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Evaluation of the Working Conditions Act 1998

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Sociaal-
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Raad

Advisory report

Evaluation of the Working Conditions Act 1998

SER Advisory report Evaluatie Arbowet 1998

The Hague, 17 June 2005

The Social and Economic Council in the Netherlands

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Note

The Appendices to the original Dutch-language version of this report have been omitted from the English translation, although references to them in the text have been retained. Copies of the Appendices (in Dutch only) are available on request from the Secretariat of the SER.



SUMMARY

Summary

This Advisory Report was drawn up in response to a Request for Advice made on 29 October 2004 by the Deputy Minister for Social Affairs and Employment concerning the evaluation of the Working Conditions Act 1998. The report was approved by the Social and Economic Council (SER) at its meeting on 17 June 2005.

Request for advice

In his request, the Deputy Minister asked the Council's advice on four topics: (i) a number of proposals for changes in the statutory working conditions system that are designed to encourage employers and employees to assume greater responsibility for ensuring safe and healthy working conditions; (ii) the suggestion that the State should focus more specifically on serious risks in the working environment and on reinforcing the active role played by employers and employees in companies, especially small and medium-sized enterprises (SMEs); (iii) reducing the number of regulations; and (iv) creating more opportunities for companies to decide for themselves, in consultation between employers and employees, how they propose to comply with statutory norms.

Observations on the Request for Advice

The SER notes from the Deputy Minister's request that the Cabinet wishes to devolve more responsibility for working conditions to employers and employees, and to drastically reduce government involvement. The SER observes that this would be in line with a general trend towards an increase in responsibility borne by employers and employees at company level and by the social partners at sector and central level. The SER believes that a good working conditions policy depends on responsibility being assumed by those most directly concerned. However, the SER also believes that the government should still maintain a clear and visible role in this area, especially in setting appropriate levels of protection by defining specific and unambiguous prescribed targets relevant to the level of protection in question, and by ensuring that such prescribed targets are enforced.

The SER believes it is important that an approach be adopted whereby companies can develop a customised solution for their own situation by choosing their own preferred method of achieving compliance, based on agreements reached between employees and employers at sector or company level.

The SER does not consider practicable the Cabinet's suggestion of creating a distinction between low and other (i.e., high) risks nor the suggested withdrawal of government from legislation and enforcement.

The SER concludes that the Cabinet's proposals presented in the Request for Advice are not the best way to reform the complex legislation on working conditions. The SER therefore proposes its own model for a new working conditions system.

New working conditions system

The SER's proposals for a new working conditions system should be seen as a situation to be worked towards in the longer term. The system proposed is based on the SER's wish that a Europe-wide 'level playing field' ultimately be achieved, one in which all employees across Europe enjoy an identical level of protection.

The purpose of the new system is to help create adequate working conditions such that employees are kept both healthy and motivated. The SER believes that, as in the present system, the basis of any new system should be that employees receive an adequate level of protection while performing their work. The new system should also help prevent or reduce absenteeism and incapacity for work, and expand opportunities for employers and employees to take responsibility for their own working conditions policy, thereby considerably reducing the number of regulations and simplifying legislation. As such, the new system can be seen as an intermediary step on the way to a uniform, European-wide system of regulation.

At the heart of the new system is a clearer separation of the public and private domains. Only the Working Conditions Act, the Working Conditions Decree and the Working Conditions Regulations should remain in the public domain: government should remain responsible for maintaining and enforcing these regulations.

It is essential that central employers' and employees' organisations should be involved in extending and filling in the finer details of the proposed system.

Public domain

In the SER's proposal for a new system, the public domain contains specific and unambiguous prescribed targets, based on clear and scientifically supported health and safety standards. These targets prescribe the level of protection employees should receive while performing their work.

The new system implies a restructuring of regulation in the public domain. This is because, on the one hand, prescribed targets or process standards currently contained in policy guidelines will (insofar as is necessary) be transferred to the working conditions regulations. On the other hand, prescribed methods, explanations or non-essential specifications that are currently in the public domain will be transferred to the private domain. Prescribed methods will thereby lose their official, prescriptive status.

Unenforceable prescribed targets that are in the public domain will, as far as possible, need to be reformulated so that they become enforceable. In addition, any unclear prescribed targets must be reformulated into clear, easily accessible regulations.

The SER is aware that in the system that it proposes situations may arise in which it is not possible (or not yet possible) to comply with one or more prescribed targets. In such cases, a solution may be found in the grant of a dispensation or exemption, or the application of a reasonableness clause. Where it is not possible (or not yet possible) to formulate enforceable prescribed targets, process standards should be used (process standards stipulate that a given risk requires further regulation, taking into account all aspects of the appropriate working conditions policy that relate to the risk in question).

Private domain

In the private domain, employers and employees agree on ways of working that allow for prescribed targets to be achieved. At sector or central level, this may take place on the basis of agreement between the social partners. Ways of working thus established may be recorded in a Working Conditions Catalogue, which contains descriptions of methods recognised by employers and employees, and from which a choice can be made in order to meet the prescribed targets. At company level, employers and employees may agree on ways of working using the plan of approach that accompanies the obligatory working conditions risk inventory and evaluation.

The present working conditions policy regulations, information newsletters (*AI-bladen*), NEN standards and working conditions covenants can all play an important part in the creation and development of the Working Conditions Catalogue. All this makes the Working Conditions Catalogue a practical, accessible tool and roadmap, making it possible to meet the prescribed targets.

Besides descriptions of particular methods, the Working Conditions Catalogue may also include examples of best practices that will also facilitate the achievement of prescribed targets. In addition, it may contain documentation on standards, practical manuals and agreements that are binding on parties to a collective labour agreement (CAO). In the future, the Working Conditions Catalogue may also contain parts of the present covenants on working conditions, the majority of which will expire around 2007.

The Working Conditions Catalogue is not intended by the SER as an exhaustive list of ways of meeting prescribed targets: targets may also be met using other methods.

Enforcement

The SER's proposed new working conditions system implies that the Labour Inspectorate will need to enforce the following: the prescribed targets, the health and safety standards and the process standards falling within the public domain.

The SER believes that the inspections carried out by the Labour Inspectorate should not be restricted to punitive enforcement. By providing practical suggestions or giving compliments where appropriate, the Labour Inspectorate can encourage compliance with the regulations and also stimulate a more positive image for itself. The SER believes that the instrument of 'naming and shaming' proposed in the Request for Advice is unhelpful. However, the SER can concur with the proposal to double the maximum fines in the case of serious breaches of working conditions regulations.



ADVISORY REPORT

1 Introduction

In this Advisory Report, the SER gives its views on the Cabinet's proposals for amendments to the Dutch system of working conditions legislation and regulation. This is in response to the Request for Advice made on 29 October 2004 by the Deputy Minister for Social Affairs and Employment concerning the evaluation of the Working Conditions Act 1998.¹

The Request for Advice contains proposals for changes in the statutory working conditions system that are designed to enable and actually ensure that the parties who bear primary responsibility for safe and healthy working conditions will assume even more responsibility than they do now.

In the Cabinet's view, the evaluation shows that government should fulfil a different steering role, with a greater focus being placed on serious risks. Government should also stimulate employers and employees in companies, especially SMEs, to play a more active role.

The Request for Advice highlights four main issues:

- Encouraging employers and employees to assume greater responsibility;
- Giving government a different steering role, focusing more on serious risks;
- Reducing the number regulations and their complexity; and,
- Further developing facilities that will enable companies to choose their own preferred method of complying with the statutory norms for working conditions.

In relation to these issues, the Deputy Minister asked the SER a number of specific questions.

The SER's Executive Board assigned the preparation of the Advisory Report to an ad hoc committee, the Working Conditions Act Evaluation Committee.² During the preparatory phase of the report, the Committee asked a number of professional organisations active in the field of working conditions to give their written opinion on the Request for Advice. Almost all the organisations approached took the opportunity to give their view.³ The SER approved the report at its meeting of 17 June 2005.⁴

1 The Request for Advice is given in full in Appendix 1.

2 The members of the Committee are listed in Appendix 5.

3 The Committee received written replies from the following organisations: Beroepsorganisatie Arboverpleegkunde (BAV); Nederlandse Vereniging voor Veiligheidskunde (NVVK); Beroepsvereniging voor Arbeids- en Organisatiekunde (BA&O), Nederlandse Vereniging voor Arbeidshygiëne (NVvA) and NVVK (joint response); Nederlandse Vereniging voor Arbeids- en Bedrijfsgeneeskunde (NVAB); Nederlandse Vereniging Van Arbeidsdeskundigen (NVVA); Beroepsvereniging van Arbo Adviseurs (BvAA); Branche Organisatie Arbodiensten (BOA); and Nederlandse Vereniging voor Ergonomie (NVvE). The replies are given in Appendix 2.

4 The minutes of the meeting can be consulted on the SER's website (www.ser.nl).

Structure of the Advisory Report

Section 2 contains a short outline of the establishment of the Working Conditions Act 1998 and the evaluation of this Act. Section 3 contains an overview of the most important proposals in the Cabinet's Request for Advice. In Section 4, the SER (in part drawing on previous Advisory Reports) makes several observations on some of the main issues mentioned in the Request for Advice. Finally, in Section 5, the SER presents its proposal for a new working conditions system as an alternative to the Cabinet's proposals.

2 Working Conditions Act: establishment, amendments and evaluation

2.1 Establishment of the Working Conditions Act

The Working Conditions Act (*Arbeidsomstandighedenwet*) was drawn up in 1980 to replace the Safety Act (*Veiligheidswet*) 1934. The Act was implemented in phases from 1983 onwards and has since then undergone a number of important amendments.

One such amendment, coming into effect on 1 January 1994, was the insertion of several elements from the Framework Directive (*kaderrichtlijn*),¹ including compulsory membership of an occupational health and safety service (*arbodienst*). Other amendments taking effect on that date ensured that the Act was in line with the Sickness Absence Reduction Act (*Wet terugdringing ziekteverzuim*), which came into force at the same time.

A second set of amendments came into effect in 1998, changing the name of the Act to the Working Conditions Act 1998 (*Arbeidsomstandighedenwet 1998*) and implementing the outcome of discussions that had arisen around the policy document 'Rethinking Working Conditions Policy and the Working Conditions Act' (*Nota Heroriëntatie arbobeleid en Arbowet*).² In that document, the then Cabinet had argued that working conditions policy and the way it was regulated and implemented was out of step with changing views on the balance of responsibility and roles between government, employers and employees. Working conditions policy also needed to be made more effective and efficient. It was envisaged that this would primarily be achieved (i) by increasing the responsibility of employers and employees for working conditions and company absenteeism policy, and (ii) by giving employers and employees greater freedom in implementing working conditions policy.

