Ministry for Economic Affairs, Agriculture & Innovation (EAA&I).⁴ Section 6 presents the main elements of this Model Code, and the focal point of section 7 is an outlook on how to use the Model Code. Section 8 concludes.

2. LEGAL FRAMEWORK: CORPORATE GOVERNANCE AND CSR

Since 2009, the revised Dutch Corporate Governance Code (the Frijns Code)⁵ explicitly acknowledges that CSR belongs to the core corporate strategy of companies.

The Frijns Code stipulates that the management board is expected to formulate a CSR policy and to submit it to the supervisory board for approval.⁶ The Frijns Code also explicitly records that the supervisory board's responsibilities include the supervision and approval of the management board's CSR policy.⁷ The Frijns Code applies to listed companies.⁸ This approach is in line with the Dutch stakeholder model; however, it is interesting that the Frijns Code uses terminology that explicitly refers to CSR, whereas this term is not yet encountered in either Dutch company law or in case law.

In addition, the Frijns Code prescribes that the main elements of a company's CSR strategy are to be included in its annual report, thereby informing not only the shareholders but also other stakeholders.⁹ This is in line with both Book 2 of the Dutch Civil Code (DCC), containing the Dutch company law provisions, and Dutch accounting guidelines.¹⁰

The Frijns Code states that the supervisory board has the duty to maintain relations between the company and its stakeholders, such as the shareholders, the works council, and others. According

to the Frijns Code and the DCC, the supervisory board shall be guided by 'the interests of the company and the enterprise' and 'shall take into account the relevant interests of *the company's stakeholders*'. In the event of conflict situations, the supervisory board must consider and balance the interests of all of the different stakeholders.¹¹ Disputes need to be solved using the standard of 'reasonableness and fairness', which guidance is likewise provided for in Article 2:8 DCC.¹² There are two observations – (1) since the core perspective of the Frijns Code is 'that a company is a long-term alliance between the various parties involved in the company',¹³ it might be assumed that 'interests' refer to long-term interests, and (2) the term 'stakeholders' aligns with CSR, since the Frijns Code unambiguously refers to stakeholders within and outside of the company¹⁴ and CSR obviously also concerns stakeholders within and outside of the company.

Hence, the Frijns Code advocates that the management board and the supervisory board should take account of the interests of the various stakeholders, including CSR issues that are relevant to the enterprise. It was acknowledged that if stakeholders are willing to cooperate within and with the company, it is essential for them to be confident that their interests are represented. It was furthermore stipulated that the two pillars on which good governance is founded and which are essential conditions for stakeholder confidence are (1) good entrepreneurship, which includes integrity and transparency of the management board's actions, and (2) effective supervision of their actions and accountability for such supervision. Moreover, it was stipulated that good relations between the various stakeholders are of great importance, particularly through a continuous and constructive dialogue.¹⁵

4 See the press coverage at <www.rijksoverheid.nl/nieuws/2011/02/08/ook-ondernemingsraad-speelt-rol-bij-mvo.html>. The English text of the Model Code can be accessed at the same website of the Ministry for EAA&I and also at <www.stichting-mno.nl/>.

5 Named after the chair of the committee tasked with the revision of the code, Mr Frijns. The text can be accessed at <http://commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF_uk_.pdf>.

6 See Principle II.1: 'The role of the management board is to manage the company, which means, among other things, that it is responsible for achieving the company's aims, the strategy and associated risk profile, the development of results and *corporate social responsibility issues that are relevant to the enterprise*. The management board is accountable for this to the supervisory board and to the general meeting. In discharging its role, the management board shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the *company's stakeholders*' [emphasis added]. See also Best Practice Provisions II.1.2(d): the management board shall submit to the supervisory board for approval... (d) '*corporate social responsibility issues that are relevant to the enterprise*'.

7 Principle III.1 stipulates that 'the supervisory board shall also have due regard for *corporate social responsibility issues* that are relevant to the enterprise'. Best Practice Provision III.1.6 highlights the most important matters that require supervision by the supervisory board, among which is stated under (g), '*corporate social responsibility issues that are relevant to the enterprise*'. Generally, Dutch law describes the supervisory board's task as follows: 'the supervisory board shall supervise the management, and general affairs of the company and the related enterprise. The supervisory board shall support the management board with advice. In the fulfilment of their duties, the supervisory board members shall focus on the interest of the company and the connected enterprise' (Art. 2:140(2) Dutch Civil Code [DCC]). Article 2:164/274 DCC also obliges the management board of certain large 'two-tier board' companies to obtain approval of the supervisory board regarding important decisions.

8 Since the Frijns Code records the best practice in Dutch industry, it also influences the behaviour of non-listed companies.

