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U.S.-based life sciences companies considering transactions in Europe may easily become overwhelmed with the complexity of Europe's various jurisdictions. In this series, members of our European Life Sciences Transactions Team provide country-specific perspective and guidance to help you navigate the jurisdictional challenges and differences that you may run into when acquiring a European life sciences company.

In this edition, Amsterdam-based Johannes Buntjer discusses life sciences transactions in the Netherlands.

### **Life sciences transactions in the Netherlands - Employee consultation matter**

The acquisition of a life sciences business in the Netherlands quite often requires consultation with employee representative bodies. This article sets out some of the consultation requirements which have to be complied with and provides practical guidelines for dealing with consultation formalities.

### **Works Council Consultations**

Every enterprise in the Netherlands employing more than 50 employees on a more or less regular basis has an obligation to establish a Works Council in terms of the Works Council Act. Where an enterprise has a Works Council, management is obliged to seek the prior advice of that Works Council on a number of important business decisions which affect the employees of the enterprise. To name a few, these issues include: the transfer or acquisition of control over an enterprise; the entering into of a long-term joint venture; and the entering into of material loan agreements and guarantees of the obligations of third parties.

The advice should be sought at a stage when the advice can have an impact on the outcome of the contemplated decision so that the Works Council can have an influence on the decision. If the advice is sought regarding a change of control, it must be requested before the acquisition agreement is concluded. Further, the Works Council must be given access to all relevant information such as the reasons for entering into the transaction as well as information about

how the transaction will affect employees and what measures are being taken to protect the employees. These issues need to be addressed cautiously and any additional information that the Works Council may request regarding these issues should be made available.

The Works Council's advice comprises its opinion on the proposed transaction. It can be a positive opinion (if the Works Council supports the decision), a negative opinion (if it opposes the decision) or a positive opinion subject to certain requirements and conditions – considered as a positive opinion if the conditions are fulfilled. Following receipt of the advice, management must inform the Works Council of its decision. To the extent the decision does not follow the Works Council's advice; the reasons therefor must be explained. In such a case, the implementation of the decision (i.e. finalisation of the agreement and the completion of the transaction) must be suspended for a period of one month [during which period the Works Council can lodge an appeal against the decision with the Enterprise Chamber \("Ondernemingskamer"\) of the Court of Appeal in Amsterdam](#). The Enterprise Chamber has the power to: revoke the management's decision either wholly or partially; reverse certain consequences of the decision; or stop the transaction. The Enterprise Chamber specifically addresses whether all the required formalities have been considered (including, among other matters, requesting the advice and notifying the Works Council in a timely manner). It is, therefore, essential that the formal procedures are followed diligently and that the Works Council advice is sought timeously.

## **Trade Unions Consultations**

The SER Merger Code of the Dutch Social Economic Council provides for consultation with trade unions in the event of a change of control in an enterprise (or a merger). Subject to certain exceptions (mainly concerning mergers falling outside of Dutch jurisdiction), the SER Merger Code must be complied with if 50 or more employees involved in the merger are employed in the Netherlands or if application of the Merger Code has been provided for in a collective labour agreement.

Before agreement on the merger has been reached and before the relevant Works Council has rendered its advice, the relevant trade unions must be notified about the contemplated merger and must be given an opportunity to express their views with regard to the contemplated merger from the perspective of the interests of the employees involved. Compliance with the notification requirements of the SER Merger Code is the responsibility of all of the parties to the merger.

## **Practical Matters**

Where a Dutch life sciences company with a Works Council is being sold by means of a

controlled auction in which multiple bidders are involved in the bidding process, the requirement of obtaining advice from the Works Council and consulting with the trade unions can be dealt with in the following manner:

The Works Council (or its chairman) is informed on a confidential basis of the plans to possibly sell the company and is given the assurance that the Works Council will be given the opportunity to render its advice in accordance with applicable legislation.

The seller invites a number of interested parties and, as is usual in a controlled auction process will most likely end up with one preferred bidder with whom it will negotiate the terms of an acquisition agreement.

Once the acquisition agreement is in a mutually agreed form between the seller and the preferred bidder, the bidder and the seller enter into an acquisition protocol in which the bidder and the seller agree to complete the employee consultation requirements in accordance with applicable requirements. This will include an undertaking by both parties to consult with the Works Council in such a manner that any points raised by the Works Council are taken into consideration. The protocol can also include provisions on how to deal with the situation where the Works Council renders a negative opinion or an advice with conditions which are not reasonably acceptable, for example, by stating that the parties will suspend the implementation of the acquisition until the legal proceedings have been completed.

Once the Works Council's advice process and, to the extent applicable, the consultations with the trade unions have been completed and have resulted in a positive opinion from the Works Council, the seller and the preferred bidder can go ahead and finalise and complete the acquisition agreement.

Depending on the specific circumstances of the case including, for example, how good the relationship is with the Works Council, the entire consultation process with the Works Council may take between anywhere between two weeks to two months (or more in cases where there is a high level of employee involvement and major issues at stake).

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Transactions Team has you covered. [Learn More.](#)

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