The Cabinet asked the SER to comment on the contents of this policy document, and the SER published its Advisory Report on 21 February 1997.³ The Cabinet's proposals were intended to create a more effective and efficient working conditions policy, allowing more scope for the development of customised solutions. However, the SER was of the opinion that the Cabinet's proposals would not achieve their aim and suggested an alternative. It argued that the quickest way to arrive at a more effective and more customised system would be to base it on the strong points of the existing system, avoiding, as far as possible, any weak points. This new system would be one in which

1 Directive 89/391/EEG dated 12 June 1989.

2 The policy document was sent to the SER together with a Request for Advice from the Deputy Minister for Social Affairs and Employment on 15 April 1996.

3 SER Advisory Report *Heroriëntatie arbobeleid en Arbowet*, Publication no. 97/03, The Hague 1997.

employers, employees and government would each have a clear, explicit role to play; and it would be based on the idea that companies should be given more autonomy to develop a customised solution by being able to select their preferred method of achieving compliance. And indeed one of the major amendments made to the Working Conditions Act 1998 was the inclusion, as recommended by the SER, of a provision enabling such customisation.⁴

During the parliamentary discussion of the legislative proposal for the Working Conditions Act 1998, the Deputy Minister promised an evaluation of the legislative system (see also 2.2).

On the basis of an advisory report from the SER issued at the beginning of 2004 in response to a Request for Advice from the Deputy Minister for Social Affairs and Employment,⁵ as of 1 July 2005, the Act was further amended to make membership of an occupational health and safety service (*arbodienst*) optional rather than compulsory: employers and employees can now choose which arrangements they wish to make prevent and monitor absenteeism.⁶

2.2 Evaluation of the Working Conditions Act 1998

In a letter of 21 October 2002 to the House of Representatives,⁷ the then Deputy Minister for Social Affairs and Employment outlined the approach he envisaged for the evaluation of the Working Conditions Act. The main focus was to be on the following aspects:

- 1 The working conditions care system, especially the risk assessment and evaluation (*risico-inventarisatie en -evaluatie*); the action plan (*plan van aanpak*) and progress reports; specialist advice; employee participation; and the changes concerning the reporting and registration of occupational illnesses;
- 2 Enforcement;
- 3 Simplification and customisation.

The evaluation would therefore need to provide answers to the following questions:

- How and to what extent have the relevant actors implemented the changes in practice?
- What consequences has this had for the companies and actors involved?
- What has been successful, what relatively unsuccessful, and why?

4 Currently Article 17 of the Working Conditions Act 1998.

5 SER Advisory Report, *Arbodienstverlening*, Publication no. 04/03, The Hague, 2004

6 Act of 7 April 2005 for the Amendment of the Working Conditions Act 1998 in connection with a change in the organisation of specialist support regarding working conditions policy and related provisions. *Stb.* 2005, 202.

7 Letter dated 21 October 2002 (ref. AVB/AIS/02 67182).

Depending on the results of the evaluation, any implications for policy would be examined, and possible improvements and ways of implementing them considered. In a letter dated 14 June 2004, the then Deputy Minister for Social Affairs and Employment reported to the House of Representatives the preliminary results of the evaluation of the Working Conditions Act 1998.⁸ He then also presented the final report of the Institute for Applied Social Sciences (*Instituut voor Toegepaste Sociale wetenschappen, ITS*), entitled *Arbowet in beeld*,⁹ which incorporated the results of the evaluation (which had meanwhile been completed).

In its report, the Institute reviewed all the amendments to the Working Conditions Act 1998, and made the following general observations:

- The costs are high in relation to the perceived benefits;
- Employers are dissatisfied about the role of the occupational health and safety service (*arbodienst*);
- The role of the working conditions coordinator at company level needs to be enhanced and worked out in more detail;
- Employee participatory bodies are finding it difficult to define their role vis-à-vis working conditions care professionals within the company. To alleviate this problem, it is essential to raise the level of knowledge of working conditions issues, and train people in the skills they need in order to apply this knowledge;
- The threat of punitive fines against management works reasonably well, but fines must be imposed more quickly;
- The government's working conditions policy should focus primarily on serious work-related risks; the policy should be enforced by means of norms and/or assessment frameworks (if necessary, based on agreements between social partners).

The Institute also reached some conclusions specifically as to how the size of a company is affecting the Act's successful implementation:

- More information on work-related risks is required, especially in small companies;
- Employers generally consider the working conditions measures to be effective, although those employing fewer than 50 people are less positive;
- Most people in companies, especially large companies, are positive about the possibilities the Act provides for pursuing an effective working conditions policy;
- Most companies have made a reasonable attempt to approach working conditions policy systematically, although less so in the case of the smallest companies;
- The risk assessment and evaluation and the accompanying action plan are important tools in implementing working conditions policy within companies and should remain in the Act, but should be made more suitable for SMEs and should focus on sector priorities;

⁸ Letter dated 14 June 2004 (ref. AVB/AIS/04 40062).

⁹ *Arbowet in beeld; onderzoek ten behoeve van de evaluatie van de Arbowet 1998*. Instituut voor Toegepaste Sociale wetenschappen (ITS), Nijmegen, March 2004.

- For companies with fewer than 10 employees, consideration should be given to the possibility of reducing the risk assessment and evaluation and the accompanying action plan to a list of risk priorities per sector.

In his letter of 14 June 2004, the then Deputy Minister stated that the outcome of the Institute's research (which also involved consulting social partners and working conditions experts) would be an important element in the evaluation of the Working Conditions Act 1998. Other major elements would include research into reducing the number of regulations, research into the administrative burden caused by working conditions policy, and the interim results of the action plan for simplifying Social Affairs and Employment legislation. The Deputy Minister also said he was awaiting the result of an evaluation of undesirable behaviour.¹⁰ Finally, the interim results of the Social Security and Care project would also be taken into account.

The Deputy Minister noted that the Institute's report contained several points that could be useful in developing new policy. These included the following:

- The importance of using the risk assessment and evaluation and the accompanying action plan as starting points when developing working conditions policy at company level;
- The need to adjust the Working Conditions Act and working conditions policy so that the needs of smaller companies are also addressed, especially with respect to fundamental risks in their sector;
- The positive effect of reducing the number of regulations and the administrative burden;
- The need to further develop the role of the working conditions coordinator (including in relation to employee participation).
- Useful ideas on how to deal with work-related risks (both existing and new) and stimulate employers and employees to take more responsibility in deciding for themselves how they propose to achieve compliance with statutory norms.

The Deputy Minister stated that these matters would need to play an important role in the evaluation. He indicated that he wished to move towards a system that, by being in alignment with priorities at sector level, actively encourages employers and employees to take responsibility. The system he envisaged would distinguish between low and high work-related risks: while the social partners would bear primary responsibility for working conditions and manage these independently, government should focus only on the high risks. In this context, the Deputy Minister considered detailed regulations for low risks that go into greater depth than required by EU legislation would not be appropriate. Priority should be given to tackling fundamental risks sector by sector, as

¹⁰ *Evaluatie van de Arbowet inzake ongewenste omgangsvormen*, final report on research conducted by Research voor Beleid (Research for Policy) and commissioned by the Ministry of Social Affairs and Employment, published on 26 August 2004.

this will allow companies to immediately address the working conditions issues relevant to them. When developing working conditions policy for the future, the design of regulations, enforcement, information service and incentives would all have to be tailored to this approach. Discussions would therefore be held with the social partners, whom he expected to provide fruitful insights for the evaluation.

In the period immediately leading up to the Request for Advice, several policy documents and research reports on the evaluation of the Working Conditions Act were also published by central employers' and employees' organisations.¹¹

2.3 Recent developments

With a view to drawing up the budget for the Ministry of Social Affairs and Employment for 2005, in December 2004, two members of the House of Representatives (G. Verburg and B. de Vries) proposed a motion requesting the government to deliver a package of measures to the House of Representatives before 1 June 2005 that would, as of 1 January 2006, halve the burden created by implementing working conditions regulations.¹² The motion was passed by the House of Representatives.

In his letter to the House of Representatives dated 13 May 2005, the Deputy Minister of Social Affairs and Employment discussed the current state of the amendments to the Working Conditions Act 1998. In reaction to the above-mentioned motion, he wrote that he would do his best to have an outline response to the SER Advisory Report no later than one month after its publication. His letter is included as Appendix 4 of this Advisory Report.

11 These include the following publications: *Deregulering en vereenvoudiging van arboregeling; voorstellen tot deregulering, vereenvoudiging en evaluatie van de Arbowet*, Vereniging VNO-NCW, November 2003; *Deregulering Arbowet en -regelgeving*, Koninklijke vereniging MKB-Nederland, May 2004; *Arbo werkt! Voorstellen voor een transparante en effectieve Arbowetgeving met duidelijke regels, gericht op de Nederlandse werkplek*, Vakcentrale FNV, June 2004; *Evaluatie van de arbeidsomstandighedenwetgeving*, Nota van de Vakcentrale MHP, June 2004; *Arbo in kleine ondernemingen*, Onderzoek (conducted by the ITS) and commissioned by the Vakcentrale FNV, June 2004.

12 House of Representatives, 2004-2005 session, 29 800 XV, no. 55.

3 The Request for Advice

In his Request for Advice dated 29 October 2004, the Deputy Minister for Social Affairs and Employment presented the Cabinet's views on the evaluation of the Working Conditions Act 1998 to the SER.

In this document, the Deputy Minister pointed out that, in the late 1990s, developments in the regulation of working conditions had been aimed at creating a more effective and efficient working conditions policy. The level of responsibility borne by employers and employees had been increased, and changes had been introduced to allow greater flexibility and more scope for companies to choose the methods they wished to employ to achieve compliance, specifically through the use of the following:

- An improved working conditions care system that employs risk assessment and evaluation to identify risks and deal with them;
- Expert advice from professional providers of occupational health and safety services; and
- Simplified rules and prescribed targets rather than prescribed methods.

In the Cabinet's view, evaluation of these changes by various parties raised the following issues:

- Although the systemic approach (i.e., involving the use of an improved working conditions care system and the advice of experts) is working better all the time, smaller companies (those with fewer than ten employees) are lagging behind;
- The role of the occupational health and safety service is problematic, as companies experience the advice given by these service providers as mandatory rather than advisory;
- The complexity of the regulations and the high costs involved are a problem, especially for SMEs;
- Although employee participation has a positive effect on the quality of working conditions care in companies, the role played by participatory bodies appears to have stagnated;
- The working conditions coordinator, with clear, proactive responsibility for working conditions, has a positive effect in stimulating working conditions care;
- Enforcement by the Labour Inspectorate needs to be improved.

The evaluation of the Working Conditions Act 1998 led the Cabinet to conclude that, in general, the key objectives of the Act (i.e., giving employers and employees more responsibility, and giving them greater autonomy to develop a customised solution for achieving compliance) were still valid, but were not being sufficiently realised in practice. Under the current statutory system, working conditions issues are still too often dealt with by means of government intervention and regulation, while the idea that employers and employees can jointly manage their own working conditions has not

gained sufficient ground. The Cabinet therefore believes that the steering role of government should take on a different form, focusing more on serious risks and on encouraging employers and employees, especially in SMEs, to play a more active role.