9 Best Practice Provision II.1.2.

10 See Art. 2:391(1) DCC, which requires the inclusion of extra-financial information in the annual report, such as information regarding environmental and employee matters and Accounting Guideline 400, issued by the Dutch Council for Annual Reporting, which recommends providing ample information on CSR strategies, policies, and results in the annual report. See further on CSR reporting T.E. Lambooy & N. van Vliet, 'Transparency on Corporate Social Responsibility in Annual Reports', *European Company Law* 5, no. 3 (2008): 127–135. Notably, neither Dutch law nor the Frijns Code refers to a specific reporting standard for reporting on the corporate CSR achievements, which weakens the impact. Nor is external verification of the CSR information in the annual report required, other than that the content thereof may not be inconsistent with the annual accounts. See T.E. Lambooy, *Corporate Social Responsibility. Legal and Semi-Legal Frameworks Supporting CSR* (Deventer: Kluwer, 2010), 139. See also the contribution of Karin Buhmann on CSR reporting in this ECL Special Issue.

11 Principle III.1. See also Recitals 7–10, 6–7, and 51.

12 Article 2:8 DCC is a key provision of Dutch company law, which typically applies to 'in-company' stakeholders. It stipulates that a company and those who, pursuant to the law or the articles of association, are involved with its organization must behave towards each other in accordance with the principle of reasonableness and fairness.

13 Recital 7. This aligns with the common Dutch perception of the role of a company in society, that is, that corporate activities are embedded in a stakeholder model (as opposed to the shareholder model usually explained in the Anglo-Saxon legal literature from the concept of agency theories).

14 Recital 7.

15 Recitals, at 5–8.

The Frijns Code also points to general rules of conduct that are supposed to ensure the careful handling of processes involving the various bodies constituting the company. These general rules of conduct are designed to help management and the supervisory board in balancing the different interests in a correct and fair manner.¹⁶ Although a works council does not qualify as a formal 'corporate body' in the sense of the DCC, the Frijns Code insists that consultation with works councils is essential. Besides highlighting the system of co-determination as provided for by the DWCA, the Frijns Code emphasizes that it is important that the supervisory board maintain a good relationship with the works council's representatives.¹⁷ This is exemplified by Best Practice Provision III.4.1(g), which obliges the supervisory board chairman to ensure that the supervisory board has proper contact with the management board and the works council (or central works council). Especially the relationship with the works council is interesting from a CSR perspective as it stimulates stakeholder participation given that the works council represents employees and employees are considered important stakeholders.

Another Best Practice Provision asserts that 'the supervisory board and its individual members each have their own responsibility for obtaining all *information* from the management board and the external auditor that the supervisory board needs in order to be able to fulfil its duties in a proper fashion'. The board may obtain information from company officers and external advisers and may require them to attend its meetings.¹⁸ This provision thus grants the supervisory board discretion to make experts a part of its deliberations. Hence, the supervisory board can invite external representatives of 'People and Planet Non-Governmental Organizations (NGOs)' or other experts in these fields in order to solicit their opinion on the company's CSR strategy and policies. This not only would help the supervisory board to gain a better understanding of the issues at stake but could also simultaneously contribute to securing interests of stakeholders outside of the company.

The Frijns Code also addresses the role of the general meeting as a corporate body and the duties of shareholders. However, CSR is not awarded a role in those provisions. Principle IV.4 is sub-divided into 'responsibility of institutional investors' and

'responsibility of shareholders'. Institutional investors (i.e., pension funds, insurers, investment institutions, and asset managers) are seen as a special category of shareholders as they have to act primarily in the interests of the ultimate beneficiary owners.¹⁹ As such, Principle IV.4 makes this explicit by requiring transparency from institutional investors concerning their voting policies as an obligation to their beneficiaries and to the listed companies in which they invest; institutional investors must decide in a careful and transparent manner whether they wish to exercise their voting rights and, if they decide to do so, must indicate how they have voted.²⁰ From a CSR perspective, it would have been important to stimulate institutional investors to also be transparent as to whether and to what extent they take environmental, social, and governance factors (ESG) into account when taking investment decisions. Unfortunately, the Frijns Code does not require from institutional investors that they disclose how ESG factors are taken into account in their investment decisions. The authors of the Frijns Code decided not to include such an obligation despite (1) the suggestion of the Burgmans Report (2008) to require this from institutional investors;²¹ (2) the Freshfields Report (2005) and its sequel, Fiduciary II (2008), which stipulate that institutional investors would do well to pay attention to ESG factors given that they matter for taking well-informed investment decisions; (3) the Eumedion Report of March 2010 (i.e., the Dutch corporate governance forum), which recommends institutional investors to integrate ESG factors into the investment process and which is presently exploring whether a Dutch code for institutional investors should be drafted.²²

Furthermore, all shareholders are required by the Frijns Code to act in accordance with the principle of 'reasonableness and fairness',²³ which principle was also mentioned above as the standard in accordance with which disputes need be solved.

