Health and Safety at Work

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Health and Safety at Work

European and Comparative Perspective

Edited by

Edoardo Ales

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Summary of Contents

CHAPTER 10

Occupational Health and Safety in the Netherlands: A Shift of Responsibilities

Teun Jaspers and Frans Pennings

§10.01 HISTORICAL AND LEGAL BACKGROUND

[A] Introduction

The shift of terminology by the legislature in 1980 is a sign of a changing approach to the issue of health and safety at work. In the 1980 newly presented law, the government was using the term 'work environment' replacing the traditional terms of health and safety. It was the result of a discussion in which, apart from the academic world, the main advising body of the country in the field of social and economic policies – the Social Economic Council, played a decisive role.[1]

The discussion has been started more than a decade before under the heading of: humanization of labour.[2] It was more than a change of wording. It puts the issue in a broader perspective. Following the opinion of a British governmental committee, the Robens Committee, the general view was that 'the primary responsibility (for healthy and safe working conditions) has to lie with those who create the risk and those who work with them'. That should imply a retreat of the government and the central legislator from this field by offering more room to the parties directly involved. The role of the government should 'predominantly [be] concerned with influencing attitudes

1. Cf. A.J.C.M. Geers, *Recht en Humanisering van de Arbeid* (Law and the Humanisation of Labour) (Kluwer: Deventer, 1988).
2. The sociologist H.J. van Zuthem introduced this term in 1967 in his study: *Arbeidsbeleid in de onderneming* (Assen, 1967). He stated that the humanity of labour should be the core objective of human resources management.

and creating a framework for better health and safety organization and action by industry itself'.[3]

Alongside the United Kingdom, the *Robens Report* influenced significantly the legislatures in, *inter alia*, some Scandinavian countries and the Netherlands. According to this modern concept everything was revolving around the 'duty to care' of the employer and the obligation of the employee to co-operate as reasonably could be required from him or her. Mutuality was introduced in a field where in the past the top-down approach was the usual one. This can be seen as a shift of approach in more than one sense. Apart from the redistribution of responsibilities between the government, the employer and the employee and the introduction of self-regulation instead of state regulation, the change can also be seen in terms of (modern industrial) citizenship. The legislature leaves it to the parties involved to regulate by themselves what they think is necessary. The law sets the goals to be achieved and leaves it to the parties themselves to choose the instruments to attain the goals. They are assumed to be able and capable to do so. They can even do it better than the legislature. Tailor made rules are more effective and will be more easily accepted by those who are affected.

Although the main and primary task lies with the employer, s/he and the employee have been made more jointly responsible for the work environment, each with his or her specific duties and obligations. This is in line with the ideology of the recent governments of treating employers as well as employees (and their representatives) as self-responsible actors and not as solely addressees of top-down state regulation. In this approach the Dutch legislator is obviously showing the importance of the idea of citizenship as leading principle.

Hereafter we will demonstrate how these thoughts, advocated as new ideas, have been inserted in the Dutch law and practice. As will become clear, that does not mean that this approach is solving all the problems easily. New risks, in particular psychosocial risks, which are often connected to the behaviour, the attitudes of the employee and to the way the employee is acting as employee and in his or her private sphere, are raising new questions also as to the approach chosen. This new development we are facing in all developed economies, is challenging when we approach it from the joint responsibility perspective.

[B] Historical Background

The first Dutch statutory provisions on health and safety at work were adopted at the end of the nineteenth century. Since then the concept of health and safety has been changed over time.[4]

3. Robens Committee, Safety and Health at Work, *Report of the Committee 1970–1972* 7 (Her Majesty's Stationery Office 1972).
4. Cf. A.J.C.M. Geers, *Recht en Humanisering van de Arbeid* (Law and the Humanisation of Labour) (Kluwer: Deventer, 1988). Cf. J. Popma, M.H. Schaapman & T. Wilthagen, *The Netherlands: Implementation within wider Regulatory Reform*, in *Regulating Health and Safety Management in the European Union. A Study of the Dynamics of Change* 183 ff (D. Walters ed., 2002) (Peter Lang: New York, Bern, Berlin, Bruxelles, Frankfurt am Main, Oxford, Wien).

The legislative interference with health and safety started with an Act to protect young workers, the *Kinderwetje* (the Child (Labour) Act), which was based on a bill proposed by a member of Parliament and meant to combat the excessive working time and terrible working conditions of children.[5] This Act was succeeded by the *Arbeidswet* (Labour Act), which was meant to ensure the protection of women and (again) young workers.[6] The latter Act also created the possibility to set up a labour inspectorate. Before the start of the twentieth century a third Act was adopted, a (framework) Act on health and safety at work.[7]

After World War I, as a reaction to the revolutionary threat following from the developments in Russia and Germany, the Labour Act was renewed and strengthened, more in particular as regards working time. The Act limited the number of working hours to eight per day.[8] In the light of later developments it is interesting to note that from the beginning of the interference of the legislator the target was not only the improvement of the health and safety of the workers at the workplace. Moreover, it has to serve the well-being of the employees. The regulation of the working and rest hours as part of the policy on health and safety has to contribute also to 'the happiness and the mental well-being' of the person.[9]

The Health and Safety Act, amended in 1934, introduced health and safety committees, which were mostly to be established on a voluntary basis. This Act was a reaction to a proposal of trade unions to introduce effective participation of employees in health and safety matters in the enterprises, which proposal was rejected.

The Health and Safety Act of 1959 brought a change of approach, which can be identified in the obligation to establish an industrial medical service on the company level with the explicit objective to promote preventive medical care in the enterprise.[10]

A new approach was adopted by the Act of 1980, the *Arbeidsomstandighedenwet* (hereinafter Arbo Act or ARBO[11]). This Act not only adopted prevention as its main approach, but it introduced the well-being of the employees, or in other words, the humanization of labour, as a separate objective. This new approach did not focus only

5. The Child (Labour) Act of 1874
6. The Labour Act of 1889. This act was the result of a parliamentary inquiry on the application and functioning of the Child Labour Act and more generally on the working circumstances of workers in factories and workshops in view of their safety, health and well-being. The inquiry contained more recommendations than were adopted in the Labour Act. Cf. A.J.C.M. Geers, *Recht en Humanisering van de Arbeid* (Law and the Humanisation of work) (Kluwer: Deventer, 1988), 38 ff.
7. The Health and Safety Act of 1895. By ministerial decrees more detailed regulations could be issued. This legislative technique (framework Act and decrees) allowed for an easier way of making and changing rules; for this purpose decrees were made on the basis of the Act. In some sectors specific legislation has been adopted, such as mining, phosphormatches, quarrying and stevedores. The 1895 Act was maintained until the 1980s, while it was several times amended but these amendments did not concern the concept of health and safety.
8. It also gave a regulation for rest time in all kinds of circumstances.
9. *Handelingen TK* 1918–1919, p. 2876 (Proceedings of the Second Chamber of Parliament).
10. This new approach has been applied in some specific regulations: the Act on the use of silicosis (1951) and the Act on dangerous equipment (1952).
11. Literally: Working Environment Act.

on a decrease of the number of occupational accidents and diseases, which could be beneficial because of the reduction of costs, but it also aimed at the reduction of the absenteeism due to incapacity for work caused by occupational accidents and diseases.[12] The third objective of the new Act was to offer employees possibilities for self-fulfilment by improving their working conditions.

Next to the regulations specifically concerning health and safety of employees, two other pillars of regulations deal with health and safety issues. The oldest is the *Burgerlijk Wetboek* (Civil Code – CC, which dates back to 1907), in particular the part on the employment contract. Article 7:658 CC lays the duty on the employer to ensure healthy and safe working conditions. If s/he infringes this obligation, s/he is liable for the damages suffered by his or her employees resulting from his or her lack of care. At the time when this obligation was inserted in the Civil Code, this provision was mainly aimed at the financial compensation of the damages suffered by the employee caused by occupational accidents. Later, as from the end of the 1960s, this provision lost part of its ground (and application) when the damages suffered were compensated by the social security law provisions made for this purpose.[13] Indeed, social security legislation is the third bunch of legislation relevant to health and safety issues. We will deal with all these three parts below.

A main characteristic of the approach of the Dutch government and legislature is the deliberate choice for *self-regulation* by those bodies that are most able to ensure health and safety at enterprise level. The relevant legislation (primary and secondary legislation, discussed below in section 10.01[C]) shows that policy clearly. This legislation is characterized by the use of so-called goal provisions: these provisions contain objectives (in terms of preventing or reducing risks to the health and safety of the workers) that have to be attained. The provisions do not mention the exact means by which these goals have to be reached, since the choice for these means is left to the social partners. Indeed, the health and safety policy, the regulations and the necessary measures have to be established by the employer(s) and the representative bodies of the workers, be it trade unions or works councils. They are laid down in so-called Arbo-catalogues, which are the result of negotiations by both sides of industry (the catalogues will be discussed below). At the end of the day, however, it is the (individual) employer who has to take the concrete measures to implement the relevant regulations, in particular the Arbo-catalogue.

Because of this considerable room for own responsibility of social partners to develop their standards we used the phrase 'more room for citizens' responsibility' in

12. In terms used in the social security schemes: rehabilitation.
13. Until 1967, the loss of income was compensated by the occupational accidents law and the mandatory medical care legislation. The first one has been replaced by the Disability Act (WAO) that often offered a relatively generous (i.e., until the 1980s 80%, later 70%, of the former wage in case of full disability) compensation. It covers occupational accidents and occupational diseases as well as disablement in general. Since the disability benefits have deteriorated substantially the Civil Code provisions have gained importance. In 2006, a general act on medical care has been adopted which requires all residents to buy insurance for a basic package of care.

the title of this chapter.[14] Below we will discuss the exact contents of this responsibility in more detail and we will also try to address the question as to what the effects are of this room.