The Request for Advice contains a number of suggestions for changes to the statutory working conditions system designed to encourage and enable those parties that bear primary responsibility for working conditions to take that responsibility more seriously. The main changes required are, in the Cabinet's view, as follows:

- The statutory system should clearly allow for companies to adopt a customised solution, with the Act itself serving more as a safety net;
- Government involvement should be reduced in cases where employers and employees are cooperating effectively on working conditions issues in their company or sector;
- Government involvement in both legislation and enforcement should be reduced in the case of low risks;
- Government should take decisive action in the event of any abuse;
- The complexity and number of regulations should continue to be reduced;
- Factors that enable companies to successfully manage their own working conditions should be developed further (particularly the use of risk assessment/evaluation and the plan of approach to construct a sound working conditions policy; the role of the working conditions coordinator; and the role of employee participation).

The Request for Advice highlights four main issues:

- 1 Encouraging greater responsibility
- 2 A different steering role for government
- 3 Reducing the number of regulations
- 4 Provisions for the independent management of working conditions

Encouraging greater responsibility

In order to encourage employers and employees to assume greater responsibility for their own working conditions policy, the Cabinet distinguishes three basic criteria that an improved statutory working conditions system should meet:

1 It should offer more scope for employers and employees to assume greater responsibility

First and foremost, employers and employees should take responsibility for their own situation, with the statutory regulations serving only as a safety net. It is also important for employees to take an active role and, in particular, not to underestimate the importance of safety issues.

2 It should allow for and encourage self-regulation and the independent management of working conditions by companies

The Cabinet envisages self-regulation proceeding in practice as follows. It assumes that any sector-wide agreement made between employers and employees about the most serious risks to which employees in that sector are exposed will be deemed to meet the

legal requirements. The Labour Inspectorate will then assess whether or not all relevant work-related risks have been included in the agreements and will point out any major risks that have been missed. Active inspection of companies participating in such sector-wide agreements on major risks will only be carried out in the event of a suspected abuse. The Cabinet believes it is essential to have a way of monitoring that risks are actually being dealt with in a specific sector. The sector-wide agreements are deemed to reflect the current state of knowledge, and the Labour Inspectorate will take these as the basis for enforcement.

This line of thought implies explicit acknowledgement of the principle that different ways of dealing with the same risk are acceptable if they meet the prescribed targets. If, in a sector that has no sector-wide agreements, a situation arises whereby employees are being exposed to unacceptable risks, the government envisages, in principle, an active policy of enforcement. In such cases, the Labour Inspectorate can find a solution to the problem in question by basing itself on a solution to a similar problem found in another sector (as expressed in a sector-specific agreement), translating the state of the art in the one sector to the other. The parties involved will, of course, still be free to shape their own policy.

3 It should acknowledge that self-enforcement is a precondition for self-regulation

The parties involved are themselves primarily responsible for ensuring that everyone complies with the agreements made. Parties that violate an agreement can be brought into line in one of several ways: (i) through consultation (ii) by enforcing compliance through the civil courts; or (iii), if provided for in the agreement, through some alternative form of settlement. In addition, a works council, an employee representative body or a trade union may apply for an investigation by the Labour Inspectorate (under Article 24 of the Working Conditions Act 1998). Individual employees may also lodge a complaint with the Labour Inspectorate. The Cabinet believes that a separate clause should be added to the Act to regulate when the Labour Inspectorate may be called in. The new clause should stipulate that arbitration or other forms of mediation must already have taken place before the Labour Inspectorate becomes involved.

A different steering role for government

In the Cabinet's view, if the government takes on a different steering role, it will need to cease to be involved in cases of low risks (i.e., risks that do not lead to lasting injury or death and do not give rise to substantial social costs or social unrest). Existing legislation regulating low risks should be abolished so that government is no longer required to enforce it.

The parties directly affected also bear the primary responsibility in the case of other risks, although government involvement is nonetheless also called for here. Since the government wants employers and their employees to give careful consideration to these

risks, its role should therefore be one of providing encouragement, varying depending on the risk in question, just as the agreements reached will also vary.

Where, owing to EU commitments, legislation cannot be abolished, the enforcement of low risks should, in the Cabinet's view, fall in principle under civil law. A public law 'safety net' should then be created to deal with those low risks for which norms are still defined in law. In exceptional circumstances, low risks may still be problematic: for example, in cases where an accumulation of low risks is liable to cause serious damage to health, or in other obvious cases of abuse.

To deal with other (i.e., not low-level) risks and violations, strong, focused enforcement is needed to encourage companies to act. The level of enforcement should be increased and sanctions should be tightened; this may include raising the level of fines and 'naming and shaming'. The Cabinet plans to double the standard fines for serious offences in the near future, and intends in due course to amend the Working Conditions Act 1998 to double the maximum stipulated fines.

In providing a legal basis for 'naming and shaming', the Cabinet wishes to make it possible for the Labour Inspectorate in principle to publish its inspection results, disclosing the full names of the organisations and companies in question. The Cabinet believes this will have a positive effect on the enforcement of the Act.

Reducing the number of regulations

In April 2004, in order to reduce the number of regulations, the Ministry of Social Affairs and Employment introduced a package of measures intended to ensure good working conditions at the lowest possible cost. At the same time, the Ministry observed that, in the short term, it would not be easy to reduce administrative burdens any further, as working conditions legislation is largely determined at international level. The Ministry also examined potential opportunities for simplifying and deregulating the body of national legislation not deriving from international obligations.

In the Cabinet's view, the reduction of government legislation relating to low risks is central to the proposals on deregulation. A more detailed review of the body of national legislation not deriving from international obligations is therefore now being carried out to see which parts can be dropped, which can be left to the responsibility of the parties involved and which should (for the time being) be kept.¹

1 In March 2005, the Ministry of Social Affairs and Employment provided the preparatory committee for this Advisory Report with the results of this review in the form of an overview of obligations deriving from the Working Conditions Act, the Working Conditions Decree and the Working Conditions Regulations not deriving from international obligations. This overview is given in Appendix 3 of this Advisory Report.

The Cabinet also stresses once again the importance of having clear and simple regulations and of providing demand-driven information. The Dutch Occupational Safety and Health Platform puts considerable effort into providing such information. On regulatory matters, the Ministry of Social Affairs and Employment has produced an action plan for the simplification of Social Affairs and Employment regulations, a cluster approach for hazardous substances in their 'Other Government' programme, and a 'contradictory regulations' project.

The Cabinet believes that the proposals for deregulation and simplification in particular will help reduce the irritation and burden (both perceived and real) of the number of regulations. However, current EU legislation may obstruct attempts at deregulation. The Cabinet's European policy therefore includes trying to create more flexibility by introducing a customised solution approach for companies, whereby the EU lays down prescribed targets and prescribed methods for dealing with certain risks. The Cabinet will also focus on the simplification of European legislation, the removal of unnecessary details, and deregulation. In doing so, the Cabinet will base itself on the European Commission's forthcoming proposals for simplifying the European Framework Directive and five specific working conditions directives.

Provisions for autonomy to choose how to achieve compliance

Finally, the Cabinet mentions three provisions for giving companies the autonomy to choose how they wish to achieve compliance with statutory targets: (i) the risk assessment and evaluation and the accompanying action plan (to form the basis of working conditions policy within a company); (ii) the Working Conditions Coordinator; and (iii) employee participation. These are the factors that underpin the successful creation of an effective working conditions policy within a company, and it is important that they be developed further. However, the initiative for doing so lies with the parties involved, not the government: the government's role will be limited to implementing policy specifically designed to support such efforts.

4 Observations on a number of key themes

In this section, the SER discusses three themes relating to the main issues raised in the Request for Advice, in part by referring to previous SER Advisory Reports. The following topics are discussed: the increasing responsibility of employers and employees, including in relation to the role of government (4.1); provisions for independent management of working conditions and an approach that enables companies to adopt a customised solution by choosing their preferred methods for achieving compliance (4.2); and the proposal in the Request for Advice to create a distinction between low risks and other (i.e., high) risks (4.3). Section 4 ends with some concluding remarks (4.4).

4.1 Responsibilities of employers and employees and the role of government

In its Request for Advice, the Cabinet states that its purpose in proposing changes to the statutory working conditions system is so that employers and employees, who are primarily responsible for working conditions in companies, can and will assume a greater degree of responsibility than at present.

In 1996, the then Cabinet addressed the responsibilities of employers and employees in relation to those of government in a policy document entitled ‘Rethinking Working Conditions Policy and the Working Conditions Act’.¹ In that document, the Cabinet noted that working conditions policy and the way it was regulated and implemented was not in line with changing views on the responsibility and role of government in relation to that of, among others, employers and employees.

The most important principle of the system envisaged by the then Cabinet was to further increase the level of responsibility of employers and employees for working conditions and absenteeism policy in companies, and thereby to create greater freedom for employers and employees to implement their own working conditions policy. In this context, the Cabinet spoke of ‘room for customisation’. Government responsibility should be limited to monitoring the system, and defining and enforcing norms for serious risks.

In its Advisory Report on ‘Rethinking Working Conditions Policy and the Working Conditions Act’,² the SER concluded that the Cabinet’s proposals would not achieve their intended primary goal, which was a more effective and efficient working conditions policy with more room for customisation.

1 Submitted to the SER for advice with a letter dated 15 April 1996 from the then Deputy Minister for Social Affairs and Employment.

2 SER Advisory Report *Heroriëntatie arbobeleid en Arbowet*, Publication no. 97/03, The Hague, 1997.

The SER believed that the quickest way to achieve an effective and more customised working conditions policy would be to develop a system that was based largely on the best aspects of the existing system while avoiding, as far as possible, its weaker aspects, and in which all three parties – employers, employees and government – would explicitly bear a measure of responsibility. The basic aim behind such a system would be to meet the growing need for more scope for customisation.

The field of working conditions is not the only one in which employers and employees are being required to take on greater responsibility: the same trend can be seen in the field of social security, for instance. Successive changes in social security legislation³ with respect to absenteeism and incapacity for work have made it increasingly important for employers and employees themselves to make an effort to prevent absenteeism and incapacitation. This is also evident in the SER's Advisory Report on the Disablement Benefits Act (published in 2002),⁴ in which the SER put forward a coordinated packet of proposals at the heart of which was an effective, adequately equipped prevention policy. The SER argued that, in a policy aimed at effectively preventing absenteeism and promoting workplace re-entry, the responsibilities of employers and employees are key. In the SER's view, such a policy should primarily be implemented at the level of the individual company, although this should not exclude the possibility that the government might also bear some clear responsibilities in the matter: in this connection, the SER referred to the passage cited above from its Advisory Report on 'Rethinking Working Conditions Policy and the Working Conditions Act'.

In the second SER Advisory Report on incapacity for work, the Disablement Benefits Act Advisory Report 2004,⁵ the SER set out proposals for the further elaboration of disablement benefits policy, which included filling in the finer details of its proposals in the Disablement Benefits Act Advisory Report 2002. At that time, the SER reiterated its view, expressed in its Disablement Benefits Act Advisory Report 2002, that absenteeism due to illness and incapacity for work should be minimised either through a policy of prevention or by providing absenteeism support, in both cases at company level.