3. LEGAL FRAMEWORK: DUTCH WORKS COUNCILS ACT AND CSR

In section 2, it was demonstrated that CSR has become a subject on which the board has to determine a strategy. Co-determination aims at influencing corporate strategy and decisions. If CSR can be considered to be part of the board's decision-making

¹⁶ *Ibid.*

¹⁷ Best Practice Provision III.1.9.

¹⁸ *Ibid.*

¹⁹ Frijns Code, 56.

²⁰ Best Practice Provisions IV.4.1–IV.4.3 instruct institutional investors to publish annually, in any event on their website, their policy on the exercise of the voting rights for shares held in listed companies, the implementation of their policy in the year under review, and at least once a quarter whether and, if so, how they have voted as shareholders at general meetings.

²¹ The Burgmans Report had suggested adding the following CSR-related phrase to Principle IV.4 of the Frijns Code regarding disclosures by institutional investors: 'and whether and to which extent they take into account ESG factors'. If this text had been included, it would have meant that institutional investors would have been held to disclose to what extent and in what manner they had considered extra-financial information regarding the environmental, social, and governance aspects (concerning the companies in which they invest) in their decision-making process. However, the Monitoring Committee that drafted the Frijns Code decided that this matter was beyond the scope of the Frijns Code.

²² See the discussion on this subject in Lambooy (2010), *supra* n. 10, 126–134.

²³ Principle IV.4 expresses this. The same phrasing can be found in Art. 2:8 DCC (see n. 12 *supra*). Furthermore, the Frijns Code stipulates on p. 56 that in the event of conflicts, shareholders should demonstrate their willingness to enter into a dialogue with the company and fellow shareholders. If the dialogue fails to produce results, shareholders are entitled to exercise their statutory rights in order to express the views they have on the strategy, including the right to put items on the agenda and the right to call an extraordinary meeting of shareholders.

process, it also falls within the competence of the works council's co-determination rights and duties. More specifically, considering the statutory competencies of the works council, the latter theoretically can influence a company's CSR strategy and implementation in the following ways.²⁴

The works council has a right to advise on the strategic decisions listed in Article 25 DWCA (e.g., transfer of control, mergers, joint ventures, acquisitions, divestments, reorganizations, financing). Consequently, the works council can include various CSR concerns in its advice. For example, in respect of a proposed joint venture or acquisition abroad, the works council could indicate that the board must undertake a due diligence investigation concerning possible human rights issues with which the foreign 'target company' might be associated or probable corruption issues the other company might be involved in.²⁵ Additionally, if the target company were to have an inadequate CO2 reduction policy or unsustainable water-use practice, the works council might indicate in its advice that they expect the company – once in control – to adjust such target company's policy and practices as a matter of priority. If the management decides not to follow the works council's advice, it must postpone implementation of the decision for a period of one month. During this month, the works council can request the Enterprise Chamber of the Amsterdam Court of Appeal to order a rescission of the decision or to issue a stand-still order in regard of executing the decision (in whole or in part).²⁶

Another competency is that the approval of the works council is required for proposed changes concerning labour conditions such as working hours, staff training, staff assessment, and pension insurance schemes (Article 27 DWCA). It is a known fact that the works council will take 'people' concerns into account when considering a request for approval. This competence could, however, also be extended to cover the CSR perspective more fully. The question that the works council could ask itself in this context is how can the company become *more* profitable by investing *more* in its people? A win-win situation can, however, only be found when thinking 'out of the box'. Creative thinking will lead to (social) innovations. Human resource strategies are always developing, and CSR is becoming a part thereof. Recently, various companies in the Netherlands have integrated CSR in the key performance indicators (KPIs), which are used in the annual evaluation of their employees' performance. Some have even made the director's variable salaries dependent on the

performance of the company in international sustainability indices such as the Dow Jones Sustainability Indices.