A second typical Dutch element is the introduction of financial incentives, in particular for the employer, in order to encourage him or her to take the necessary measures. If the employer does not take these measures, s/he may face the obligation to pay damages to employees, which can amount to high levels.[15] Such payments may be due both in case of illness of the employee and for the payment of all other kinds of damages caused by an accident or an occupational disease. We will come back to these payments in section 10.05[B][2].

The legislature strongly believes in this approach, since it is supposed to contribute much better to the attainment of the goal of healthy and safe working conditions than public supervision of statutory obligations can do.

The concept of decent working conditions has in many countries widened to go beyond the terms of health and safety, and also includes the 'well-being' of the employee. In the Netherlands, the development of this concept has gone in a direction different from that in other European Union (EU) Member States and EU law. The notion of 'well-being' as part of the working conditions of an employee in the enterprise – a notion being part of the health and safety policy since the beginning of the twentieth century though not explicitly – was introduced in the Dutch legislation in 1980 when a large reform of the existing legislation took place.[16] The attempt to regulate humanization of work was the motor behind this change.

However, at the time when other Member States have adopted this notion in their legislation, the Dutch legislature deleted it from the Arbo Act rather recently, i.e., 2007.[17] This was because the content of this notion was considered as too vague. Therefore, it has been deleted as a separate element of the health and safety policy.

[C] The Dutch System of Regulation of Health and Safety

Since the change of approach in 1980, the Arbo Act has the character of a framework Act. It primarily contains a series of obligations for employers – and employees – targeting on improving and maintaining healthy and safe working conditions. The framework character implies that the general Act neither provides concrete provisions on the obligations of the employer nor gives concrete norms and standards to be

14. More room for citizen's responsibility is not only present on the collective side. It lies also on the individual employer and employee in the sense that they can make arrangements between themselves tailored on the particular situation. This implies that according to the approach of the Dutch legislator the individual employer and employee has to take responsibility by their own in respect to the working environment.
15. It can cover all kinds of damages actually suffered.
16. Cf. AJ.C.M. Geers, *Recht en humanisering van de arbeid* (The Law and the Humanisation of Work) (Deventer: Kluwer, 1988), 82–97.
17. The provision was repealed by the amendment of the Work Environment Act in 2007.

applied. Instead it imposes the obligation on the employer to develop and pursue a policy aiming at healthy and safe working conditions.

The main obligation is the prevention of accidents and occupational diseases. In this respect, the Dutch law is in line with the general approach of the Directive89/391/EEC (hereinafter Framework Directive). In addition, the employer has to adapt the working methods, the equipment used and the nature of the work to be done to the personal capacities of the worker 'in so far as reasonably can be required'. S/he also has to avoid monotonous and pace driven work, again subject to what reasonably can be required from him or her. The Act – again completely in accordance with the Framework Directive – prescribes as an important tool for attaining these objectives that the employer has to carry out an inventory of the risks which the workers face and that these risks have to be systematically evaluated. Another general principle is the involvement of the workers' representatives in the whole chain of health and safety policy measures. As we will see hereafter, in some cases the workers' representatives, mainly the works council, has a right to consent. Besides that the employer has to offer effective information in due time and training courses to the individual employees.

In addition, the Act defines the function and tasks of the labour inspectors in general terms. In specific circumstances, the inspectors have the competence to give orders to the employer. Such orders can include a warning, an order to observe specific obligations by the Act and the imposition of a fine or an order to stop (dangerous) work. By a more recent amendment of the law the labour inspector has been provided with a specific tool: administrative coercion (see hereafter).

A novelty introduced by the Act is the introduction of a system of certification, not required by the Framework Directive. The Act provides that in case the employer is making use of an external service – a so-called Arbo service – only certified institutions may be used to carry out the various tasks required by the law concerning health and safety at work. The employer is no (longer) obliged to contract such a service. S/he can carry out these tasks by him or herself usually by one or more of his or her employees with specific expertise and tasks in the field of health and safety. For some specific tasks, listed in the law, the employer has to rely on certified experts (individuals or services).[18] The workers' representatives have a strong position in this field. The employer needs their consent to his or her decision of organizing these tasks. If s/he fails to get it, s/he has to contract a certified Arbo service.

As was already remarked, this approach of the Arbo Act 1980 is quite similar to that of the Framework Directive. Therefore, the implementation of this directive into Dutch law has not caused many problems. Since the Arbo Act encompasses all crucial elements of the directive it was not necessary to adapt the existing Dutch law to the requirements of the directive.[19]

18. For instance, occupational medical care services, doctors or experts in the field. A special certification body has been established. We will come back to this issue.
19. It does not mean the transposition is perfect. See hereafter.

Still, the Dutch implementation of the Framework Directive has specific characteristics. Its leading principle is the distribution of responsibilities and obligations over the various parties involved. This is in accordance with the general approach in Dutch labour market and labour issues policy and legislation to 'put the government at a distance'. In other words, the social partners are the main actors to regulate themselves their mutual relationship and the set of obligations and rights adhered to these.[20] The legislature was convinced and assured that the social partners were very well able to do so.

Also in the health and safety field the government has deliberately chosen for this approach. The actors, more in particular the employer, employees and their representative bodies, have to take their responsibility in order to improve and maintain healthy and safe working conditions. This approach fits very well in a policy of creating room for tailor made regulations and measures on a decentralized level rather than on the central level. These are made not only on the sectoral level but also on company or plant level.

Thus the main principle is the (re-)allocation of responsibilities to the main actors in this field. That implies that, next to the employer and the employee, trade unions, the works councils, the labour inspectorate, social security institutions and other health and safety services, be it private or public, have a role to play. It is left to the main actors, the employers and the workers' representatives (the key parties), to shape their various tasks and obligations by means of the instruments they prefer. Various instruments are available for this purpose, varying from collective agreements to informal arrangements.

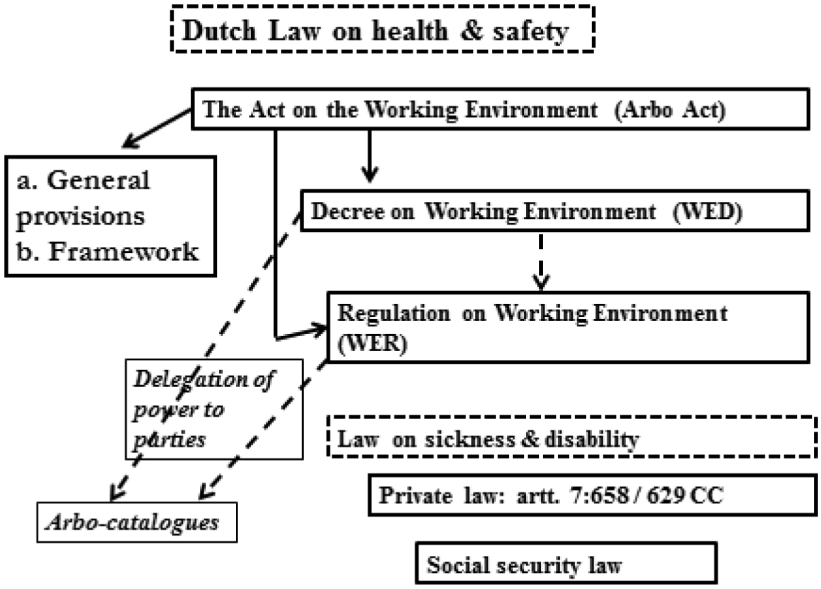
The Dutch health and safety legislation has a layered structure. Three layers belong to the public domain and one to the private sphere:

(1) the (general) *Arbeidsomstandighedenwet* (Arbo Act) as a Framework Act;
(2) the Working Environment Decree (WED), based on the Arbo Act, which provides for a flexible way of regulating the main obligations;
(3) the Working Environment Regulation (WER) containing more concrete norms and standards;
(4) arrangements by the parties, be it *collective agreements* or arrangements, laid down in *Working Conditions Catalogues* (Arbo-catalogues) as a set of concrete norms and standards.

This can be illustrated in a Figure 10.1:

20. This approach is applied in many fields of labour and supplementary social security. The collective labour agreement is the main instrument. The parties are allowed to make their own rules in order to create 'tailor made' arrangements. In some areas, they are even allowed to deviate to the detriment of workers from statutory law. Sometimes trade unions indeed agree with such deteriorations if they can gain advantages in other fields.

Figure 10.1 Dutch Law on Health and Safety



The Working Environment Decree of 1997 replaced the numerous decrees which date from the time before the introduction of the Arbo Act. By the most recent amendment of the Working Environment Decree in 2007, it was envisaged to bring the Dutch protective health and safety system at the level required by the Framework Directive. In this context, this means levelling down the level of the standards: insofar as the national standards exceeded the European level many of them were repealed or adjusted to require no more than required by EU law.[21] In this way a European level playing field has been established.

At the same time, the more detailed regulation of the older Act was replaced by more general rules setting targets to be achieved or limits to be respected.[22] It thereby created room for more tailored and more precise regulation on the lower levels (layers 3 and more in particular 4).

21. One can wonder whether the Dutch legislator has respected a so-called non-regression principle expressed in the pre-amble of the directive: 'Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member State being committed, under the Treaty, to encouraging improvements in conditions in this area and to harmonizing conditions while maintaining the improvements made.' The directive itself does not contain an explicit provision on non-regression.
22. An example of this kind of target ruling is Article 5.2 WED: the workplace and the equipment to be used have to be shaped in a way that the health and safety of the employee will not be imperiled by the physical workload. An example of ruling by setting limits is Article 6.8 WED: a daily exposure to noise has to be limited to a certain amount of decibels (87). Another important example of putting limits is to be found in the sectors where dangerous substances are at stake.

Another instrument of the WED is what can be called 'process norms'. One of them, the most important one, obliges the employer to deploy a policy in respect to psychosocial workload, such as stress, sexual harassment and mobbing.[23]

The Regulation (WER) and the Arbo-catalogues[24] are the instruments that give more precise and detailed norms and rules. The advantage of this approach is the possibility of adapting the rules to the specific characteristics of the branch or sector of activities.