A similar view was expressed by the Labour Foundation in its Statement of 5 November 2004.⁶ It stressed the necessity of encouraging an integrated approach to prevention policy, working conditions policy, absenteeism support, reintegration policy and incomes policy. In response, the central trade unions and central employers' organisations argued that it is the employer's responsibility to implement, in consultation with employees, a good social policy, including working conditions policy,

3 Wet TZ/Arbo; Wet uitbreiding loondoorbetalingsplicht bij ziekte; Wet verbetering Poortwachter.

4 SER Advisory Report *Werken aan arbeidsgeschiktheid*, Publication no. 02/05, The Hague, 2002, p. 87.

5 SER Advisory Report *Verdere uitwerking WAO-beleid*, Publication no. 04/02, The Hague, 2004.

6 Stichting van de Arbeid *Verklaring van de in de Stichting van de Arbeid vertegenwoordigde centrale organisaties van werkgevers en van werknemers*, The Hague, 5 November 2004, pp. 1-2.

in order to be able to detect early indications of future absenteeism and to take timely measures to prevent it. The statement also recognises that employees too have a responsibility in this matter.

4.2 Provisions enabling greater autonomy and customisation

In its Request for Advice, the Cabinet indicates that ample scope for employers and employees to create customised agreements in companies and sectors on the working conditions that affect them should be provided primarily by the Working Conditions Act, and that the statutory regulations should merely provide a safety net. The Cabinet notes that, in practice, no use is actually being made of the provision for greater customisation contained in Article 17 of the Working Conditions Act (added in consequence of the Advisory Report on ‘Rethinking Working Conditions Policy and the Working Conditions Act’). The Cabinet also refers to the legislative proposal concerning customisation provided by the occupational health and safety services.⁷

The background to the current provision for greater customisation is as follows. In its Advisory Report on ‘Rethinking Working Conditions Policy and the Working Conditions Act’, the SER argued that it was important to meet the need for more scope for customisation. More specifically, the SER envisaged that the required level of protection would be defined as precisely as possible by means of statutory prescribed targets. The SER also suggested that the Working Conditions Act should provide for the possibility that certain prescribed targets could be met otherwise than by following the prescribed method linked to the prescribed target in question. However, such an alternative method should only be permissible if both employers and employees have agreed on it.⁸

In the SER’s view, implementation of the provision for greater customisation proposed in the Advisory Report would greatly improve the effectiveness of working conditions policy. The proposal introduces genuine opportunities for customisation, while, at the same time, still maintaining a differentiated system of specific regulations to meet the clear need for such a system (felt in particular within SMEs and by employee representatives). Such an approach reflects the diversity of trade and industry, and would provide employers and employees with more opportunities to take responsibility for their own methods of implementation, if they wish to do so.

The SER also advocated a Europe-wide approach, in which EU directives would make a clearer distinction between those elements that define an adequate level of protection and those that can be regarded rather as prescribed methods, and for which (in certain circumstances) there may be adequate alternatives. Elements of the first type should be

7 The legislative proposal *Wijziging Arbeidsomstandighedenwet 1998 in verband met een gewijzigde organisatie van de deskundige bijstand*; House of Representatives, Parliamentary session 2004-2005, 29 814.

8 SER Advisory Report *Heroriëntatie arbobeleid en Arbowet*, Publication no. 97/03, The Hague, 1997, pp. 35-36.

included in the texts of the directives themselves, while those of the second type should be included in the appendices to the directives. This approach would increase the number of opportunities for customised solutions at national level.

The SER also discussed the importance of introducing customisation in its Advisory Report on the Provision of Occupational Health and Safety Services.⁹ In this report, the SER stated that it is up to employers and employees to reach agreement on working conditions policy at company level, and that this includes, in the SER's view, reaching agreement at company or sector level on organising and coordinating the provision of occupational health and safety services.

In the SER's chosen model of services provision, companies would be able to offer alternative occupational health and safety services that presently fall outside the current statutory occupational health and safety services system, subject to agreement being reached at the companies in question or at sector level. Such agreements would then make it possible to implement an integrated approach to work and absenteeism policy in a way that does not oblige companies to engage the services of a provider of health and safety service. In this light, the SER believes that a working conditions system is needed that is easily accessible and offers sufficient freedom of choice. Such a system (i.e., one based on agreements between employers and employees) would enable a greater degree of customisation than either the current system or the system proposed by the then Cabinet. In the meantime, the legislative proposal that was drawn up by the Minister in accordance with the Advisory Report has been accepted by the Senate.¹⁰ As of 1 July 2005, sectors and companies have been able to choose how they wish to be supported in preventing absenteeism due to illness and in providing support for those who are incapacitated for work.

Customisation is also discussed in the SER's recent Advisory Report on the Working Hours Act. The Working Hours Act contains legal regulations to govern working hours and rest periods (per day and per week), in the interests of the safety, health and wellbeing of employees. In its Advisory Report on the evaluation of this Act,¹¹ published in February 2005, the SER stated that the system of norms contained in the Working Hours Act should provide opportunities for more flexible, customised solutions, while still, of course, fulfilling its aim of protecting employees. The SER believes that the Working Hours Act must offer the opportunity for exemption from the applicable statutory norms to be granted when, either in collective labour agreements or in written agreements between companies and Works Councils or employee representative bodies, employers and employees have agreed that such exemption is acceptable. This would be

9 SER Advisory Report *Arbodienstverlening*, Publication no. 04/03, The Hague, 2004.

10 *Wijziging van de Arbeidsomstandighedenwet 1998 in verband met een gewijzigde organisatie van de deskundige bijstand bij het arbeidsomstandighedenbeleid en de daarmee samenhangende bepalingen*; Stb. 2005, 202.

11 SER Advisory Report *Vereenvoudiging ATW*, Publication no. 05/03, The Hague, 2005, Paragraph 5.1.

analogous to the opportunity provided by the EC Directive on Working Hours to deviate from a number of norms in the Directive in cases where this is collectively agreed upon. The system advocated by the SER would encourage employers and employees to consult each other on working hours, and would decentralise responsibility, thus enabling customisation.

The importance of customisation was also stressed by the Labour Foundation in its statement of 5 November 2004. On behalf of their members, the organisations that make up the Foundation stated that (insofar as this is not already the case), during the decentralised consultations between employers and employees, supplementary initiatives should be launched and investments made to improve working conditions, convert existing Working Conditions Covenants into collective labour agreements, prevent absenteeism due to illness or incapacity for work, and to reintegrate employees with reduced abilities back into the workforce. This comprehensive approach is expected to lead to an increased level of support within the various sectors and to greater customisation.

Working Conditions Covenants

In the 1998-2002 coalition agreement, the coalition partners announced that they planned to pursue a more effective and more focused working conditions policy. The aim was to stimulate the improvement of working conditions and the prevention of absenteeism and incapacity for work. Most of the funds allocated for this purpose were devoted to bringing about Working Conditions Covenants between the government and the social partners.

This approach, involving Working Conditions Covenants, places primary responsibility on employers and employees at sector level, with the Ministry of Social Affairs and Employment providing financial support and initiating activities where necessary. Working Conditions Covenants contain agreements on one or more major risks affecting the workplace: aggression, labour conflicts, hazardous substances, psychological pressure, damaging noise levels, physical burdens, work pressure and reintegration. Covenants may also contain additional agreements on other labour risks. In the initial phase, the main emphasis was on preventing absenteeism due to illness by improving working conditions: by the end of 2003, more than fifty Working Conditions Covenants had been drawn up. In the second phase (which is still in progress), attention is still being given to prevention, but the new series of covenants (known as 'Working Conditions Plus Covenants') focus primarily on reinforcing absenteeism policy and reintegration policy: they are intended ultimately to reduce absenteeism and the numbers of new claimants falling under the regulations governing incapacity for work by at least 20 percent by the end of 2007 (compared to 2001 levels).

The Labour Foundation's Recommendation for reducing unemployment and advancing the reintegration of unemployed workers, adopted on 15 April 2005, once again emphasised that employers and employees bear joint responsibility at decentralised level for an integrated approach to prevention, reintegration and incomes policy (in this case in relation to unemployed workers).¹²

4.3 Risk differentiation

In his Request for Advice, the Deputy Minister also suggests that the steering role played by the government should be adjusted to focus particularly on serious risks and on stimulating employers and employees in companies to adopt a more proactive attitude. Accordingly, the Deputy Minister proposes that government cease to take responsibility for low-level work-related risks (i.e., risks that do not lead to serious lasting injury or death and that do not cause major social unrest or costs).¹³ He also proposes that, as far as possible, existing regulations relating to low risks should be repealed, and that any remaining such regulations should no longer be enforced. In the regulation of all other risks, the initiative should lie with the parties concerned, although, if circumstances require it, the government will be obliged to take appropriate measures.

Previously, in connection with the 1996 policy document 'Rethinking Working Conditions and the Working Conditions Act', the then Cabinet had expressed its opinion that government should only be responsible for working conditions that pose serious risks (defined in the policy document as any circumstances in the working environment that are likely to lead to death, serious injury or permanent damage to health). However, only regulations covering 'very serious' risks should be enforced by means of penal sanctions. The then Cabinet distinguished two sets of rules for enforcement purposes: (i) 'Rules of the game', subdivided into fundamental rules, other rules and administrative obligations; and (ii) 'Substantive rules', subdivided into rules concerning 'very serious' risks, other serious risks and low risks.

In its Advisory Report on 'Rethinking Working Conditions Policy and the Working Conditions Act of 1996', the SER unanimously criticised the Cabinet's proposals. It noted that the system for imposing sanctions advocated by the Cabinet was largely based on the system of norms it was proposing for future regulation, involving a categorisation according to type and content. The SER considered the proposed system unfortunate, especially the concept of 'substantive rules': the classification of risks according to degrees of seriousness would mean that the potential effects associated with these risks would also have to be ranked. Creating such a classification would therefore, in the SER's view, be an enormous task. Not only that, but the absence of clear boundaries between

12 The Labour Foundation *Aanbeveling van de in de Stichting van de Arbeid vertegenwoordigde centrale organisaties van werkgevers en van werknemers*, The Hague, 15 April 2005.

13 The grounds for this are given in Appendix 1 to the Request for Advice.

the different risk categories would mean that the final classification would also be extremely arbitrary. Moreover, given that under the Cabinet's proposals the type of sanction imposed would depend on the type of norm violated, the system of sanctions itself would be arbitrary. For this reason, the SER was unable to give any general endorsement to the proposed system for imposing sanctions.

Professional organisations also criticised the proposed distinction between low and high (or other) risks (see Section 1 and Appendix 2). For instance, they questioned the examples of low risks given in the appendix to the Request for Advice, specifically because no link was made between the risks and their effects on employees' health. The organisations also criticised the fact that the description given of low risks differed from that used by safety experts, a number of organisations calling for a consistent use of terminology. The organisations also noted that the bases for the descriptions of high and low risks were inadequate, and that the introduction of different levels of government involvement in cases of low or other risks seemed to be more an efficiency measure than a responsible method of enforcement.