The works council also has certain duties of care. It has been assigned special tasks such as (1) to ensure compliance with the health and safety regulations, (2) to guard against discrimination, (3) to promote the equal treatment of men and women, and (4) to do everything in its power to promote environmental care on the part of the enterprise, including the taking or changing of policy-related, organizational, or administrative measures relating to the natural environment. The works council can limit its involvement in ensuring good environmental performance (Article 28(4) DCWA) to the company's impact on the Dutch environment, but it also has the option to draw attention to the worldwide impact of the company's activities on nature and ecosystems services, which would reflect a CSR approach. It could share ideas for improvement with the board and others in the company. One step further would be to consider the impact of the company's supply chain on the worldwide environment. Examples of front runners in this respect are Unilever, Akzo, and Mars, which are presently trying to influence their suppliers to operate in a more sustainable way. The promotion of equal opportunities for men and women (Article 28(3) DWCA) is typically a CSR subject as it concerns structural gender discrimination in areas such as promotions, salary, and board positions.²⁷

It is interesting to note that the works council also has the right to render advice on proposals for director appointments or dismissals (Article 30 DWCA). In addition, a company's articles of association can provide that one-third of the supervisory board members can be appointed by others than the general meeting, hence for example, by the works council.²⁸ In certain large two-tier board companies (*structuurvennootschappen*), the works council is also entitled (1) to comment on the general profile prepared by the supervisory board for the selection of new members, (2) to comment on tangible proposals for candidates by the supervisory board to the general meeting, and (3) to propose supervisory board candidates for appointment.²⁹ A so-called *versterkt aanbevelingsrecht*, that is, a reinforced right of recommendation pursuant to which the proposed candidates are included in the appointment proposal submitted to the general meeting, applies to one-third of the supervisory board members.³⁰ The works council can use these competencies to impact board composition in order to ensure increased diversity and equal gender representation. That would also align with the Bill

24 A more extended analysis of the DWCA Legal framework with a view to CSR is presented in T.E. Lambooy & A. Hordijk, 'De rol van medezeggenschap bij MVO-vraagstukken [the role of co-determination regarding CSR]', in *Maatschappelijk verantwoord ondernemen. Op weg naar maatschappelijk verantwoorde medezeggenschap* [CSR. On the way to socially responsible co-determination], ed. A. van Halem (Deventer: Kluwer, 2010), 59–72.

25 Lambooy (2010), *supra* n. 10, 277–342.

26 Pursuant to Art. 26 DWCA.

27 The contribution of Charlotte Villiers in this ECL Special Issue elaborates on this subject.

28 Article 2:143 DCC. This does not apply to certain large two-tier board companies.

29 Articles 2:158(3)(5) and 2:268(3)(5) DCC.

30 Articles 2:158(6) and 2:268(6) DCC.

adopted by the Dutch Lower House, yet under consideration in the Upper House, which prescribes that boards should consist of at least 30% females and 30% males.³¹ Boards and works councils need to go out and look for appropriate females so to say. Furthermore, the works council can indicate that they wish to appoint a director or supervisory director who has a constructive vision on sustainability.

Worth mentioning is also that the works council regularly has 'consultation meetings' with the entrepreneur, in which meetings, on a regular basis, one or more directors and supervisory directors also participate ('*overlegvergadering*' in accordance with Articles 23 and 24 DWCA). These meetings can be used as a platform to discuss CSR subjects. In particular, when new strategies or important changes are the subject of the meeting, CSR issues in relation thereto can be brought up by the works council. Or, more proactively, the works council can table for discussion the issue of which sustainability direction the company should opt for, for example, regarding the use of water, paper, and food; CO2 reduction policies; and whether to source commodities and products from fragile states or countries in conflict (the works council can use its 'right of initiative' pursuant to Article 23(3) DWCA).

In addition to the works council's rights under the DWCA, the DCC allows for works councils' involvement in the decision-making process in the general meeting. The works council can share its opinion and speak at the general meeting on (1) key board resolutions that require shareholder approval as referred to in Article 2:107a DCC; (2) resolutions to appoint, suspend, and dismiss managing directors and supervisory directors; and (3) the directors' remuneration policy.³² In regard of the last subject, the works council can propose to link the director's remuneration also to achievements of the company in the field of CSR.

Finally, the right to information and the annual works council meeting in which the company's results and annual report, social policy, and remuneration policies are discussed (Articles 31, 31a, 31b, 31c, and 31d DWCA) can support, or provide an opportunity to, the works council to address the company's CSR policy and behaviour.

In conclusion, based on the examination in this section, it can be argued that CSR is a good match for the duties of the works council and that legal competencies offer works councils ways of getting actively involved in CSR themes.

4. MOTIVATION FOR THE STUDY AND METHODOLOGY

CSR has become an important theme for Dutch companies, and the government also often organizes meetings on the subject and opens websites with useful information. NGOs actively

participate in the discourse: they engage with companies concerning their CSR strategies and international supply chain management and act as stakeholders in the political debate about whether and how best to regulate CSR. Additionally, campaigning organizations organize public campaigns, sometimes 'live', at other times via the internet, to draw public attention and in particular the consumer's attention to corporate malpractice.