Box 10.1. The Construction Industry

This industry has a complicated form of health and safety regulation. The WED contains a paragraph dealing with general rules applicable also to this industry. Next to this regulation targeted at the health and safety of employees, another Government Decree deals with all aspects of construction activities. It mainly contains technical rules that have to be observed and respected in the construction industry. Although they are not directed to health and safety of the employees, these rules contain also safety measures to be taken or observed in relation to the construction workers. Rather recently the part of the WED mentioned above has been transferred to the Construction Decree in order to bring the rules in conformity with each other. Next to these regulations several Arbo-catalogues have been issued dealing with various aspects of the activities in the construction industry. For instance: paving, infrastructure, foundation, painting, and glazing. All these catalogues contain special rules for the various situations at work which can cause accidents, in order to prevent these accidents from occurring and to protect workers by specific means. A good example is a document dealing with breathing protection. In an extended advice several issues are tackled related to the danger of inhaling of all kinds of dangerous substances. It also contains an overview of available protection means that can or have to be used in order to diminish or exclude the risks of inhaling such substances. It does not prescribe which protection means have to be used but it gives all relevant information about the tools and means. It is up to the employer and the employees to make use of this information. Apart from physical risks the catalogue also contains issues on stress related disorders: various forms of psychological stress, overburdening, burn-out, post traumatic disorder. Various measures are recommended varying from adequate information of the employee, consultation on the quality of the work and the way of performing, regular consultation, adapting of the work to the capacities of the worker. The nature of this part of the catalogue is also an advice and not an order to be observed and explicitly sanctioned. It is on a more or less voluntary basis. That does not imply that not observing this advice is without consequences. The remedies rest in the liability of the employer in case of damages (see hereafter) either in private law or in public law by intervention of the labour inspectorate.

An interesting aspect is the danger of the use of asbestos. If asbestos has to be removed it has to be done by a certified enterprise. Since using asbestos in buildings is not allowed, the problem has become less important. The requirement of certification for enterprises dealing with asbestos is aimed at getting a grip on the danger of asbestosis. The case law on the issue meaning that the employer is fully reliable for damages caused by the use of asbestos, even

23. By the most recent amendment of the ARBO this issue has been introduced in the act itself; Article 1(1) sub e and f. The act defines psychosocial workload as all the factors that causes *directly as well as indirectly* stress referring explicitly to sexual harassment, aggression, violence and mobbing (emphasis by the authors). See more about this in §10.04 below.
24. At present there are more than 130 Arbo catalogues.

for damages arisen in the past, has had a substantial influence on this policy. In a series of decisions the Supreme Court constantly has decided in that way (the first one dates from 1993: HR 25 June 1993, NJ 1993, 686. Since then, *inter alia*, HR 2 October 1998, JAR 1998/228).

Another example of explicit regulation in the construction industry is dealing with the lifting and pushing of heavy things. The DWC (Dutch Working Conditions Act) contains some general provisions on this issue. As usual it is a goal provision: the employer has to take care that lifting or pushing of heavy things (physical burdens) does not cause danger to the safety and health of the employees. Furthermore, it provides for some tools or working methods to help the employer to fulfil his or her care obligation. On this general basis the Arbo-catalogue contains among other rules a maximum burden of lifting of 25 kilo per person. This shows that the Arbo-catalogue is the more detailed regulation adapted to the special features of the construction industry.

Unlike the three first mentioned instruments, the Arbo-catalogues are not made by the government but by the employer(s) and employees or their organizations (see Figure 10.2).

This approach implies the involvement of trade unions and/or works councils. They are the main actors to make concrete norms and standards on healthy and safe working conditions. Actually they are the main actors for implementing the Act by making implementation rules.

A second non-government driven instrument is called 'standardisation'. Standardization is the task of a private organization, the Dutch Normalization Institute,[25] which develops and issues the norms to be observed by enterprises in a certain branch of industry. These norms have a private law nature. Since this type of regulation – a kind of self-regulation – can respond better and faster to new technical developments and the needs of the industries, the government supports the activities of this institute, as it considers them as an interpretation of what is requested according to the 'state of technology', a legal term used in the Arbo Act. In recent decades this institute has developed sets of norms, which standards, being private norms in nature, acquire a public law status if the government adopts them in its policy measures.[26]

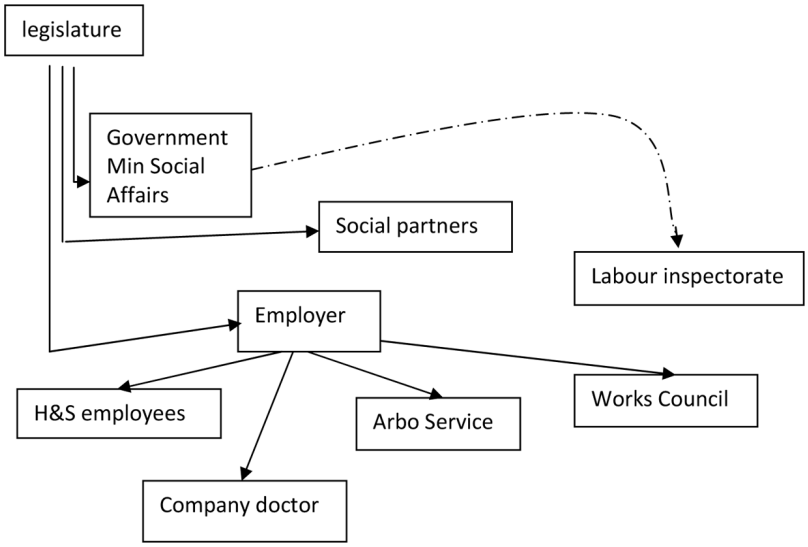
This practice can have some real shortcomings. Since the norms are of a private nature, accessibility, cognoscibility and legal certainty are not guaranteed. Mostly one has to pay for receiving a particular set of norms or to take part in the development of the standards. A shortcoming can also be that some parties that are involved, such as the workers and their representatives, are not allowed to participate in the development of the norms. Nevertheless, the norms can be applied as part of the set of health and safety norms to which the minister refers to in his or her policy measures.

Finally, the instrument of certification has to be mentioned. By this instrument the quality of the agents involved in the health and safety policy and practice of

25. The Dutch Normalisation Institute (NEN) was founded in 1916 by the Dutch Business and Trade Company and the National Association of Engineers. It has joined the International Organisation for Standardisation (ISO) and European institutions including the European Committee for Standardisation (CEN).
26. The Minister of Social Affairs, the competent person for health and safety issues, often refers to these NEN norms.

enterprises is checked and supposed to be secured. An independent body assesses whether the requirements for certification are fulfilled. It also periodically supervises the actions of the various bodies involved. The minister appoints the certification body and the Council for Accreditation checks the reliability and the independency of the certification body and its expertise.

Figure 10.2 The Actors



A general feature of the Dutch regulations in this field is that they are made by private parties. This private involvement is not unlimited, but beyond doubt the impact of private parties goes quite far. This can be seen from the structure of the standard setting as discussed *supra* and it corresponds to a main principle of regulation that has become quite common in Dutch labour law: retreat of the government and more room for self-regulation and self-responsibility. That phenomenon can also be seen in the approach of the financial consequences of damages due to occupational accidents and diseases.

As stated *supra*, the objective of the whole body of regulations is prevention. Only in case prevention has failed, compensation is an option. This is not a specific Dutch phenomenon, but characteristic for the Dutch system is the systematic use of a steering instrument: the financial incentive. In the last decade, financial incentives as steering instrument have become popular in Dutch policy. It is assumed that they invite or force individuals, employers and employees, to act in their own interest, but still in a way desired by the legislature and that they thus contribute to the attainment of the goals set in the law. Facing the payment of a substantial compensation for the damages suffered if the obligations have not been respected, the employer will 'voluntarily' act in conformity with the goal to be reached: healthy and safe working conditions.

This approach has reshaped the responsibilities of the parties and is put in practice in two ways: (a) by threatening with financial compensation in case of damages suffered (to be paid by the employer) and (b) on the side of the employee: a denial of a financial compensation if s/he fails to contribute to the prevention or to reduce the damages s/he might suffer or is suffering. The legislature has introduced – financial – incentives to the parties directly involved in working environment. It is supposed to be an incentive to improve and maintain healthy and safe working conditions. Protection is a responsibility once and for all of the employer(s) and the employees.

§10.02 BASIC CONCEPTS

[A] The Concept of Health and Safety and Risks

The present Dutch law neither explicitly uses nor provides for a definition of health and safety or working conditions. Even an explicit concept of health and safety is lacking.

The meaning and the content of health and safety at work may vary with the time, the state of knowledge and technical developments. For that reason, the legislature found it neither fruitful nor effective to define health and safety at work. Nor does a definition fit into the 'new' approach, also advocated at the European level.[27]

It seems more interesting and important to see whether the law indicates which risks are covered by health and safety regulations and which dangers or dangerous situations have to be effectively combated by taking protective and preventive measures. The Act takes a pragmatic approach: the employer has to develop and apply a policy in that field. In the words of Article 3 Arbo Act: 'the employer provides safe and healthy conditions concerning all aspects connected to the work to be done; he also pursues a policy that aims at working conditions that are as good as possible. To attain that goal, several obligations rest on him'. These obligations are phrased in a general way and do not contain detailed and concrete instructions. Also the – before mentioned – *Working Environment Decree* and, more importantly, the *Working Environment Regulation* (WER) do not provide instructions. They generally indicate and list the risks and the dangers to be avoided and which, if they occur, have to be taken away or remedied. The more detailed regulation has to be found in the Arbo-catalogues as mentioned above. But even in these instruments a body of detailed instructions is lacking.

[1] Legislation

The body of rules depicted above shows in the first place that physical risks are covered. These risks still belong to the usual treatment of accidents and diseases[28] and

27. Cf the Framework Directive 89/391/EEC.
28. We refer to accidents and diseases that cause physical symptoms.

form a main part of the various regulations: to prevent or to remedy injuries by dangerous, toxic substances, machines, tools, equipment etc.