4.4 Concluding remarks

The SER concludes that the Cabinet, in its Request for Advice, had in mind that the responsibility of employers and employees should increase, while the responsibility of government should decrease considerably. However, the Cabinet's proposals leave undefined the limits of the government's roles as legislator and enforcer.

As the SER has already expressed clearly in its previous advisory reports, it notes and approves of the greater responsibility being shouldered by employers and employees at company level and by the social partners at sector and central level in general, including in the field of working conditions. This is because such responsibility is a prerequisite for a good working conditions policy. However, the SER still believes that government should maintain a clearly defined and visible role in this area. Government responsibility is firmly rooted in law: the Dutch Constitution guarantees the right to protection of physical integrity (i.e., health). Furthermore, government is also accountable for the health and safety of employees under the European Framework Directive: it is obliged to provide a system that ensures adequate protection of employees' health and safety. Consequently, the SER sees it as the government's responsibility to set the level of protection in the area of working conditions. One of the ways it can do this is by defining unambiguous and specific prescribed targets that will ensure the required level of protection. The SER believes that these targets should also be adequately enforced by government, proportionate to the level of protection.

The SER also stresses the importance and desirability of adopting greater customisation. However, in line with earlier Advisory Reports, it considers it essential that any customisation at sector or company level should be founded in agreements between

employers and employees. Both the SER and the Cabinet are of the opinion that the current provision for greater customisation (Article 17 of the Working Conditions Act) has not been as effective as had been hoped for. In the SER's view, this is attributable to the fact that (a) the differentiated system of specific regulations advocated by the SER in its Advisory Report on 'Rethinking Working Conditions Policy and the Working Conditions Act' has not been set up; and (b) Article 17 has remained an 'empty' provision, because its potential scope was never defined in any detail. It should also be noted in this connection that EU regulations leave little room for customisation.

The SER believes the Cabinet's proposals (made in the Request for Advice) for a distinction between low and high (or other) risks and the associated withdrawal of government from regulation and from related enforcement tasks are still largely unworkable. In its previous Advisory Report on 'Rethinking Working Conditions and the Working Conditions Act', the SER presented arguments against a similar categorisation of risks, and since it believes those arguments still hold good, it is unable to support the Cabinet's present proposals.

In summary, the SER agrees with the Deputy Minister on a number of key points: (i) that a number of the problem areas pointed out in the Request for Advice do indeed exist; (ii) that it is indeed necessary to specify the details of exactly how greater responsibility could be devolved to employers and employees; and (iii) that the current detailed body of regulations should be subjected to critical review (whereby, in the SER's view, significant simplification could be achieved by abolishing superfluous regulations). However, for the reasons described above, the SER has come to the conclusion that the Cabinet's proposals as presented in the Request for Advice do not constitute the best way of addressing these issues.

The SER has therefore looked for ways in which the body of regulations on working conditions might be reformed without giving rise to the problems that have been identified. The SER believes that the system it has developed (in part expanding on work described in its earlier Advisory Report on 'Rethinking Working Conditions Policy and the Working Conditions Act') provides a better solution. This new system for regulating working conditions will be outlined in Section 5.

5 Towards a new working conditions system

5.1 Introduction

As noted above, the SER finds itself in agreement with a number of the basic ideas and assumptions contained in the Request for Advice. However, the SER believes that the reform of the current regulatory system of working conditions requires an approach different to that proposed in the Request for Advice.

In this section, the SER proposes, as an alternative to the system proposed in the Request for Advice, its own concept of a new working conditions system. The SER believes that its own system provides significantly better solutions to the difficulties with the current body of regulations on working conditions pointed out in the Request for Advice. In addition, the SER believes its proposals can advance the achievement of the objective, shared by both the SER and the Deputy Minister, of simplifying working conditions regulations and defining in greater detail the more active role and increasing responsibility that employers and employees in companies have with regard to working conditions. Furthermore, the SER considers that genuinely superfluous regulation should be abolished and that the structure of the remaining regulations can be clarified. The SER believes that customisation should be further developed, and should form one of the underlying principles of working conditions legislation.

Finally, in the SER's view, it is important that any revised working conditions system should form part of a consistent, comprehensive approach, on the basis of which the development of an integrated approach to prevention policy, working conditions policy, absenteeism support, reintegration policy and incomes policy should be encouraged. As already noted, this comprehensive approach is followed in the Declaration issued by the central employers' and employees' organisations in the Labour Foundation on 5 November 2004. The Recommendations issued by the Labour Foundation on 15 April 2005 reiterated the importance of such an integrated approach.

The SER's proposals for a new working conditions system should be seen as something to be worked towards over the longer term. The proposed system is based on the SER's wish to see, ultimately, a 'level playing field' throughout Europe, with all employees across Europe enjoying an identical level of protection.

In the rest of Section 5, the SER explains the objectives it envisages for the new working conditions system (5.2) and the responsibilities of various parties under the new system (5.3). It then provides a more detailed description of its proposed working conditions system within a European context (5.4). Finally, an outline of the envisaged national structure is given (5.5 and 5.6).

5.2 Objectives

The SER believes that a new working conditions system should help create adequate working conditions such that employees are kept both healthy and motivated. Like the present system, any new system should be based on the principle that employees should receive a sufficient level of protection while performing their work. The new system should also help prevent or reduce absenteeism and incapacitation, as this is one of the factors that enables a company to operate properly, enhances the reputations of companies and sectors, and attracts new employees. In addition, the new structure should expand the opportunities for employers and employees to take responsibility for their own working conditions policy, thereby considerably reducing the number of regulations and simplifying legislation.

5.3 Responsibilities

The SER agrees with the Deputy Minister that the primary responsibility for achieving and maintaining good working conditions should be borne by employers and employees at company level. The statutory framework for this responsibility has now been laid down in the Working Conditions Act and in the Dutch Civil Code.

The Working Conditions Act¹ obliges employers to implement as good a working conditions policy as possible and, taking into account the present state of scientific knowledge and professional services practice, comply with a number of specific requirements. The Act also imposes an equivalent obligation on employees, requiring them to take all necessary precautions and care while working, and bear responsibility for their own and others' health and safety.²

The Dutch Civil Code obliges employers and employees to behave as good employer and good employee.³ The Code also lays down employers' responsibility for the working environment of their employees, making employers liable if they fail to meet their obligations.⁴

Although the primary responsibility for working conditions policy lies with employers and employees, the SER believes that government should also retain certain responsibilities (see further also 4.4).⁵

1 See Article 3, Working Conditions Act.

2 See Article 11, Working Conditions Act.

3 See Article 7: 611, Dutch Civil Code.

4 See Article 7: 658, Dutch Civil Code.

5 See also the SER Advisory Report *Heroriëntatie arbobeleid en Arbowet*, Publication no. 97/03; The Hague, 1997, p. 35 and the SER Advisory Report *Werken aan arbeidsgeschiedheid. Voorstellen WAO-beleid*; Publication no. 02/05, The Hague, 2002, p. 87.

5.4 Towards a European working conditions system

The SER believes that the ultimate goal should be to have a Europe-wide body of regulations with public norms that cover all relevant risks at work, on the grounds that the underlying principle of effective health-based protection of employees is not only applicable at national level, but should apply to all employees wherever they work. A Europe-wide approach would also prevent competition in working conditions arising between EU member states.

A European working conditions system would ideally make a distinction between the public domain and the private domain. For the public domain, the system should lay down specific and unambiguous prescribed targets for all relevant risks at work, based on clear and scientifically supported health and safety standards. For the private domain, the system should specify (with due observance of national legislation regarding employee participation) how the prescribed targets are to be achieved at company level; agreements on such ways of working may of course also be made a sector level or central level. Such a new system would mean that an equal level of public protection would be provided to all employees in Europe, while the methods and procedures agreed upon in order to meet these public norms may take into account both national differences and also differences between companies and sectors.

The SER believes that, in the EU decision-making process on working conditions, the primary aim of the Netherlands should be to ensure the establishment of such a structure, specifically by promoting at European level the prerequisite conditions that will allow the proposed working conditions system to be introduced in its entirety. Naturally, it will also be important to ensure the clarity, enforceability and feasibility of the Europe-wide regulations.

In addition, the SER believes that the standardisation of working conditions regulations at European level should not result in any decline in the level of protection provided within member states (although it does not wish to imply that superfluous regulations cannot be repealed). Consequently, the Netherlands should urge that the level of employee protection be particularly increased in new member states. Naturally, in order to guarantee a genuinely equal level of protection, enforcement will also need to be carried out on an equal, European basis.

The SER is aware that a uniform European regulatory framework for working conditions can only be realised in the long term. It does not believe, however, that the Netherlands should therefore sit back and do nothing until the proposed situation has been attained. The SER's proposed new working conditions system (described in more detail below) can already contribute to solving problem areas thus far identified and can serve to advance preferred developments. Since the proposed system already anticipates the advocated Europe-wide system, it will be able to be integrated seamlessly at the appropriate time.

The SER believes that, while a uniform European working conditions system is being developed, regulation at national level will still be required, alongside the current European regulatory framework. The SER's proposal will therefore need to contain specific and unambiguous prescribed targets that are, as far as possible, based on health and safety standards (although current European legislation should first be examined to establish how far it already provides for this). In addition, consideration would need to be given as to which existing working conditions regulations not required by European directives could be abolished as being irrelevant to the protection of employees.

The SER believes that once a properly functioning uniform European system has been attained, the international regulatory framework should in principle be taken as the norm at national level as well. If additional standards are required at national level, then the necessity for them should be made absolutely clear.

Despite the fact that, as noted above, the development of a European system is only feasible in the longer term, there is, in the SER's view, no reason to delay making a start on examining the body of national regulations not deriving from international obligations. In this matter, the SER supports the goal of reducing the number of regulations, mentioned by the Deputy Minister for Social Affairs and Employment in his letter of 13 May 2005 to the House of Representatives.⁶ In this context, the SER also refers to the memorandum from the Ministry of Social Affairs and Employment of 21 March 2005,⁷ which contains detailed proposals dealing with the body of national regulations not deriving from international obligations. The Ministry distinguishes three categories:

- Category 1 Matters that can be left to individual parties to regulate and which therefore no longer need to be covered by public regulations;
- Category 2 Matters that need to be examined with a view to keeping them as part of the body of national regulations;
- Category 3 Matters that need to be examined with a view to keeping them as part of the body of national regulations, either on a temporary basis or in modified form.

The SER believes the Ministry's proposals constitute a useful starting point for the development of the SER's proposal for a new working conditions system (eventually for Europe as a whole, but initially for the Netherlands alone).