Dutch works councils represent the employees in the consultation process with management. Employees are one of the recognized stakeholder groups in the CSR arena. Whereas CSR is usually considered to concern the worldwide business activities of a company, that is, to avoid double standards in respect of labour conditions and to prevent environmental damages from occurring, co-determination by works councils is often interpreted as a duty to guard the interests of Dutch employees only.

To MNO, in the course of 2009, it became apparent that Dutch works councils were searching for their role as regards CSR. MNO decided to make this the theme of its annual conference. MNO had invited speakers from the different interest groups to shed their light on this question: a board member, a supervisory board member, the chair of a works council, a representative of a large institutional investor, and the author (as scientist) expressed their views on the issue. This was followed by a panel discussion with the audience comprising of works councils' representatives of large companies with extended international operations and/or supply chains.

The conference offered a podium for exchanging views. Some works councils' representatives shared very interesting best practices with the audience. A common denominator was that many works councils' members would like to do more but felt unsure about how to organize that or felt that they needed more tools in order to be in a position to do so.

MNO decided to commission a study to map best practices in the field of co-determination and CSR in order to find out what roles works councils could play in the field of CSR, to analyse how this could best be set up, and to determine which tools or instruments could be of assistance in supporting the works councils in performing this new role. One of the questions to explore was whether a Model Code could be a useful instrument in institutionalizing the works council's capability with regard to CSR by making best practices accessible.

The study was set up as follows: first, a questionnaire was sent to the works councils of the forty-seven MNO members, all works councils in MNCs. At a subsequent meeting of the MNO members, the forms were completed and turned in.³³ The questions ranged from investigating which CSR issues were relevant to the

31 Wet Kalma, Parliamentary Documents II, 2008/09, 31 763. See also Lambooy (2010), *supra* n. 10, 123–126, discussing the situation in Norway and France, and the contribution of Villiers, mentioned in n. 27, on female board representation in the UK.

32 Articles 2:107a, 2:134a(1), 2:135(2), 2:144(a), and 2:158(4) DCC. See Parliamentary Documents II, 2008/09, 31 877; Parliamentary Documents I, 2009/2010, 31 877A; *Staatsblad* [Official Gazette] 2010, no. 250.

33 Some representatives who were not able to attend the meeting submitted their completed form on 7 Jun. 2010. The researchers received the forms from the works councils of twenty-three companies in total.

work councils' own company to assessing to what extent and how the determination of CSR strategy and policies had been institutionalized within a company.

The outcome of the questionnaire revealed that eight MNCs provided various interesting examples of best practices regarding institutionalization of co-determination in respect of CSR.³⁴ From these, for various reasons, four companies operating in different industries were elected for further research.³⁵ Desk research was performed regarding the corporate and the co-determination structures of each of these four companies and the CSR issues with which these companies had to deal.

Subsequently, from the four MNCs, CEOs, supervisory board members with a special interest in CSR, and chairs of the (central) works council were interviewed in-depth, as was, in certain cases, the manager of the CSR department. The semi-structured interviews were performed by two to three researchers.³⁶

The next step consisted of two brainstorming sessions, which were held to distil best practices from the interview reports.³⁷

The identified best practices formed the basis for the first draft of a 'Model Code on Co-determination and CSR', which was presented to the MNO members in a consultation round. The consultation round was organized to test whether such a model code would be supported. The MNO members were requested to examine the draft text and to reflect on it, together with other people from their company. Subsequently, they were invited to participate in round-table sessions on the same subject with the representatives of other MNO members.³⁸ The purposes of the round-table sessions were: (1) to discuss the proposal of using a model code, (2) to develop ideas on how it could be used, (3) to look critically at the text of the draft code, (4) to discuss comments and exchange views, and (5) to come up with suggestions for improvements.

The comments were collected, and the draft Model Code was amended accordingly, after which the new draft was again circulated among the MNO members. After receiving the last comments and suggestions, a final text was drafted in January 2011 and was formally presented, together with the report on the study, to the State Secretary for EAA&I in February 2011. The report (in Dutch) and the Code (in Dutch and English) are accessible at the EAA&I website and MNO website (see footnote 4).

5. RESULTS OF THE STUDY: BEST PRACTICES REGARDING CSR AND CO-DETERMINATION

The study revealed that many Dutch works councils had experience with CSR matters and had also been involved in co-determination but mostly only on a case-by-case basis. The works councils expressed a clear interest in becoming involved on a

more structural basis, and they supported the idea of having CSR co-determination be made more institutionalized. Some companies already showed a developed degree of institutionalization of co-determination concerning CSR. The four case studies provided for interesting best practices, such as the following:

- a single board member has been made responsible for CSR matters; in most cases, this was the CEO;
- a single supervisory board member has been made responsible for CSR matters; often, this was a person appointed as a supervisory director pursuant to a recommendation of the works council;
- the 'CSR management board member' regularly communicates with the CSR staff department and with the works council, and so does the 'CSR supervisory board member';
- the company has established a staff department for CSR, which is tasked to follow trends, make concrete proposals for the company on how to deal with (new) CSR challenges, and disseminate ideas and new protocols in respect of implementing CSR throughout the company;
- the company has set up a so-called CR Council (i.e., a corporate responsibility council) or a body with a similar name comprising the pertinent members of the board and the supervisory board who consider managing the CSR affairs to be part of their duties, the managers heading the CSR staff department, the accounting and controlling departments, the human affairs department, the marketing department, and the communication department;
- the works council has CSR as a subject included in the Article 25 DWCA checklist, which it uses when preparing advice to the board on strategic matters;
- some works councils have developed their own CSR vision document;
- the works council reports on CSR activities in its newsletter, sometimes in a regular column;
- the works council involves external experts on CSR issues or solicits advice from internal research services;
- the internal management information system includes systemized internal reporting on People and Planet issues, even on a worldwide basis, that is, including information from the business activities of all (foreign) subsidiaries; and
- CSR reporting is integrated in the annual report of the company rather than being communicated in a separate CSR report.

In some companies, the involvement of the employees with CSR really developed in a bottom-up way, especially in companies where high-level employees as consultants can use their skills to develop sustainability strategies for other companies.

³⁴ Rabo Bank, TNT, KLM, Imtech, Arcadis, Sara Lee, Philips, NS.

³⁵ Rabo Bank, TNT, Imtech, Sara Lee.

³⁶ During September and October 2010.

³⁷ On 4 and 15 Nov. 2010 (the second meeting was held with the steering committee (see n. 3)).

³⁸ On 6 Dec. 2010.

The idea of a Model Code on co-determination and CSR was supported by most of the interviewees³⁹ and by many of the works councils' representatives who attended the meetings and the round-table sessions. It was advised to concentrate the content of the Code on the manner in which co-determination in respect of CSR could be institutionalized rather than to make an attempt to regulate how to deal with the various CSR themes from a content perspective. Various interviewees recommended drafting the Code in a 'positive tone' and to avoid very detailed language and instructions. They considered that the Code could be seen as a 'mental mind map' and could serve as an aid to companies and their works councils in institutionalizing co-determination involvement with CSR. It was suggested that the Code should address and provide guidance on how to set up and to sustain the relationships between the parties and persons involved with the CSR strategy, policies, and implementation, such as directors, supervisory directors, staff, work councils, and external experts.

6. THE MODEL CODE ON CO-DETERMINATION AND CSR

The deliberations about the content of the Code centred on certain main themes. The first question to be answered was what type of involvement do works councils wish to have in respect of co-determining the company's CSR strategy. Should involvement be structured as a right to render advice, such as the Article 25 DWCA right to advise?⁴⁰ Or, alternatively, as a right to consent, which is a really strong right (Article 27 DWCA), or as the less stronger rights of advice or recommendation as provided for in Articles 30 DWCA and 2:158/268 DCC? In the round-table sessions, it was advocated that a right to render advice, such as stated in Article 25 DWCA, would work best because CSR was considered a strategic issue just like the other issues listed in this article. Moreover, the participants indicated that they liked this procedure because they were basically used to dealing with it. Finally, they indicated that they considered CSR a subject in respect of which they would prefer reacting to a board's proposal rather than coming up with their own proposal, plan, or recommendations.⁴¹ Consequently, the right to render advice concerning the so-called CSR Plan (see below) has been incorporated in the Code in provision 3. Additionally, provision 2.3 indicates that the works council will assist and support the board in the execution of the CSR Plan and in the monitoring of the implementation thereof, and will also assist and support in stimulating other employees to generate ideas on how to improve sustainability in the company and its processes.

Another matter discussed was whether the works council should develop its own vision in respect of the strategy that the company should employ towards CSR or that the works council only needs to respond to the CSR Plan as proposed by the board. Although considered a difficult and challenging task for a works council, a pro-active attitude was preferred. Hence, support was expressed for the idea that the works council needs to develop its own vision as to (1) how CSR impacts the company, (2) how the company can make a difference by running its operations in a sustainable way, and (3) why it could be of importance for the company, its continued existence, and for its employees, to develop sustainability strategies. In this regard, understanding the concept of CSR in relation to the business of the company would help the works council to respond to any proposals by the board in relation to CSR. This view has been implemented in the Code in provision 2.3. Additionally, provision 1.7 provides a definition of 'CSR vision'.