Over the past few decades, 'new' risks have been introduced in the legislation. In 1993, by amendment of the ARBO of 1980, psychosocial risks were taken on board. Article 1(3)(e) ARBO refers to psychosocial workload as containing 'all factors which either directly or indirectly, including sexual harassment, aggression and violence, mobbing and heavy workload, may cause stress at work'. Stress is defined as a situation that causes negative physical, psychical or social consequences. The Act provides that these factors are relevant if they cause stress at work. Sexual harassment and aggression as such do not fall under the terms of providing safe and healthy working conditions, this is only the case if they lead to stress. However, since the term stress is rather widely defined, in practice these psychosocial risks are covered by the Act and are recognized as risks for the health of workers. So if (sexual) harassment or mobbing result in medical problems (including mental illness) it is very likely that these risks fall within the scope of the regulations. Under discussion is still whether all 'modern' diseases such as Repetitive Strain Injury (RSI), burn-out and impaired neuropsychological development fall under the concept of (new) risks covered by the regulations.

As indicated above, in this respect the Arbo-catalogues are very important sources, because they are more elaborated as to risks covered and the measures to be taken. Most of the industries issue rules in various forms, containing all kinds of means, tools and instruments dealing with physical as well as psychosocial risks and dangers. They may differ in the details of their provisions, but they all provide information and give proposals for improving the working conditions. In nearly all of them attention is paid to the psychosocial risks related to performing work in specific industries. Psychosocial risks are most often described in more specific detail in the catalogues (see the example of the construction industry, mentioned *supra*). A striking example is found in hospital care and in care in all kinds of homes (for elderly, disabled and young people).

Box 10.2. Care in nursing homes and private houses

This sector knows an extensive catalogue on this issue. The catalogue contains a detailed regulation of the physical risks related to the specific tasks to be performed in this sector such as lifting of patients, helping people who are not able to do the necessary things as to his or her external care. Next to these issues there exists an extensive body of guidelines related to psychosocial issues from harassment, overburdening, burn-out, stress. The guidelines contain checklists on which a policy of the institution can be assessed whether it is aiming at sufficient, operative and effective means to prevent physical overburdening. It can be helpful when establishing or filling in the risks inventory and assessment. It is providing all kinds of tools to attain that goal.

In the sphere of psychosocial risks the catalogue entails a whole body of means and tools. The approach is the common one in Dutch practice. The catalogue is laying down the obligation for the employer to carry out a preventive policy in order to protect the employees against aggression, violence, harassment and mobbing. It should contain a code of behaviour, information on harassment and training of employees, a procedure of reporting and registration of incidents of harassment, reception, guidance and after-care of employees exposed to harassment.
As to work-related stress the catalogue provides for a five steps approach. The first step is making a system of picking the signs and inserting them in the (mandatory) risks inventory and assessment. Second, if necessary carrying out a research to get a better and deeper insight the problems that could cause stress. The third step is taking effective measures in order to reduce the workload to be laid down in a concrete plan. The fourth and fifth stages are the carrying out of the measures in practice and checking the effect of the measures.

[2] The Role of the Courts

A second source, equally or even more important, is the judge. The labour law judge as well as the social security law judge play an increasingly important role in interpreting the concept of risk of health and safety. This is at least partly due to the fact that the legislation is rather vague and leaves room for the courts to interpret the content and to determine the boundaries of this term.

For instance, employers are subject to the obligation to pay damages to the extent that they can be held responsible and liable for not observing the – health and safety – obligations imposed on them. Since the law uses very wide and open norms it is to the judge to take a stand in the dispute, not only on which risks are covered, but also whether one or both actors have infringed the law on health and safety at work. In an extensive case law, courts have shed light on these problems. The legislature has deliberately chosen to leave room to the courts in order to give room for more flexibility. Since central legislation is deemed not effective and too far from the workplace and courts are considered much better equipped to assess the concrete circumstances of the case.

[B] The Risks Covered

As in all legal systems, traditionally the focus of the regulations lies on the physical risks. That was mainly due to the dominant character of economic activities, mainly of a manufacturing nature. The change of focus in the 1990s has been caused by various factors. An important one is the extended introduction of advanced technologies which has influenced the production methods substantially. The rise of the services industries connected to a decline of the traditional manufacturing has also contributed to other kinds than physical risks. Another development to be mentioned is the increasing attention to issues as (all forms of) harassment as part of a growing awareness of discriminatory practices, more in particular on enterprise level. The new risks are taken together under the heading of psychosocial risks. In the regulatory field, the state

reacted by introducing state regulation. Also in the case law the courts, faced with problems connected to all kinds of psychosocial risks are dealing with it. From the statistics of the causes of accidents and occupational diseases it is evident that the psychosocial risks are taking an increasing share. Nearly 25% have a psychosocial background.

Special attention should be paid to the regulations on working time. The connection between health and safety on the one hand, and working time on the other is since the first regulations either on working time or on health and safety common. The first regulation on working time whether it concerns young workers or women, is based on health and safety of these groups of vulnerable workers. The Working Time Directive of the European Community of 1993 (Directive 93/104/EEC) was directly based on the health and safety of employees. It was (re)confirmed by the decision of the Court of Justice in 1996.[29] We will deal with this issue separately.

[1] Physical Risks

Traditionally, these risks were covered by extensive and detailed state regulations. By adopting the new approach in the 1980s, the government and the parliament have deregulated the body of laws. The detailed state regulations have been replaced by the Work Environment Decree and the Work Environment Regulation and more in particular by the various Arbo-catalogues. These instruments were perceived as more adequate because they fit better to the demands, needs and possibilities of the enterprise and were, for that reason, deemed to serve the health and safety of the employees better. The WED and the WER contain only partly concrete substantive norms, mostly minimum or maximum provisions (noise, toxic agents etc.) or prohibitions.[30] In general, the provisions of these regulations are so-called purpose provisions: aiming at achieving a pre-established objective. Leaving room for the employer to choose his or her own methods and measures provided s/he achieves what the law prescribes.

Box 10.3. In particular for the construction industry Article 3 paragraph 16 of the WED states that in order to prevent the danger of falling a safe scaffold or floor has to be built; anyhow measures against the danger of falling have to be taken in case of the existence of a working environment that entails an increased risk of falling, such as holes in a floor, or in case the danger actually exists that a fall of more than 2.5 meter can occur.
Another example is Article 5 WED that stipulates in general that work has to be organized, the production methods have to be used or protective tools have to be available in such a way that the physical burdening does not endanger the health and safety of the worker.

29. ECJ 12 Nov. 1996, Case C-84/94. (*United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*), [1996] *ECR* I-5755.
30. For instance, a prohibition of the use of certain substances unless in exceptional (controlled) situations.

Another instrument that is often used in regard to physical risks is the use of limiting values. In particular it is used in industries where workers are exposed to noise and toxic agents.

Box 10.4. In this field the whole range of regulatory instruments is used. The WED provides the Minister of Social Affairs with the power to issue special regulations on these issues. For the various toxic agents the regulation contains detailed limiting values the workers may be exposed to. In case the exposure is going beyond the maximum or possibly could go beyond, the employer is obliged to take the necessary and effective measures to secure the health and safety of the worker.
An example of the construction industry: these Ministerial regulations are elaborated by Arbouw[31] in the Arbo-catalogue which provides the employer and the worker with concrete information, tools and methods how to handle situations where workers could be exposed to, inhaling toxic agents.

In case purpose provisions are not suitable, because the objective cannot be formulated in sufficient clear terms, the Arbo law is offering an alternative: process-provisions. The employer has to develop and to follow a procedure aiming at identifying, assessing and handling the risks to which the workers are exposed. This is part of the general duty to care.

Apart from the regulations by decrees, regulations and catalogues, the protection against physical risks is also an issue in the case law. It is for sure that the situation in the field of physical risks is clearer than as to psychosocial risks as we will see hereafter.

When an employee suffers damages caused by an accident while performing his or her tasks or suffers from an occupational physical disease which relates to the work done, the employer is held responsible and liable. The employee has to make plausible that the damages have occurred during performing the work; the employer has to prove that this is not the case in order to be released from his or her responsibility and liability. Actually the employer has to prove that s/he has complied with the responsibilities expressed in Article 7:658(1) CC.[32]

This provision[33] imposes obligation on the employer to take such measures as to the equipment and the maintenance of the workplaces, to the tools used for performing the work and to give orders and instructions to the employee for performing the work as may *reasonably* be deemed necessary to prevent the employee from suffering damage while doing his or her work. In Article 658(2) the employer is made liable for

31. Arbouw is the bilateral body representing Dutch employers and employees in the construction industry: www.arbouw.nl
32. This is in conformity with the wording and the meaning of the Framework Directive 391/89/EEC which contains a similar obligation.
33. This provision is part of the law on the employment contract, which in its turn is part of the Civil Code. It has to be borne in mind that this provision of liability differs from the common provision on civil liability in the sense that the burden for the employer is much heavier than in civil law for a person who caused damages to another person. The liability under common civil law is more a 'liability based on guilt', which implies that in case the person who suffered damages (caused by an accident by the other person), has (partly) contributed to the occurrence of the damages, is also liable. This can result in shared liability. Such shared liability does not exist in cases based on Art. 658 CC.

any damage which the employee suffers while carrying out his or her work, unless either the employer can prove that the obligations referred to in paragraph 1 have been respected and complied with or the damage was to a large extent the result of *intent* or *deliberate recklessness* of the employee.[34]

These obligations are elaborated by, *inter alia*, the provisions of the Health and Safety legislation (Arbo Act, the WED and WER and more in detail the Arbo-catalogues). The risks inventory and evaluation is in this respect a very important source, since the inventory and evaluation have to contain concrete measures to prevent the occurrence of the risks at the level of the enterprise. When assessing the liability of the employer, the court takes all these aspects into account. The employer has to provide information to his or her employees and must train them to make them aware of the risks. The mere existence of protective measures (equipment, tools) is not sufficient to become (released) exempted from liability.