The SER also considers the above-mentioned categorisation as a practical heuristic tool for this purpose. For example, within Category 1, the SER is in agreement with the proposal that public regulations do not need to specify a norm for the number of toilets available in factories and workplaces. The SER also approves the proposal to remove from the public domain policy regulations relating to prescribed methods. Within Category 2,

6 See Appendix 4 to this Advisory Report.

7 See Appendix 3 to this Advisory Report.

the SER agrees with the proposal to keep the regulations recently drawn up to cover problems relating to Organic Psycho Syndrome (OPS), as also the changed regulations governing the provision of occupational health and safety services, which came into force on 1 July 2005. With respect to Category 3, given that the need for positive action in this field is felt to be pressing, the SER urges the social partners consult with government on these matters, preferably completing their deliberations (which the SER believes should not be limited to Category 3) before 1 September 2005.

5.5 Basic principles of the new working conditions system

5.5.1 *Introduction*

Given the current dual structure of national and European legislation, the implementation of the new working conditions system in the Netherlands will need to be designed in such a way that it fits in with and meets the requirements of the currently applicable European directives and other international obligations.⁸ The great majority of Dutch working conditions regulations are based on international (primarily European) legislation.

The working conditions system advocated by the SER clearly differentiates between prescribed targets linked to health and safety standards in the public domain, and means or methods to meet those prescribed targets in the private domain.

As previously mentioned, the SER considers its proposals for a new working conditions system in the Netherlands (to be developed further in due course) to be a first step towards the creation of a 'level playing-field' throughout Europe. The proposed system can thus be seen as a 'halfway house' towards a situation in which legislation is structured in the same way throughout Europe.

The proposals described below provide the main outlines of the new working conditions system advocated by the SER. The SER deems it essential that central employers' and employees' organisations should be involved in extending and further developing this new working conditions system.

5.5.2 *Key elements of the new structure*

At the heart of the new working conditions system proposed by the SER is a clearer separation of the public and private domains. In the SER's view, only the Working Conditions Act, the Working Conditions Decree and the Working Conditions Regulations

8 Besides EU directives, ILO agreements also form the basis for national working conditions regulations.

should stay in the public domain,⁹ and government should remain responsible for maintaining and enforcing them.

The public domain

The public domain contains specific, unambiguous prescribed targets, as many of them as possible being linked to clear and scientifically supported health and safety standards. These prescribed targets define the level of protection employees should receive while performing their work. They are enforced by the Labour Inspectorate. Where enforceable prescribed targets cannot be formulated, process standards are defined instead.

The new working conditions system advocated by the SER implies a restructuring of current regulation in the public domain in two respects: on the one hand, prescribed targets or process standards currently contained in policy guidelines will be transferred to working conditions regulations (insofar as this is necessary); and, on the other hand, prescribed methods, explanations or non-essential specifications currently contained in the public domain will be transferred to the private domain. Prescribed methods thereby lose their official, prescriptive status.

Unenforceable prescribed targets that are in the public domain will, as far as possible, need to be reformulated so that they become enforceable. In addition, any prescribed targets that are unclear will need to be reformulated into clear, easily accessible regulations.

The private domain

In the private domain, employers and employees will agree on ways of working that allow the prescribed targets to be achieved. This agreement may take place either (i) at the level of individual companies, on the basis of the action plan that accompanies the risk assessment and evaluation; or (ii) at sector or central level, on the basis of agreement between employer and employees. The ways of working thus established may be recorded in a Working Conditions Catalogue, containing descriptions of methods recognised by employers and employees, and from which a choice can be made in order to meet the prescribed targets. The present working conditions policy regulations, information newsletters (*AI-bladen*), NEN standards and Working Conditions Covenants can all play an important part in the creation and development of the Working Conditions Catalogue. The prescribed methods (which correspond with specific prescribed targets) contained in the present Working Conditions Act, the Working Conditions Decree and the Working Conditions Regulations, all of which will be removed from the public domain, may also be incorporated into the Working Conditions Catalogue, albeit no longer in the form of regulations. Other elements removed from the public domain may likewise find a new home in the Catalogue.

9 The SER sees no reason to limit the application of the legislation (e.g., in relation to students and trainees).

The proposed transfer of prescribed methods, explanations and non-essential specifications from the enforceable prescribed targets to the private domain will, the SER believes, enable the number of regulations to be reduced significantly. Furthermore, in the SER's view, this new structure will allow public working conditions legislation (including the remaining working conditions legislation) to be simplified and implemented better, thus also significantly reducing the administrative burden placed on companies.

5.5.3 *Transition and evaluation*

Before the above proposals can be implemented responsibly, the possible methods for achieving compliance with targets should be clearly specified in the Working Conditions Catalogue: implementing the transition without working out in sufficient detail how it is to be done could have far-reaching, undesirable consequences.

Accordingly, when changing to the new working conditions system, it will be necessary to appoint a definite date for implementation together with an associated period of transition, so that employers and employees will have time to decide on methods or tools that will enable them to meet the public prescribed targets.

Furthermore, the SER believes that it is important to specify in the Working Conditions Act when the operation of the proposed changes is to be evaluated. In line with the view expressed in its previous Advisory Report on Occupational Health and Safety Services, the SER feels that an evaluation period of five years would be reasonable. The evaluation should show how the new system is functioning in practice, what effects it has had on working conditions policy in companies, and whether, in the light of the outcome of the evaluation, legislation needs to be amended.

5.6 Further specification of the new working conditions system

5.6.1 *Public domain*

In the working conditions system proposed by the SER, the public domain contains, as far as possible, specific and unambiguous prescribed targets, based on clear and scientifically supported health and safety standards. Collectively, these prescribed targets should cover all currently known and relevant future risks to which employees are or could be exposed (as described in the Working Conditions Act and the Working Conditions Decree), as well as the priority work-related risks underlying the new Working Conditions Covenants.

In determining compliance with prescribed targets, the current principle of workplace hygiene strategy (as formulated in Article 3(1)(b) of the Working Conditions Act) should be applied. This principle (which will remain in the public domain) states the following.

Unless it can in all reasonableness not be demanded of the employer, an employer must, as far as possible, prevent or limit the danger and risks to the safety and health of his employees, in the first instance at source. In so far as such dangers and risks cannot be prevented or limited at source, other effective measures must be taken, whereby measures designed to provide collective protection must have priority over those designed to provide individual protection. Only in cases where it cannot in all reasonableness be required that measures designed to provide individual protection be taken should effective and suitable personal protection aids be made available to employees.

In the SER's view, the main elements in the proposed system are the prescribed targets currently contained in the Working Conditions Decree. As currently formulated, these targets are grouped according to content: the public domain regulations should be similarly structured to make them easily accessible.

Under the proposed system, the regulations contained in the current Working Conditions Act governing the management of working conditions (e.g., the obligation to draw up a risk assessment and evaluation with accompanying action plan and the registration of occupational accidents) will remain in the public domain. These regulations will need to be incorporated into the new system in a clear and accessible way.

Finally, while the proposed single Europe-wide system is being developed, those prescribed methods (current and future) that are based on EU legislation will need to remain in the public domain. Under the new system, those regulations that are based on EU legislation must be clearly indicated as such. In this respect, the SER's proposal relates to a transitional phase.

The SER is aware that, under its proposed system, situations may arise in which compliance with one or more prescribed targets is (i) not possible at all or (ii) not possible yet.

With respect to (i), if it is clearly impossible to meet the norm under any circumstances, a company can request a dispensation, and a sector or industry category can request an exemption to compliance with the prescribed target: the current working conditions regulations provide for such exemptions.

With respect to (ii), it is conceivable, in certain cases, that due to temporary technical limitations, for instance, one or more sectors may find it impossible to meet a prescribed target. In such cases, a reasonableness clause can provide the sector(s) in question with time in which they can take steps that will enable them to meet the target. Such a reasonableness clause is already included in the Working Conditions Act and the Working Conditions Decree (see box below). In general terms, this clause makes it possible to weigh working conditions interests against other interests (e.g., economic interests). The SER believes that, in a situation such as that described above, a reasonableness clause restricted to the prescribed target in question would give

companies a chance to draw up an appropriately phased action plan that will enable them in due course to meet the prescribed target.

The reasonableness clause

The term ‘reasonableness’ is used in both the Working Conditions Act and the Working Conditions Decree. The term is applied in situations in which an employer is obliged to take a certain measure unless it would be unreasonable to demand it. The reasonableness clause is designed to make it possible to weigh working conditions interests against other (e.g., economic) interests. The acceptability of any appeal to the reasonableness clause will be decided by weighing (above all) the technical, operational and economic feasibility of implementing the measure against the danger that would result for employees if the measure were not implemented. Given the nature of this clause, it is only inserted where the EU legislation to be implemented allows for such a clause.

Technical feasibility: Employers are expected, in principle, to apply the generally recognised state of the art in technology (and specifically in the technologies used in the relevant sector).

Operational feasibility: Measures may be operationally infeasible if, for example, they would make employees’ working conditions worse in some other way or have a substantial damaging effect on a product’s quality.

Economic feasibility: In assessing economic feasibility, consideration will in practice be given to, above all, factors such as excessive absolute costs and the disruption of competitive conditions.

The essential point is that, in all such cases, the prescribed target itself is not being challenged. Rather, it is the way in which or the timeframe within which it can be implemented in practice that is being questioned. In any case, the employer will need to make a convincing case that his policy provides a method that will lead to the desired situation.

Given that employers and employees are expected to management their own working conditions, it is first and foremost for the employer to decide if he believes it is unreasonable to expect him to implement a measure. If he decides it is indeed unreasonable, he will naturally need to consult his employees and/or their representatives on this matter. During such discussions, he will need to convince employees that he is correct in believing that it will be impossible in a given situation to meet the desired level, and to put forward alternatives, if necessary (involving specialists within the company and external experts or specialised services for this purpose). If no satisfactory solution can be found, as a last resort the Labour Inspectorate may be asked to arbitrate.

- Adapted from *Handboek Arbeidsomstandighedenwetgeving*, the text being drawn up on the basis of the original Explanatory Memorandum accompanying the Working Conditions Decree.

Conceivably, in some fields in which prescribed targets are important in order to prevent damage to health, a situation may arise in which there is no enforceable prescribed target in the form of a health and safety standard (either because it has not yet been defined or indeed because it cannot be defined). The SER believes that in such cases it is nonetheless possible to prevent damage to health by formulating process standards. These process standards (which will formally be in the public domain) would stipulate that, for a given risk, further regulation is required, with account being taken of all aspects of the working conditions policy relating to the matter in question.

The SER suggests that it should be possible to create such a process standard by including the matter in question as a general policy obligation in Article 3 of the Working Conditions Act (obligation to exert one's best efforts). The content of this policy obligation could then be specified in more detail in an 'agenda provision' in the Working Conditions Decree. This provision would list the elements that a company's working conditions policy would need to contain with respect to the matter in question. Employers and employees would then work out the finer details in joint discussions.