One of the important results of the research was that it is considered recommendable to clearly delineate responsibility for CSR tasks by having one person in the management board appointed as the 'CSR Director' and one person in the supervisory board appointed as 'CSR Supervisory Director'. Although the responsibility for the CSR policy belongs to the board as a whole, in line with the DCC and Frijns Code, and the supervision thereof belongs to the full supervisory board, it was considered practical and expedient to identify a contact person for CSR. In analogy of the principle 'co-determination follows the corporate structure of a company', the same was suggested for the works council: to appoint a 'CSR Works Council Representative'. This idea was included in the Code in provision 2, and the provisions 1.3–1.5 provide supporting definitions.

An essential barrier to stimulating an active involvement of the works council in resolving the CSR strategy and its implementation, as perceived by works councils' representatives, was the fact that boards' CSR Plans are usually expressed in quite vague terms. The representatives insisted that when the strategies were to become more concrete and include tangible ambitions and goals, it would be less complicated for them to assume and play a role. Taking this important point into consideration, the Code stipulates in provision 2 that the board prepares a 'CSR Plan' and is responsible for the execution thereof. The CSR Director is primarily responsible for doing this and serves as the board's contact person for this matter. The supervisory board takes responsibility in advising, consulting, and consenting to the CSR Plan, and the CSR Supervisory Director is the first point of contact on behalf of the supervisory board. Provision 1.6 sets forth that the CSR Plan encompasses the CSR strategy, policies, and

³⁹ However understanding the code as a tool, in particular, some of the interviewed board members reacted hesitantly to the idea of yet another code to adhere to.

⁴⁰ This right has the legal implications, which are mentioned above in s. 3.

⁴¹ A recommendation right, such as the one in Arts 2:158(6) and 2:268(6) DCC, is more pro-active in character than the Art. 25 DWCA right of advice, which grants the works council the right to respond to a request for advice. In practice, however, the works council sometimes demands the board that it wishes to render advice on certain matters (thus using their right of advice proactively).

implementation thereof by the company and all of its subsidiaries and group companies, worldwide. The CSR Plan should comprise of three components: (1) a short-term plan including concrete ambitions for tangible results to be achieved in the next financial year and to be adjusted every year, (2) a medium-term plan including concrete ambitions for tangible results to be achieved in the next five financial years and to be adjusted every five years, and (3) a long-term plan focusing on the next twenty years. If necessary, the twenty-year plan can be adjusted, but only every five years together with the medium-term plan (in order to avoid that optimistic ambition for the future will be decreased every year). Ambitions will have to be quantified where possible and presented in a tangible and measurable way. For consideration, an Annex to the Code contains a non-limitative list of CSR themes, which could be addressed in the CSR Plan. Provision 3 of the Code states that the works council has the right to advise on the CSR Plan and provides some timeframes within which the draft CSR Plan has to be submitted to the works council for advice. The final version of the CSR Plan has to be determined by the CSR Director and approved by the CSR Supervisory Director, and must be published on the company's website one month before the financial year commences.

Another subject that was brought up as a useful tool for the works council to monitor the implementation of the CSR Plan and to measure progress is the compilation and publication of an annual CSR report. This can be a separate CSR report or a report on CSR achievements included in the annual report (i.e., the Article 2:391 DCC report). It was agreed that this report should either follow the GRI Sustainability Reporting Guidelines or the Dutch Accounting Guideline 400,⁴² as amended from time to time. The works councils' representatives have indicated that a meeting with the board would be appreciated prior to publication. Provision 4 of the Model Code captures this subject and lays down that the main themes of the report are to be discussed – prior to publication of the report – in a works council consultation meeting (Articles 23 and 24 DWCA). The Code also stipulates that the annual CSR report is to be assessed by external experts. Furthermore, the works council is expected to annually contribute a paragraph to the annual CSR report containing the works council's reaction to the board's CSR policies and the execution thereof.

One of the subjects that were discussed in-depth during the interviews, in the case studies and with the works councils' representatives in the meetings, was the issue of stakeholders: who are the company's stakeholders and to what extent and how should they be involved in the CSR Plan of the company? Provision 2.1 of the Code states that the CSR Director should assume responsibility for regularly performing a 'stakeholder mapping',

that is, survey the company's stakeholders and to assess to what extent they wish to enter into a dialogue with the CSR Director or with other company representatives on issues of CSR. The Code recommends that the CSR Works Council Representative be informed of significant stakeholder complaints. It shall also be considered whether the CSR Works Council Representative has a role to play in subsequently finding a solution. In respect of less significant stakeholder complaints, the Code proposes that the CSR Director will include them in a 'complaint report' from time to time in order to discuss this with the CSR Works Council Representative. Additionally, the Code points out that stakeholders can submit complaints that cannot be resolved with the company representatives to the National Contact Point established in The Hague pursuant to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. In such an event, the CSR Works Council Representative will be informed. Finally, on this matter, the Code suggests in provision 4.4 that in addition to the annual CSR report, the company is to publish current developments on its website and shall provide information regarding any CSR-related conflicts and problems with internal or external stakeholders.