Employers have to check periodically whether the measures are actually applied and the instructions followed by the employees, where they have to take into account that employees when doing a job on a routine basis may become inattentive as to the exact application of the rules and thus incur safety or health risks. Courts have to weigh all such aspects when deciding a case.

Special attention has to be paid to RSI. The problem here is to decide in an individual case whether this injury has been caused by the work performed. One essential element of the liability of the employer is whether the damages have arisen either while the employee performed the work; whether they are (mainly) caused by activities in the private sphere; or, as a third possibility, whether they are caused as a result of a combination of factors at work and at home. In the second situation, there is no liability of the employer, whereas in the first situation there is no doubt that s/he is liable. But even in this case the employee bears the burden of proof: s/he has to provide sufficient evidence that the damages occurred while s/he was exercising his or her tasks. The existence of a causal link between the injury and the work performed has to be proven by the employee.[35] The medical report addressing this particular issue may play an important role in this procedure.

To conclude: in cases of physical damages, the burden rests mainly upon the employer when an accident at work has caused damages or in case of an occupational disease. The employer is relieved from his or her obligations if s/he can prove that s/he has done what reasonably can be required in order to avoid the occurrence of the accident or the occupational disease or in case the employee has caused the damages intentionally or due to deliberate recklessness.

34. The obligation is not absolute: what the employer *reasonably* has to do taking into account the state of knowledge, science and technology.
35. HR 23 Jun. 2006, JAR 2006/174. The Supreme Court does not require a full proof, but the employee has to make sufficiently plausible that there exists a causal link. If he succeeds, the burden of proof shifts to the employer.

[2] Psychosocial Risks

The recognition of this type of risks causing problems of health and safety at work and for that reason to be taken seriously, took place at first in the ambit of the social security law and practicing policies. Psychical deficiencies were considered as causes for illness and disability and therefore covered by the sickness and disability schemes. The substantial attention in the health and safety at work politics for this kind of risks as causes of accidents and occupational diseases dates from the end of the twentieth century. The Arbo Act was dealing with sexual harassment by introducing in 1998 a – rather detailed – definition of this term.[36]

Since then, it belonged to the whole body of measures the employer has to take as part of his or her 'duty to care' in order to prevent (sexual) harassment could take place or to take the necessary measures by which the employees exposed to harassment were adequately and effectively protected. By a more general change of the health and safety at work law in 2007 psychosocial risks have been explicitly included in the legislation. As we have seen before, in the Arbo Act psychosocial risks have been defined as 'psychosocial workload that contains all factors that either directly or indirectly may cause stress at work'. It includes sexual harassment, aggression, violence, mobbing. In the same article, stress is defined as 'a situation that causes negative physical, psychical or social consequences'.[37] It has been elaborated in the Decree on the Work Environment (WED): if a worker has been or could be exposed to psychosocial workload, measures have to be taken in order to prevent or, if that is not possible, to reduce the psychosocial burden at work; such plans have to be based on and inserted in the mandatory inventory and evaluation of risks workers are facing or could face at work in the enterprise.[38] Similarly to the 'traditional' risks, the psychosocial risks are further elaborated in more detailed rules to be followed and aiming at the achievement of the main objective. The numerous Arbo-catalogues are providing for more extensive rulings and measures that could be taken in this respect. They all have a paragraph on psychosocial risks but the extent of detailed rules and measures to be taken varies widely. They are addressing the usual forms such as stress, burn-out, harassment, mobbing, overburdening. In some sectors, special issues are addressed such as violence, be it physical or more psychical.

The concept of psychosocial risks has been subject to court cases since the early 1990s. The first – lower – court decisions dates from 1991 to 1995 in which sexual harassment was the subject matter. Usually it was directly connected to dismissal cases.[39] Since 2003, burn-out and stress have been subject of court cases.[40] In these

36. It has been part of the implementation of the Equal Treatment legislation of the European Union. Cf. Article 1 para. 3 of the Arbo Act 1998.
37. Article 1, para. 3 sub E and F of the Arbo Act.
38. Article 2.15 WED. In para. 2 of this Article, an obligation is added for the employer to inform and to offer training to the workers about the risks (in particular the psychosocial risks).
39. Between 1991 and now, there have been more than fifty cases. Only one case was about something else.
40. The cases were based on the specific liability of the employer for the damages caused in the working environment. The number of court cases is not very high, around fifteen.

cases, the courts found that it is the responsibility of the employer in the first place to take the necessary measures to avoid, prevent and anyhow remedy situations leading to sexual harassment and stress or burn-out. If s/he fails to fulfil his or her duties, s/he is responsible and liable for the damages caused or in case of dismissal the dismissal has been declared invalid resulting usually to an increased amount of compensation.

In 2005, the Supreme Court issued a decision on the coverage of psychosocial risks.[41] It confirmed the case law of the lower courts and by that it put an end to the uncertainty, raised in practice and in literature as to whether also these risks fall under the protection of Article 7:658 CC and if so, to what extent. In its decision the Supreme Court decided that not only physical damages are covered by that provision, but also psychical damages in case it was about overburdening of the employee for several years. In the view of the Supreme Court, there is no reason that the liability of the employer being based on the principles of Article 7:658 CC – which include the obligation to care, aiming at prevention or, in case that is not possible, to reduce the occurrence of the risks covered as well as the consequences if the risks occur – is limited to physical damages. The employer is also liable when psychosocial damages have occurred because:

> it is the employer who determines in a decisive way where and how the work has been and has to be performed as well which equipment and tools are or will be used. A restrictive interpretation of Article 7:658 would lead to an arbitrary distinction, since physical and psychical welfare are closely linked. Therefore there is neither a fundamental nor a practical justification for restricting the damages to be protected by Article 7:658 CC to situations in which only physical injury or harm occurred.

After this key decision, courts have been faced with various questions on what has to be understood by psychosocial risks and whether certain forms of psychosocial damages fall under the protective umbrella of Article 7:658 CC. In a series of decisions, the scope of this article has been extended to various manifestations of psychosocial diseases. For instance, burn-out is acknowledged as an occupational disease[42] if it has been caused by doing the work. That does not imply that the employer is responsible and liable in all cases where a burn-out is at stake. It has to be sure that the burn-out is caused by or during the exercise of the tasks by the employee. A problem can arise when the burn-out is partly or mainly caused by circumstances in the private life of the employee. Generally, this problem is solved by assuming that the damages are caused by the performance of the work, unless the employer can prove that s/he has taken all the necessary measures which can reasonably be expected to prevent or to reduce the risk of becoming burnt-out.

Another key element that has been developed in the case law is whether the employer – reasonably – could have foreseen and recognized that the way the employee was performing the work, should or could lead to an overburdening of the

41. HR 11 Mar. 2005, JAR 2005/84 (ABN-AMRO/Nieuwenhuys).
42. In The Netherlands, there does not exist a closed list of industrial or occupational diseases.

employee.[43] In such cases even a pro-active approach can be demanded from the employer.[44] The same way of reasoning is used in cases in which stress is at stake.

In cases of harassment, mobbing and aggression (by other employees or clients) leading to illness or at least incapacity to work, the employer is obliged to take measures to stop and prevent further damages to the employee. To be relieved from responsibility and liability, the employer has to develop and pursue an effective policy aiming at prevention of the occurrence of these risks. In such circumstances, a pro-active approach can be required as well.

Sexual harassment is addressed in the ARBO and in the Act on Equal Treatment (ET Act). Before 2007, the ARBO explicitly mentioned and defined sexual harassment, but in 2007 the definition has been replaced by a general term: 'psychosocial workload', that explicitly includes sexual harassment.

Finally, it has to be mentioned that certain decisions or actions of employees can lead to liability of their employer when they result into the mental injury of fellow employees. In such cases, it has to established whether the employer has infringed the so-called employer's *Fürsorgepflicht*, i.e., his or her duty to care, which can include the obligation to take measures aiming at protecting the fellow employees against this kind of actions. This duty is based on a general obligation in the CC that imposes the employer to act as 'a good employer' (Article 7:611 CC). If the employee suffers damages by falling mentally ill and s/he is therefore not able to perform the tasks, s/he may be entitled to compensation.[45]

As mentioned above, in cases of a combination of causes partly within the working environment and partly in the private sphere, the problem arises whether the responsibility and the liability have to be shared by both: the employer and the employee. Since the Article of the Civil Code – Article 7:658 CC – uses the adagio 'all or nothing', it is logical that only in particular circumstances the employer and the employee share the risks. There are a few cases in which the courts decided that such situation was indeed at stake. These decisions were based on medical reports in which the medical experts give a reliable estimation of the risks borne by each of the parties. So it has to be clear that the damages are caused by the exposure to risks at work and by the behaviour of the employee him or herself.[46]

43. Supreme Court (HR) 27 Apr. 2007, JAR 2007/177. Generally speaking, the employee has to give indications to the employer that the workload is too heavy and that (s)he cannot handle it (HR 3 Apr. 2009, JAR 2009/111). The judges are rather reluctant as to the extent the employee has to inform the employer. If the employer is or can be aware of the personal characteristics of the employee that (can) contributes to the illness due to a burn-out, the employer is liable. Information by colleagues of the employee has to be taken into account as well. Recently Gerechtshof 's-Hertogenbosch (Court of Appeal) 9 Nov. 2010, JAR 2011/41.
44. Gerechtshof 's-Hertogenbosch 18 Feb. 2011.
45. S/he is entitled to the continuation of payment of the wages during the illness; see §10.04[B][2][b] below.
46. The case law has been developed in the asbestos cases: when an employee suffers cancer caused by being exposed to asbestos and by continuing smoking the court has divided the liability between the employer and the employee. HR 31 Mar. 2006, JAR 2006/100 and in nearly similar case HR 9 Jan. 2009, JAR 2009/59. This approach is criticized by labour law scholars because the estimation by doctors is at least questionable.