In summary, with regard to the public domain, the process for implementing the SER's proposed working conditions system can be broken down into the following steps:

- Existing general prescribed targets are reformulated into prescribed targets that are clear, specific and enforceable, and based on clear, scientifically supported health and safety standards.
- Where clear, specific and enforceable prescribed targets already exist elsewhere (e.g., in policy rules or standards), they are incorporated into regulations in the public domain.
- Where the general prescribed targets have been reformulated as described above, the corresponding prescribed methods can be removed from regulations in the public domain.
- Where it proves impossible (at least, for the time being) to reformulate a prescribed target into a clear, specific and enforceable prescribed target, a process standard may be formulated to provide a solution.

The SER realises that the reformulation of general prescribed targets into clear, specific and enforceable prescribed targets, linked to clear, scientifically supported health and safety standards, could turn out to be difficult and a major operation. It could include the classification (or reclassification) of provisions relating to the various risks in terms of their subject matter. As already noted, the SER believes that the central employers' and employees' organisations should be involved in setting up and specifying the details of the proposed working conditions system. The SER also believes that it is important (and eminently reasonable) to assign the task of developing and managing health and safety standards to an independent and authoritative institute.

5.6.2 *Private domain: Working Conditions Catalogue*

Under the SER's proposal for a new working conditions system, in the private domain it is up to employers and employees to agree on which methods or means would enable them to meet the public prescribed targets, and which of those methods and means they will actually use in practice for that purpose.¹⁰

If these methods and means are to be clear and easy to communicate, they will need to be recorded in some form. In the SER's view, a suitable means for this would be a Working Conditions Catalogue,¹¹ a practical, accessible tool and roadmap suggesting ways in which prescribed targets can be met.

The contents of such a Working Conditions Catalogue could be quite varied. Besides definitions of methods and means, it could include examples of best practices that facilitate the achievement of prescribed targets. It could also contain standards documentation, practical manuals, and agreements that are binding on parties to a collective labour agreement (CAO). And in due course, it could also contain (in addition to their possible incorporation into CAOs) parts of the present covenants on working conditions, most of which are due to expire around 2007. The Catalogue might also be based on the Reinforcing Working Conditions Policy Substances Programme (*Versterking Arbeidsomstandighedenbeleid Stoffen*) and the SME Working Conditions Activity Programme (*MKB-Arbo-activiteitenprogramma*).

The SER does not see the Working Conditions Catalogue as an exhaustive list of admissible ways of meeting prescribed targets: targets may also be met using other methods.

The Working Conditions Catalogue can be created through agreements by social partners at either central or sector level. One possibility is that the Working Conditions Catalogues at sector level could fall under the management of joint sectoral bodies (like those that have been or are being set up for some Working Conditions Covenants or that already exist in certain sectors (e.g., in the case of the building industry, *Arbouw*). Naturally, parties at sector level would also be free to choose a different management model.

10 Under the current Working Conditions Act, customisation is possible by appeal to an exception provision (Article 17). In the structure proposed by the SER, employers and employees are to extend and fill in the finer details of the statutory prescribed targets themselves.

11 In current working conditions practice, a number of examples can be found of how a Working Conditions Catalogue might be drawn up: see for example <http://www.datwerktwelzolekker.nl/Default.aspx?tabid=120>, which is part of the Working Conditions Covenant information campaign entitled 'Koek en Snoep' (website consulted in May 2005).

Observing Dutch employee participation laws and, if needed, making use of the Working Conditions Catalogue, companies establish, as part of their action plan, methods and ways of working that take account of the safety and welfare of their employees.

Agreements

The SER believes that the best basis for agreements is consensus among all parties involved. Such consensus is always, of necessity, required for agreements at sector and central level. At company level, however, if no agreement can be reached on the policy to be followed, the SER believes that the employee participatory body should at least have the right to veto implementation of the policy. If the participatory body exercises its right of veto and the company subsequently applies to the Subdistrict Court for the right to obtain approval elsewhere, the SER considers it desirable that the judge may, if necessary, call upon the expertise of the Labour Inspectorate.

Incidentally, the SER believes in this connection that the employee participatory body's right of veto over working conditions policy should not itself be the subject of negotiation between the employer and the employee participatory body.

Although agreements to be included in the Working Conditions Catalogue may be made at various levels, the SER considers it desirable that catalogues be drawn up at sector level in particular. One great advantage of this is that it allows links to be made with issues and agreements made in adjacent policy areas.¹² This comprehensive approach builds on the principle (agreed by the social partners in their Declaration of Purpose (*Stichtingsverklaring*) of 5 November 2004) of encouraging an inclusive approach to prevention policy, working conditions policy, absenteeism support, reintegration policy and incomes policy. This approach can be expected to lead to greater customisation and to more grass-roots support within the sector.

Another advantage of agreements made at sector level is that they have a wide reach. This reach can extend even further if they are confirmed in collective labour agreements and possibly declared to be binding on the entire sector.

Under the proposed system, the responsibility for the creation of a Working Conditions Catalogue and its content lies entirely with employers and employees or with the employers' and employees' organisations at the level in question. The SER suggests that, when filling in the details of the catalogue at national level, the social partners could avail themselves of the knowledge and information provided by the collaborative network Arbo Platform Nederland, or some similar organisation, which could in turn collect sector and company catalogues and present the methods and means of meeting prescribed targets classified according to risk.

12 In this context, the SER also refers to the development and creation of the sector risk assessment and evaluation tool.

The Working Conditions Catalogue (or otherwise agreed methods and means of meeting prescribed targets) would need as far as possible to be kept in line with the latest technology and scientific developments. New methods can then be added to extend the range of choice.

The choice of methods applied at sector or company level is determined on the basis of the main principles underlying the strategy for workplace hygiene (see 5.6.1).

The SER believes that agreements made between social partners at sector level for the purpose of meeting prescribed targets can also be significant for individual companies in the sector in question. For example, if a certain way of working exists within a sector and, as part of the strategy for workplace hygiene, measures have been taken aimed at providing collective protection, individual companies in the same sector that instead decide to take measures aimed at providing individual protection must be able to justify their decision with sound arguments.

No agreement made between social partners for meeting a prescribed target can affect the duty of care that an employer has towards his employees (contained in Article 7:658 of the Dutch Civil Code and related case law). This duty of care is not enforceable by the Labour Inspectorate, but remedy of any breach can be sought through a civil law suit. In such a suit, an employer who has failed to comply with the methods and ways of working described in the Working Conditions Catalogue may be accused of neglecting his duty of care towards his employees, pursuant to Article 7:658 of the Dutch Civil Code. According to the case law based on Article 7:658, even if an employer has complied with the norms as laid down, this does not free him of his duty to look into and ascertain the state of circumstances (especially dangerous circumstances) himself.

The agreements reached may also be referred to in assessing to what extent an employer's actions are in line with 'good employership' (*goed werkgeverschap*), as referred to in Article 7:611 of the Dutch Civil Code.

The above-mentioned provisions in general employment law do not have a solely corrective effect. Given the case law (particularly with regard to Article 7:658 of the Dutch Civil Code), the provisions also have a preventative effect.

Duty of care

The duty of care owed in civil law towards employees includes, amongst other things, the employer's obligations pursuant to the Working Conditions Act and other public law regulations relating to working conditions. Employers are obliged to strive for an optimum level of protection. Because possible damage to the health of employees is involved, employers are expected to exert their best

efforts in this matter. At a minimum level, the safety measures implemented must at least conform to what is usual for companies engaged in similar activities.

Case law shows that what may reasonably be expected from employers depends on the circumstances in the case at hand. The duty of care employers owe to their employees is closely related to the degree of control they have over the workplace and their right to give employees instructions about the way work is to be carried out. The employers' duty of care extends to the working environment. Under Article 7:658 of the Dutch Civil Code, employers are liable if they culpably fail in their duty of care. The article establishes a liability based on fault, but case law shows that a failure to fulfil the duty of care is quite often assumed. In its Advisory Report entitled *Nieuwe risico's* ['New risks'], the SER points out that, in combination with the strict limitation of employees' own fault, the assumption of retroactive liability and shifting the burden of causal uncertainty, the standards courts place on employers' duty of care towards employees lead to a result that closely resembles risk liability.

- Source: SER Advisory Report *Nieuwe risico's*, Publication no. 02/06, The Hague 2002, p. 68.

Finally, the other body of employment law dealing with the manner in which agreements are made is the Works Council Act. This Act requires the employer to seek the endorsement of the Works Council for any proposed decision on arrangements affecting working conditions, absenteeism due to illness, reintegration, or any changes to such arrangements.¹³ Arrangements of this type may include company-level agreements designed to ensure compliance with legally prescribed targets, possibly containing specific aspects geared to the type of company in question, selected from a Working Conditions Catalogue created at sector level.

The SER believes that the current statutory framework relating to employment law provides sufficient incentive and encouragement to ensure that social partners not only reach agreements on how to meet prescribed targets, but also that those agreements are observed. The provisions in the current Working Conditions Act on consultation and the exchange of information are, in the SER's view, of great importance in stimulating employers and employees to select their own preferred way of achieving compliance. (See 5.6.3 for more discussion on the keeping of agreements.)

Finally, the SER believes that the structure and content of the private domain it has outlined above also imply an affirmative answer to the questions posed in the Request for

¹³ In Article 27(1)(d), the Works Council Act refers to endorsement for any proposed decision on the part of the entrepreneur to lay down, amend or withdraw regulations relating to working conditions, sick leave or reintegration.

Advice with respect to encouraging employees to assume greater responsibility for and become more involved in ensuring safe and healthy working conditions.

5.6.3 *Compliance: the role of the Labour Inspectorate*

5.6.3.1 *Enforcement*

The SER's proposal for a new working conditions system has the following implications with respect to enforcement.

In enforcing compliance with the regulations, the Labour Inspectorate has several instruments at its disposal: the prescribed targets, the health and safety standards and the process standards (as contained in the public domain). To determine whether the prescribed targets and health and safety standards formulated in the Act are being observed in a specific situation, the Labour Inspectorate considers all the measures, both technical and organisational, that have been taken.

The Labour Inspectorate decides to what extent the Working Conditions Catalogue provides the company with an adequate reference framework to enable it to meet the prescribed targets. In exceptional circumstances (e.g., where there is either no Working Conditions Catalogue or only one that cannot reasonably be expected to enable the company to meet the prescribed targets), the Labour Inspectorate independently defines the current state of knowledge that will be taken as the norm. If, therefore, the Labour Inspectorate considers that the methods and means contained in the Working Conditions Catalogue are clearly unable to provide an adequate level of protection, or if there is no Working Conditions Catalogue, the Labour Inspectorate may decide which instrument will provide an adequate level of protection. If such a situation arises, the sector will, as far as possible, be consulted.

If possible, the Labour Inspectorate will make known in advance the current state of knowledge it proposes to use.

The SER agrees with the idea stated by the Deputy Minister for Social Affairs and Employment in his letter of 13 May 2005 to the House of Representatives to inform sectors in advance about inspection projects (including the standards to be used) by means of short brochures.