It was noted that certain terminology, relevant when talking about co-determination of board strategy matters, diverges in the DWCA, the Frijns Code, and the DCC. In particular, terms such as 'company' (DCC and Frijns Code) and 'enterprise' (DWCA), 'director' (DCC and Frijns Code), and 'entrepreneur' (DWCA) may sometimes have different meanings. It was argued by the works councils' representatives that it would be most practical if the Code would adhere as much as possible to the DWCA. This recommendation has been followed in the Code, and provision 1, which contains the terminology section, explains this and tries to resolve inconsistencies.

7. HOW TO USE THE MODEL CODE?

The recitals explain that the Model Code can be used by works councils as a guideline in their consultation with the board with regard to CSR, in order to function as a tool in the development of the company's CSR strategy and in the execution thereof.

The preamble states that the Model Code predominantly addresses MNCs. These are often listed companies that are also subject to the Frijns Code. The preamble explains that the Code contains best practices regarding the institutionalization of co-determination concerning CSR and that, in addition to MNCs, SMEs can also use it, or part of it, should they so wish.

It is considered that the Model Code could also be signed as a 'charter' or 'voluntary agreement' (covenant) entered into between the board ('the entrepreneur') and the works council.

⁴² See for the GRI sustainability reporting guidelines, <www.globalreporting.org>. See the 2009 Revised Dutch Accounting Guideline 400 at <www.rjnet.nl/readfile.aspx?ContentID=51535&ObjectID=492464&Type=1&File=0000026826_RJ_Uiting_2009_8_Herziene_Richtlijn_400_Jaarverslag_en_Handreiking.pdf> (in Dutch), and see the accompanying 'Guide to Sustainability Reporting' at <www.rjnet.nl/readfile.aspx?ContentID=51535&ObjectID=492464&Type=1&File=0000025166_HandreikingMVO_Engels.pdf>.

This type of agreement, regulated by Article 32 DWCA, expands the rights of the works council.

The preamble states that it is the intention that this Model Code, in consultation with the Ministry for EAA&I, the Dutch Social-Economic Council, and representatives of directors, and supervisory directors, will operate in the near future as a code regulating the establishment of the CSR strategy, policy, and implementation of companies to which it applies. Such code will possibly, besides the (Dutch) works councils, also involve other stakeholders, such as external stakeholders. Hence, it is considered important that this Model Code will be put into practice in order to gain experience with the setup.

MNO has announced the intention to annually assess in which way its members use the Model Code, and MNO will report the results of the assessment to its members, to the Ministry for EAA&I, the Social-Economic Council, and on its website.

Provision 5 of the Model Code sets out courses for further action, for example, that the MNO members will advocate inclusion of CSR in Articles 25 and 28 DWCA and inclusion of the main features of the Model Code in their company's works council regulations as well as in the 'Example Works Councils Regulation' (*Voorbeeldreglement Ondernemingsraden*) published by the Social-Economic Council). Finally, it is proposed that the MNO members shall lobby for a statutory right for works councils' representatives to speak in the general meeting in respect of the CSR Plan and/or to explain their reaction to the board's CSR policy as included in the CSR report.

The Model Code indicates that it can be used as of 1 March 2011. The Code recommends that MNCs subject to the Frijns Code should issue a 'comply or explain' statement in respect of this Code, either on the company's website or in addition to the board's corporate governance statement.⁴³

8. CONCLUSION

This article has discussed the works council's role in determining a company's CSR strategy and the implementation thereof throughout the organization, both from a technical legal perspective and from a practical perspective. Furthermore, the author deliberated on a research project that explored best practices in this field and investigated whether there would be sufficient support for a code on co-determination and CSR. Positive results led to a subsequent step and MNO, the Dutch platform for works councils of large companies with international operations, has developed a 'Model Code on Co-determination and CSR' in consultation with its members. As part of the research project, in order to profit from their experience, a limited number of interviews have been held with CEOs, supervisory directors, works

councils' chairs, and CSR staff managers in different industries of companies that were considered leading in best practices.

The Model Code combines new insights in respect of co-determination on CSR matters and existing statutory rights and duties secured in the DWCA, the DCC, and the Frijns Code. The main features have been set out in this article. It will be interesting to see in which manner and to what extent works councils will make use of the Model Code.

⁴³ Regarding the Frijns Code, a Royal Decree of December 2009 pursuant to Art. 2:391(5) DCC mandates listed companies to annually issue a corporate governance statement. It is possible to use a similar system for this Model Code.

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