The issue of psychosocial risks resulting in illness occurs also as to the question whether the employee will be paid during sickness due to psychosocial causes. In this context, the question could rise whether the symptoms of an employee are recognized as illness, which is a requirement to be fulfilled in order to become eligible for payment of the wages by the employer according to Article 7:629 CC.[47] The solution of the courts is comprehensive. The judges rely on the view of the medical doctors. If they decide that the illness is caused by psychosocial problems, the judge accepts this view. There is no case law in which a court decided 'on its own' that a symptom is of a psychosocial nature or not. The law requires that the sickness has to be based on a cause objectively medically recognized as such.[48]

A related problem which has occurred in practice is that it is uncertain whether the labour inspectorate in its capacity as controller of the workplace and the methods of working, has any competence in the private sphere of the employee (including when s/he is working at home) in order to make the working situation safer and healthier. This problem does not only occur in cases of psychosocial risks but also in cases of physical accidents and diseases.[49] Since the inspector has the competence of checking and interfering only within the workplace one can wonder whether s/he can effectively operate. Until now this problem has not been solved.

[3] Working Time

Similarly as the Working Environment Act, the Working Time Act of 1996 (WHA)[50] imposes on the employer the obligation to care in terms of an obligation to pursue a policy in the enterprise in relation to the working time. Article 4, paragraph 1 of the WHA states: 'the employer pursues a policy as to working time and rest periods as appropriate as possible; he takes into account as reasonably can be required, the personal circumstances of the employees'. The WHA is directly related to the WEA where the first declares that 'the policy with regard to working hours and rest periods has to be pursued in connection to the policy on health and safety of the workers'.[51] According to the general structure of the WEA, the policy of the employer on working time has to be based on a (written) inventory and an evaluation of the risks establishing the risks the actual working time can cause. On that basis, the actual working time has to be arranged in such a way that damages to the health and safety of a worker will not occur. Also, in this field prevention is the first aim of any regulation by the employer. The act contains only minimum norms to be respected.

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47. We will deal with this Article of the Code Civil hereafter in more details, in §10.08[B][2].
48. In case of a conflict between the employer and the employee resulting in a notification by the employee s/he is psychically ill caused by the conflict, it can be decided that this is not an illness according to Article 7:629 CC. Cf. S. Klosse & F.M. Noordam, *Socialezekerheidsrecht* (Kluwer, 2010), 281.
49. The most striking examples are dangerous sports, or at least sports that are risky as to causing injury; and leisure activities in which one can be exposed to dangers or risky situations.
50. Replacing the working time regulations from the (general) Labour Act of 1919 in which the working time was regulated.
51. Article 4:1 WHA refers to the WEA explicitly.

Apart from the prohibition of child work aiming at the protection of the health and safety of the child and supporting the education of the children, the Act does not contain regulation for categories of workers. The reference made in the Act to the personal circumstances of the employee provides for a tool for the employer by establishing the working time schemes for his or her employees within the enterprise to take the personal circumstances of an employee into account. Pregnancy and the period after confinement are explicitly mentioned in the law as a personal circumstance to be taken into account (Article 4:7 WHA). This fits in the policy of making the combination of work and care not impossible or too much hampered by working time arrangements.

Since 2003, the Act has specified this aspect: 'personal circumstances' implies caring of children, of (dependent) family members and relatives as well as societal responsibilities taken by the employee. It is not an absolute protection since the law is using a 'reasonability' clause implying that the interests of the individual employee have not per se priority over the interests of the enterprise. Economic interests may not endanger the health of an employee but the employer has some room to regulate the working time when weighing the interests of the enterprise and of the employee. In case law the judges are weighing these interests in the individual cases. Against the primary obligation of the employer on the employee lies the obligation of the latter to be reasonable as to the working time proposed by the employer . The judge decides on the basis of the concrete facts of a case.[52]

An important element could be and usually is whether the works council has given its consent to the proposed working time schedule. According to Article 27 of the Works Council Act, the works council has a right to give or to deny its approval to a regulation of the working time and rest periods in the enterprise. In its decision of granting or denying its approval the works council can take into account whether and if so, how the employer is taking care of the health and safety of his or her employees when establishing the working time.

The Working Time Act provides for minimum norms as to the maximum working time and the minimum rest periods. The Act is following the norms set in the EU directive 2003/88/EC.[53] Health and safety considerations are explicitly taken into account as to the regulation of night work. On this issue, the WHA is directly related to the WEA. Article 18 WEA states that employees who are working in night shifts are entitled to regular medical check-ups. In case it appears from these check-ups that the employee is suffering damages to his or her health, the employer has to adapt the working time unless it is reasonably impossible for him or her to do so.

52. See, for instance, Kantonrechter Leeuwarden 5 Apr. 2006, JAR 2006/109.
53. Including – in general terms – the case law of the CoJ as to the definition of working time in the cases of Simap (Case C-303/98), Pfeiffer (Case C-397/01 to C-403/01) and Jaeger (Case C-151/02).

§10.03 THE PERSONAL SCOPE OF APPLICATION AND THE DUTIES OF THE PARTIES

[A] The Scope in General

The Arbo Act, the decree and the regulation address employers (private as well as public employers). The regulations on sectoral and branch level cover all employers of the sector or branch concerned. If a catalogue has been established on enterprise level, it (solely) binds the enterprise concerned. As said before, if it is not a collective agreement, the catalogue does not have a legally binding effect. In such case the employers are allowed to deviate from the catalogue, but they have to meet the requirements of the Act by offering the same level of protection and solutions equivalent to those contained in the catalogue. Supervision of abiding by the Act is the responsibility of the labour inspectorate and/or the parties which adopted the catalogue.

Catalogues contain a series of duties for employers and employees. Public authorities supervise the catalogues only marginally. This concerns the way the catalogue has been established. Relevant is whether the catalogue defines for which sector or branch the catalogue applies. Also relevant is whether those who adopted the catalogue represent the employees and employers of the sector or branch concerned. Part of this supervision is that the inspectorate checks whether the catalogue is available for the employers and employees concerned. Finally, it is checked with the help of a so-called *quick scan* whether it can be assumed that by following the catalogue the goal provisions of the Act are implemented.

Catalogues which satisfy this marginal test are mentioned in a general policy rule, issued by the minister. By referring to the catalogue in a particular policy rule, the government makes clear that by following the catalogue it can be assumed, in principle, that the statutory obligations have been complied with. As a result, the catalogue as such is not binding for the individual employer, but it is 'a benchmark' for following the statutory goal obligations.

An individual company can thus deviate from a catalogue, if it demonstrates that it satisfies the goal provisions by providing an adequate safety level.[54]

On the employees' side all employees regularly working at the workplace or the place they perform the work under (formal or actual) supervision of the employer are covered by the Act, the decree and the regulation. They are also bound by the catalogue in the same way as they are by a collective agreement if the catalogue is such an agreement.

If the catalogue has a voluntary character, it depends on the employment relationship, whether the catalogue has a binding effect. If the catalogue is referred to in the individual employment contract, it has binding effect. Also if the employee claims that the employer has not adequately fulfilled his or her obligations 'as a good

54. Unless the subject has been regulated by a collective agreement to be applied to the enterprise.

employer', the standards of the catalogue may be referred to and thus become relevant for deciding the case.

Besides the regular employees, also other persons working under the supervision of the employer are covered, such as temporary agency workers, apprentices, home workers,[55] self-employed persons and employers who perform the work jointly with their employees. The user firm is responsible for all the workers carrying out the work. In some cases there is a joint responsibility and liability of the user firm and the posting firm or agency. That implies that most of the subcontractors are bound by these instruments.[56]

[B] Scope of Application and Special Groups

The Arbo Act applies to persons working on the basis of an employment contract regardless whether they have a contract of indefinite period of time, fixed term contract or a contract on call. Also civil servants are covered and persons who work under supervision of another person without an employment relationship, for instance trainees.

The act also applies to pupils and students in schools and in open areas if they perform activities that resemble work.

Also home workers are subject to this act; this is provided by the Working Environment Decree (WED).

In general, the Arbo legislation is applicable on all employees. Only for two specific groups of persons employed in an enterprise special, more protective regulations exist.

A special problem arises as to the so-called self-employed persons without staff.[57] Since they are considered as independent workers they do not have a contract of employment, even though they may be economically as dependent on a principle as employees are. They work on commission which implies they have no employer. They are neither covered by labour law nor by employees' schemes of social security.

Currently, it has been proposed that they will be covered by health and safety regulations when they work for a firm. There is also a proposal to subsume them under the (public) Disability Benefits Act.[58]

55. Unless they operate as self-employed persons. So if they are not self-employed they are covered, regardless whether they work under a contract of employment or not.
56. It has to be taken into account that catalogues are usually voluntary. That means that the responsibility of subcontractors is not so heavy.
57. The number of persons under this heading has increased since the last decade. By estimation they amount to 750,000 people. See also *The Protection of Working Relationships. A comparative study* (F. Pennings & C.Bosse eds., Kluwer L. Intl. 2011).
58. At the moment, they have to rely on a private insurance against accidents, sickness and disability.

[1] Young Workers

For persons under 18 – young workers – a special regime applies, following from the implementation of Directive 94/33/EEC on the protection of young at work.[59] This also applies to pupils and student and trainees. These persons are covered by the Arbo Act and some additional rules of the WED. These provisions require that in the risk inventory and assessment which an employer has to perform, young workers are especially taken into account. For this purpose the specific risks have to be assessed which are the result of a lack of work experience, the inability to assess the risks and a not yet completed physical and psychical development. Also the organization of the work place has to be taken into account and the nature and duration of effects of agents and physical factors. Also the training level of the young and the need for information have to be assessed. The young are entitled to medical examination if it appears from the risk inventory that they have to do work with specific risks meant in the previous sentences and the employer has to organize adequate supervision which takes account of these risks.