Owing to limited staff capacity and resources, in executing its task of enforcement, the Labour Inspectorate will need to draw up priorities on the basis of a risk analysis (Chance × Effect). In its inspections, it should focus on those risks that form the purpose of its visit, as well as any malpractices it may come across.

In applying the reasonableness clause (e.g., if the prescribed targets cannot yet be achieved; see 5.6.1), the Labour Inspectorate may apply the risk assessment and evaluation and the accompanying action plan to see whether the company is working according to the standards specified in those documents.

Enforcement by the Labour Inspectorate should not, in the SER's view, be limited to imposing fines or other types of punitive enforcement in the case of violation. The inspectors should also encourage employers and employees to comply with working conditions legislation by offering practical suggestions and opportunities for improvement as they tour the premises. Although the Labour Inspectorate does not officially have an advisory task, it should nonetheless be able to explain clearly why a given situation is considered to be dangerous. Companies that turn out to be performing well in the field of working conditions could also be encouraged by being complimented (e.g., being awarded a certificate to the effect that the premises have been inspected and no violations found). The SER believes that such a nuanced sanctioning policy could also help to give the Labour Inspectorate a more positive image.

The Labour Inspectorate's level of enforcement of public law process standards¹⁴ is limited to checking whether all the 'points on the agenda' have been dealt with. The SER interprets this to mean that the Labour Inspectorate formally checks whether, for agreements made concerning a given risk, the details of the 'points on the agenda' have been specified and whether reasonable steps are being taken to deal with the risk.

Since enforcement by the Labour Inspectorate is limited to prescribed targets and associated health and safety standards, any alleged non-compliance with agreements made between employers and employees to facilitate compliance with those prescribed targets can only be addressed by the parties involved. Consequently, adherence to these agreements falls completely within the domain of civil law.

Based on its proposed new working conditions system, the SER sees no reason to amend or further amend the enforcement policy or its implementation. Nor does it believe it is necessary (as suggested in the Request for Advice: see also box below) to limit accessibility to the Labour Inspectorate. The SER considers it almost self-evident that, when the question of accessing or calling in the Labour Inspectorate arises, any complaint is first addressed internally within the company before appeal is made to the Labour Inspectorate, and that the complaint should be dealt with in line with the Labour Inspectorate's existing internal instructions.

The SER nevertheless wishes to emphasise the importance of a careful (i.e., balanced and effective) enforcement policy. Such a policy should enable companies to know where they stand as soon as possible: as already noted, the SER approves of the proposal of the Deputy

14 These can provide for situations in which no enforceable prescribed targets in the form of health and safety standards yet exist (or cannot exist) for the prevention of health damage. See 5.6.1.

Minister for Social Affairs and Employment (in his letter of 13 May 2005) for adjusting the Labour Inspectorate's inspection policy in line with this objective. Such a policy should also require the Labour Inspectorate to answer an application for a dispensation or exemption as quickly as possible, and at least within a reasonable period of time.¹⁵ The SER also believes it is desirable that a complaint or appeal should be dealt with as quickly as possible. In this connection, the SER considers it important that the procedures and deadlines to be taken into account should be clearly communicated to employers. Finally, the SER believes a proper and balanced response from the Labour Inspectorate will be decisive factors in strengthening the policy's credibility.

Accessibility to the Labour Inspectorate in practice

The formal relationship between the Labour Inspectorate and a company's employee representative body (e.g., Works Council) is laid down in the Working Conditions Act. Members of the representative body are entitled to accompany the inspector during his visit (which will often be known in advance, if part of a regular inspection programme); they are also entitled to speak to him in private (Article 12 (3), Working Conditions Act). The body is entitled to receive information from the Inspectorate, including Inspectorate reports, any written requirements imposed by the Inspectorate, and any order halting operations (Articles 24(5), 27(6) and 28(6), Working Conditions Act).

The employee representative body can also ask the Inspectorate to start an investigation, a request that the Inspectorate is obliged to respond to as soon as possible (Article 24(7), Working Conditions Act). However, the Labour Inspectorate has received very few such requests.

Employee representative bodies may also lodge a complaint directly with the Inspectorate, but very few such complaints have actually been made. From Labour Inspectorate sources of information such as annual reports (with the one for 2001 as most recent source), it appears that of all complaints about working conditions made to the Inspectorate, less than 1% were from employee participatory bodies. From the Labour Inspectorate annual report 2003, it appears that, providing a complaint about working conditions falls under the remit of the Inspectorate, it is dealt with. In 2003, 1,947 complaints were filed and 2,052 cases arising from a complaint were processed. According to the Labour Inspectorate, the number of complaints lodged by Works Councils/ employee representative bodies and the requests for investigations from these organisations in 2002 and 2003 comprised about 1% of all complaints made.

- Primary source: Jan Popma, *Het Arbo-effect van medezeggenschap* (On the contribution of Works Councils to working conditions policy), PhD dissertation, 29 October 2003, pp. 150ff. and p. 189ff.

15 A report (*Lex Silencio*) has already been published on this matter, and was presented to the Deputy Minister for Economic Affairs in March 2005.

5.6.3.2 *Sanctioning*

In the model presented in the Request for Advice, proposals were made to double the maximum fines and to base the ‘naming and shaming’ instrument in law.

The SER considers that, as a way of stimulating action, a policy of strict, focused enforcement should also form part of its own proposed working conditions system. The importance of this is emphasised in the report entitled *Arbowet in beeld* (on which the Request for Advice was in part based), where improvements are also suggested. The SER believes the enforcement tools should have a preventative effect, and ensure any identified health or safety risks are eliminated.

Size of fines

The current fining policy is based on Articles 33 and 34 of the Working Conditions Act and is worked out in more detail in Policy Rule 33. In the SER’s view, when public regulations are violated and a fine is to be imposed, in general a clear picture should be formed of the nature of the incident and the circumstances around it; and these circumstances should then be taken into account when deciding on whether to impose a fine. The question of culpability (or degree of culpability) should also be taken into account.

The SER believes that the size of any fine should be sufficient to offset any economic benefit gained by the violation, while (in principle) not being so large as to endanger a company’s continuity. Moreover, the Labour Inspectorate, taking into account the three aspects mentioned above (the nature of the incident, the surrounding circumstances and the degree of culpability), should have the discretion to not impose a fine or to impose a fine smaller than that specified in Policy Rule 33. Policy Rule 33 already allows for ‘special circumstances’ to be taken into account,¹⁶ and the SER believes that better and more balanced use could be made of this provision.

In his Request for Advice, the Deputy Minister proposes a doubling of the maximum fine stipulated in Article 34 of the Working Conditions Act on the grounds that, within Policy Rule 33, this would allow for additional fine increases so as to take varying circumstances into account.

The SER’s view of this proposal is the following. Firstly, increasing the maximum fine would not automatically result in heavier fines being imposed. Secondly, as the SER has

16 Paragraph 9 of this policy rule states: ‘If it becomes apparent in the event of a punishable offence that special circumstances apply, this policy rule may be deviated from. In that case, the benefit of applying the policy rule is weighed against the consequences that applying the rule in full would have for the party concerned. It may be decided that either a smaller fine or no fine at all will be imposed for a given offence. Examples of special circumstances are circumstances beyond one’s control, new evidence and/or obvious mistakes.’

argued elsewhere, a flexible policy of penalties should also allow for fines to be waived or reduced when circumstances merit it. Thirdly, any restructuring of the fining policy should bring fines more into line with fines imposed in practice for violations of other laws and regulations (e.g., traffic violations). The SER therefore believes that the Deputy Minister's proposal could be an effective instrument in dealing with violations involving serious culpability or recidivism, and could thus contribute to the effective functioning of the working conditions system proposed by the SER. In this sense, the SER can concur with the Minister's proposal.

Naming and shaming

In his Request for Advice, the Deputy Minister noted that, when publishing the results of its inspections, the Labour Inspectorate has hitherto been very circumspect about mentioning the names of companies and institutions. He asked whether this policy was still appropriate and useful in this day and age. The Cabinet believes that the Labour Inspectorate should, in principle, be able to report publicly on all duties assigned to it under administrative law, and it should therefore be able to publish the names of organisations involved (though not details of private individuals). The Cabinet wishes this change to be implemented in law. This would require amendment of not only the Working Conditions Act but also the Working Hours Act and the Foreign Nationals Employment Act. The Cabinet expects the publication of inspection results to have a positive effect on enforcement. If companies and organisations are notified beforehand that their performance with regard to working conditions will or may be made public, this could result in improved compliance with the regulations. An additional advantage, in the Cabinet's view, is that the public would be able to see more clearly that the Labour Inspectorate is acting decisively against offenders. Moreover, the Cabinet points out, the Government Information (Public Access) Act allows the government to hold back information only in exceptional cases. The Cabinet acknowledges, however, that, given the need to exercise the greatest possible care, such a change from present practice would entail more work for the Labour Inspectorate.

The SER takes the following view of the Deputy Minister's proposal. Publication of a company's name may have serious consequences for the company in question and may even result in its closure: such an instrument should therefore be used only with the greatest care and fairness: for example, before the name of a company or organisation is published, the circumstances of the offence should be carefully considered and taken into account. Moreover, the SER notes that in many instances, company names are considered to be personal details in the sense of the Personal Data Protection Act.

Presumably publication would not be made if the company in question could not be considered culpable either because it was unaware of the violation, or because circumstances were such that the company bore little or no blame. As a result, the SER believes that extreme restraint is needed in the use of this instrument. Furthermore, any legal or administrative proceedings should have been concluded before publication.

Nonetheless, publication could be entertained as an option in the case of companies that show total incompetence in arranging their working conditions situation, consciously let economic interests take preference over the health of their employees, or are responsible for repeated serious violations of regulations.

The SER believes, however, that, at least in many cases, the greatest effect of this instrument lies not so much in its actual application (because in serious cases the company's name will usually have appeared in media reports already), but rather in the mere possibility that the name of the offending company may be made public. As noted above, this effect is already directly noticeable in serious cases. Indeed, even in cases where the violation does not make headlines, the desired result of 'naming and shaming' can (as is already now the case) be achieved merely as a result of the public nature of criminal proceedings.

The Labour Inspectorate, in the SER's view, already possesses an important enforcement instrument: its authority to shut down all work when it encounters a dangerous situation. The SER believes that in practice this instrument is actually more effective in putting an end to a dangerous situation than 'naming and shaming'. If, in a given case, the instrument of 'naming and shaming' were to be used instead of the possibility of shutting down a company's operations, this might even result in the prolongation of a situation that is unsafe for employees.

In the light of the above considerations, the SER concludes that the Deputy Minister's proposal for giving the 'naming and shaming' instrument a basis in law provides insufficient added value to serve as a 'new' enforcement instrument. In the SER's view, this option should therefore not be pursued and accordingly it therefore does not form part of the SER's proposed new system of working conditions. Naturally, this does not mean that the SER would argue for any change in the current powers and responsibilities of the Labour Inspectorate and the manner in which it currently reports its inspection results.

The Hague, 17 June 2005

H.H.F. Wijffels
Chairman

N.C.M. van Niekerk
General Secretary

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