In relation to other specified dangerous goods or agents they are allowed to perform the work only if they work under expert supervision which can prevent the risks. There are also a number of prohibited activities, such as working with specific dangerous goods, to be exposed to toxic or biological substances, or working under particular noise levels or dangerous vibrations (Article 6.27 WED).

From the point of view of concern with the health and safety of young workers at work, the Working Time Act prohibits young workers to work (Article 3:2 paragraph 2 WHA). The Act defines young as persons less than 16 years of age. These young persons are protected for doing work based on an agreement. This may be any agreement to which not only the child, but also other persons are committed. This rule implies a broad interpretation and includes also unpaid work on a voluntary basis. For some types of work an exception has been made, related to specified age groups. For example, non-industrial work of a light nature can be done by children of 13 years and older and newspapers can be distributed outside school hours by children over 15 years of age. Another exception is provided by the WHA giving the labour inspectorate the competence to make exemptions for certain activities of young persons subject to a general clause: the work carried out may not harm the health of the child and may not collide with school hours.

[2] Women

There are no special rules for women; only in relation to pregnant women, who have recently given birth and those who are breastfeeding (hence: protected women). These follow from Directive 92/85/EEC of 19 October 1992 on the introduction of measures

59. OJ *L* 1994, 216.

to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.[60]

The Working Time Act provides that the work of a pregnant worker has to be organized in such a way that account is taken of her special circumstances. Furthermore, the protected women are entitled to extra breaks and the right to work in a steady and regular working pattern. In principle she cannot be obliged to perform night work (unless the employer shows that this can reasonably not be required from him) and to work more than ten hours in a service, more than fifty hours a week in a period of four consecutive weeks and more than on average forty-five hours in a period of sixteen consecutive weeks. The employer shall allow the pregnant worker to undergo the necessary medical pregnancy investigations and she remains entitled to wages if these had to take place during working time.

In addition to these rules, Article 4:6 of the Working Time Act stipulates that the employer has to organize the work is such a way that the pregnant worker does not work during the period of twenty-eight days before the presumed day of delivery and not during forty-two days after the delivery.[61] The special rules on working times which apply during pregnancy apply also six months after delivery. During the first nine months of the life of her child, the mother is entitled to interrupt her work for breastfeeding or expressing milk and to do this in an appropriate room (for at least a quarter of the working time per service).

The WED provides that the employer has to make a risk inventory (such as we discussed in relation of the young workers) if s/he employs protected women. The Decree prohibits some activities for the protected women (Article 4.109), such as when she has to work with specific goods or agents or activities such as, like in the case of young, diving and work underground (Article 6.29 Decree).

§10.04 THE DUTIES AND ROLES OF WORKERS' REPRESENTATIVES

Pursuant to the character of legislation in this field, i.e., self-regulation, the role of workers' representatives has been increased. An important development is the introduction of Arbo-catalogues in the last decade as effective instruments. As said above, the workers' representatives, be it the trade unions or the works councils, are one side of the key players by establishing these catalogues. In the process of framing the Arbo-catalogues the trade unions participate in the negotiations with the employer(s), even when they do not reach an agreement. It is the explicit objective of the legislature that the social partners make rules which fit best with the requirements of the sector involved and are thus as concrete as possible.

Since works councils operate at enterprise level, they play a different role. Their functions, rights and duties are governed by the Works Council Act (hereinafter WCA).

60. OJ *L* 1992, 348.
61. These are the periods the employer is not allowed to employ the woman; the periods she is entitled to leave are longer i.e., one month before the delivery and three months after the delivery.

The WCA itself refers in several provisions to the field of health and safety. The role of the works councils on this field has been strengthened over time. Initially the works council has been attributed with the right to be informed and consulted on health and safety issues as part of the right to give an advice to the employer according to Article 25 WCA. Also the Arbo Act contained provisions on the workers' involvement which overlapped the regulations in the WCA substantially. By an amendment to the Arbo Act in 2007, a de-duplication took place by repealing the provisions of the ARBO which doubled with the obligations following from the WCA. The aim of the government and the parliament was a reduction of the bureaucratic burden for the employer. The Arbo Act kept a general provision aiming at a good co-operation between the employer and the works council in developing and carrying out a health and safety policy in the enterprise.[62]

The most important provision in the WCA is Article 27 in which the works council is attributed with a right to consent on health and safety issues. According to that Article, the employer needs the consent of the works council when taking decisions on the establishing, the changing or the withdrawal of rules or measures concerning the health and safety of his or her employees.[63] Though the wording is rather vague, its meaning becomes clear when the view of the legislature is taken into account, since this means that all kinds of rulings in respect to health and safety can be covered by this consent requirement.[64] Since in Dutch law the responsibility for health and safety measures was conferred to the employer, the potential scope of Article 27 WCA can be wide. Actually it will depend upon the role and acting of the works council what the scope will be. Although the WCA does not refer explicitly to the Arbo Act, it is obvious that the scope of Article 27 can be determined by the various regulations on health and safety. However, it has to be kept in mind that since the works council operates at enterprise level, the influence of the works council on the decisions of the employer is restricted to those the latter actually intends to take. The link between Article 27 WCA and the health and safety regulations indicates the possible issues subject to the consent by the works council. So if the employer wants to make rules at enterprise level within the ambit of the various obligations stemming from the health and safety regulations, the works council can claim that its consent is required. The restriction is that the regulations concerned must have a general nature. That means the regulation must be generally applicable and not be restricted to a single case or employee. The main subjects for which the works council can claim that its right of consent is needed include:

62. Article 12 Arbo Act. Until 2007, the employer had the obligation to inform on his or her own initiative (that means the employer has to inform the works council even when it has not asked for) the works council of a requirement for exemption of obligations, a requirement to stoppage of work, a requirement for abiding the rules and for reporting on accidents to the labour inspectorate.
63. Article 27(1) sub d WCA. According to this provision the requirement of consent applies also on issues as a policy to combat absenteeism due to illness as well as a policy on reintegration of (partly) disabled employees into work.
64. In this sense, the debates in parliament in 1996 and 1997; *Kamerstukken* (Parliamentary Papers) II 1996/97, No. 24 615.

(a) a ruling on the inventory and evaluation of risks;
(b) rulings on the prevention or restriction of heavy accidents due to dangerous substances;
(c) the establishment and the way of operating of prevention services; and
(d) the choice of the external service deploying the health and safety activities to be performed.

Since Article 27 WCA contains also an obligation for the employer to pursue an effective policy[65] on the prevention of illness of his or her employees as well as reintegration of workers who are partly disabled, the works council can claim its consent on the regulation the employer intends to make.

It can be concluded that the works council can have real influence on health and safety measures to be taken by the employer, at least when they make use of the powers conferred to them by the information and consultation provisions. The works council can decide itself the degree of its involvement. It even can extend its power if it is able (and powerful enough) to widen its involvement by concluding an agreement with the employer entailing extra rights on specific issues related to health and safety.

Finally, the WCA (Article 28) attributes to the works council the task to encourage the actual application of all health and safety measures and regulations taken by the employer. This article provides the works council with the possibility to check whether the employer actually applies his or her regulations and measures.[66]

§10.05 CONSEQUENCES FOR THE PARTIES AND REMEDIES IN CASE OF VIOLATION OF HEALTH AND SAFETY PROVISIONS

[A] Consequences for the Main Actors

The main actors in the enforcement of the health and safety measures are, on the one hand, the workers' representatives and employees themselves and, on the other hand, the labour inspectors. The inspectors check whether the employer complies with the rules laid down in the Act, the decree, the regulation and the catalogues. The Act has provided the labour inspector the power to check the observance of the rules and to give orders to the employer to comply with his or her duties within a prescribed period of time. The inspector is even allowed to order to stop the work or to order that the workers have to leave the workplace.[67] If the employer does not obey an order of the inspector, the latter can enforce his or her decision by imposing a sanction on the employer. There are several types of sanctions s/he can impose.

65. That means an obligation to take measures aiming at achieving that goal.
66. Another issue is whether the works council can enforce the regulations to be applied. Actually there are some obstacles in procedural law. Since the works council does not have legal personality it can start a normal civil law procedure, although in some cases the works council can start an interim procedure.
67. In that case the employer is obliged to continue the payment of the wages.

The main obligations rest upon the employer because s/he manages the production processes. The law, EU law as well as national law, is clear on this division of responsibilities. The employee has so-called derived responsibilities. S/he is obliged to follow the instructions of the employer, to use the equipment and tools in the way as prescribed by the various regulations and by the employer (Article 11 ARBO).

Apart from this, the employees' representatives have a role on behalf of the employees and the well-functioning of the enterprise. Their roles have been described above.

The redistribution of powers, responsibilities and obligations between the public authorities and the private sector, i.e., the employers, that has started in the 1980s and was completed in the following decades, has resulted in a new structure in which various actors operate. There are several reasons for this. Apart from the employers' liability framed by private law (labour law) principles, the law provides the employer with another set of obligations: on the one hand s/he has to continue to pay the wages of his or her employee while s/he is ill and not able to work, regardless the reason of the illness. So also in case of sickness caused by accidents at work or occupational diseases the obligation to pay the wages rests on the employer. However the employer has, on the basis of particular provisions of the Civil Code and the Sickness and Disability Laws (see hereafter), to make serious and effective efforts to re-integrate ill and disabled employees in their job or at least in a suitable job within the company.[68] For the fulfilment of these multiple tasks s/he has to make use of specialized bodies or persons.

These specialized bodies or persons can be special health and safety service providers or so-called prevention persons who have special expertise in the field.[69] In order to guarantee the quality of the service provided, certificates issued by a special body can be used.[70]

In order to be certificated, the provider will be assessed on reliability, independency and expertise. Besides these general requirements, certification norms have been developed by the parties themselves for the sectors or branches in order to adjust the requirements to the needs and peculiarities of the sector. It is expected that this kind of regulation fits better than public regulation with the specific needs. If a body or person has passed the certification procedure, it is assumed to be qualified.[71]

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68. According to the law, he is even obliged to look for a suitable job in other enterprises.
69. Usually the prevention persons are employed in the enterprise but they have (or must have) an independent role, independent from the employer; that means in this respect not subordinated to him or her. In case such a person fails to be present in the company it can be a service from outside the company. This external service needs to be certified by a special body competent to issue a certification.
70. These certifying institutions (of a private nature) have to be recognized by a separate independent institution: the Council for Accreditation, established by the Minister of Social Affairs. Cf. J. Popma, 'Normstelling tussen publiek en privaat', in *Het recht op veilige, gezonde en waardige arbeid*, ed. J. Popma (The right to safe, healthy and decent labour) (Geller Publishing: Nieuwerkerk aan de IJssel, 2008), ch. 5.
71. Research did not give clear evidence that this practice has improved the health and safety of and in enterprises. Most of the attention of these services seems to be devoted to guidance of employees aiming at reintegration in the job. Prevention does not have a high priority. Cf. J. Popma, 'Normstelling tussen publiek en privaat', in *Het recht op veilige, gezonde en waardige*

For norm-setting another instrument is used: standardization. A special standardization institution, a private institution, the already mentioned Dutch Normalization Institute (NEN), can issue standards for certain sectors or types of activities. The standards have the character of private law, but are adopted by public authorities. This approach is considered as the most effective, since it can quickly respond to new technological developments. Moreover, this kind of self-regulation is deemed to be advantageous, because it is supported by its users and thus it is expected that they will better abide by the rules.

As mentioned above, the labour inspectorate is the institution checking the implementation of the health and safety standards. It has been given the powers to do so by the ARBO and it is part of and supervised by the Ministry of Social Affairs.

Within this framework, the inspectorate has developed a policy how to check the implementation of the Act, since it does not have the means for an extensive and systematic check and assessment of all working situations. The labour inspection decides itself which sectors, branches or enterprises will be subjected to a checking procedure. In practice, this means that it reacts when its attention is drawn to a particular situation or when it suspects that there are problems or infringements of the rules in a particular enterprise.[72] In addition, it can organize random checks of the health and safety situation.

[B] The Arsenal of Remedies

On the health and safety laws, various remedies and sanctions are possible in case the obligations and standards are violated. One category consists of criminal sanctions. A second consists of private law remedies: this is the liability of the employer for damages (Article 7:658 CC) and the obligation of the employer to continue to pay wages to his or her ill employees for a maximum period of 104 weeks (Article 7:629 CC). Third, the health and safety law knows administrative sanctions.

[1] Criminal Remedies

The infringement of the duties and obligations of the employer laid down in the public regulations, can be sanctioned by a criminal remedy. The ARBO contains a general prohibition for the employer to act contrary to the law. Also if s/he neglects to act according to the law and s/he reasonably knows or should know how to act, s/he is considered to violate the law if his or her failure to act can cause danger to life or

arbeid, ed. J. Popma (The right to safe, healthy and decent labour) (Geller Publishing: Nieuwerkerk aan de Ijssel, 2008), ch. 5. The labour inspectorate is evaluating the practice regularly with a similar outcome.

72. Some sectors have a rather bad reputation: transport, subcontracting in the construction industry, catering and cleaning industries. The health care sector may be often a target industry, not because of its reputation but due to the fact that the work is often heavy and stressing.

serious damages to the health of his or her employees. The Act distinguishes between crimes and offences and different types of sanctions ensue for these.

A separate, general Act, i.e., the Act on Economic Crimes and Offences (*Wet economische delicten, WED*) defines a violation of the general obligations of the ARBO as a crime. The corresponding sanction is, according to the WED, imprisonment or a fine.[73] In addition, the ARBO provides explicitly which infringements have to be sanctioned as offences, punishable by a fine.[74] In case of recidivism, the fine can be increased by 50%. However, in practice the criminal approach is not the one usually chosen. This is because the labour inspector has to establish that there is a violation of the Act and second, the public prosecutor has to decide whether the employer will be prosecuted. Because of this complicated procedure and the defaming effect for the employer such prosecutions are rare.

[2] Private Law Remedies

Thus sanctions in case of non-abidance of the health and safety legislation are in practice private law sanctions. This is considered as more effective, since it provides an incentive to the main actors to act. Consequently, it is left to the employer[75] and the employee or their representatives to start a procedure by lodging claims before a civil court. It is left to the initiative of the employee (of the employer eventually) to attempt compliance with the obligations set by the law. Usually it is individual employees who go to court claiming the damages suffered by them or who require the continuation of the payment of the wage after they have become incapacitated for work. Only if the obligations of the employer rest on a collective labour agreement, the trade union is entitled to sue the employer on its own behalf, that of the employee or its member employees. Apart from procedures to claim compensation, the unions can follow summary proceedings in order to try to remedy the situation in which obligations following from health and safety law are not complied with. This kind of procedure can be used, and is actually used indeed to force the employer to fulfil his or her obligations, if necessary under pressure of a penalty. In a summary procedure the union can obtain result within a short time. Although such procedures can be successful, at least theoretically, they are rarely used. When trade unions are involved in negotiations on catalogues, they do not want to make use of the possibility of lodging a claim in a summary procedure and for individuals there are many reasons which make it unattractive to follow these procedures. Their dependent position in the enterprise is a real obstacle to go to court trying to force the employer to fulfil his or her

73. In addition to these sanctions, the employer can be sanctioned by suspension, partly or even fully, of the (activities of the) enterprise.
74. The law distinguishes between first category offences (the minor offences) with a maximum fine of Euros (EUR) 9,000 and second category fine of EUR 22,500 (the serious ones).
75. In case the employee has not fulfilled his or her obligations imposed on him or her and the employer has suffered damages. In practice, this is rare.

obligations. There is no general provision aiming at the protection of employees who are victimized; experiences of employees acting as a whistle-blower are not positive.[76]

The Dutch system of private law remedies consists of two layers. First, there is the one of compensation, according to Article 7:658 CC, if an employee suffers damages caused by accidents or occupational diseases. Second, this is the obligation of the employer to pay wages to an employee who is ill and not able to perform his or her tasks. This obligation exists for a maximum period of two years (Article 7:629 CC). We will discuss these two ways separately.

[a] Compensation by Virtue of Article 7:658 CC

As explained above, next to the enforcement procedures, the sanction of liability on the basis of Article 7:658 CC is considered as a functional and effective remedy. It is seen as an incentive for the employer to improve and to maintain safe and healthy working conditions. This approach is part of the introduction in labour law of the 'market' concept: for achieving the objectives of safe and healthy working conditions it is assumed that the parties involved, i.e., the employer and the employee, are better equipped and more challenged if they feel the (financial) consequences of their acting and not-acting. In other words, they will be pushed to act in order to pursue their own interests. The extent to which this approach is successful depends, however, on whether the statutory schemes provide for compensation in such cases and the extent to which private insurance is available to cover the employer's risks. We will deal with this separately hereafter. In case of private insurance of these kinds of risks, which is often bought, the compensation to be paid on the basis of Article 7:658 CC will actually be paid by the insurance company. This coverage may seem to substantially reduce the incentive for the employer, since now only the level of contributions to the insurance company is all what can influence the activities of the employer to realize safe and healthy working conditions. However, the actual situation depends on the terms of the insurance agreement between the employer and the insurance company, since the insurance company may itself require the employer to take measures in order to reduce claims to the insurance. The legislature has left it to the parties involved to make themselves the applicable arrangement, expecting, again, that market forces will lead to the best outcomes.

The compensation to be paid by the employer consists of the damages actually suffered, i.e., the economic damages of the employee, which will consist of the wages minus compensation received, if any. These other compensations may exist of social security benefits the employee may receive (see hereafter). The compensation due can include all kinds of regular expenses the employee is entitled to that are not included

76. Even in case their complaints were granted, the end was not very hopeful for them. They have been dismissed and got sometimes some compensation. A regulation to protect whistle-blowers against reprisals is steadily under discussion. Since some years it has been decided that this issue has to be left to the social partners to regulate in collective labour agreements. In a legislative proposal of 2004, the employee/whistle-blower will be better protected against, for instance, dismissal. Also this proposal has not been adopted yet.

in the social security benefits. Third, this compensation may consist of costs for medical treatments if and insofar as not covered by the applicable insurance schemes. Costs for adjustments to the house of the employee if necessary because of his or her incapacity and costs of aids are also to be compensated.

The judge can also decide *ex aequo et bono* to award compensation for immaterial damages.[77]

Since 1999, the protection by this provision, Article 7:658 C.C. has been extended to other groups of workers whose employment relationship is not based on a contract of employment with the employer. By amendment of the law as from 1 January 1999 also temporary agency workers or posted workers are covered. Till quite recently, the self-employed were excluded from the protection of Article 7:658 CC offered to workers who got injured by an occupational accident. Opposite to the proposal to subsume the self-employed under the Act on Health and Safety at Work (Arbo Act) resulting in the responsibility of the employer for healthy and safe conditions also to all persons who are working for the employer but not on a basis of an employment contract, a proposal to extend the (civil) liability of the employer for the damages self-employed workers suffer, is still lacking.

The Supreme Court[78] has filled that gap by deciding that this category of workers: the lonely working self-employed, will also be covered, under certain circumstances. In case a –self-employed – worker is suffering damage caused by an occupational accident and the enterprise has chosen to let perform a work by a self-employed worker instead of an employee,[79] there is no ground to treat him differently from a regular employee in respect of compensating the damages suffered subject to the fact the work belongs to the regular activities of the enterprise. The court referred to the objective of the introduction of paragraph 4 of Article 7:658 by which the liability of the employer has been extended to all persons 'who work for him under his supervision or commissioned by him'. He has to respect the *obligation to care* also to these workers. On the basis of the actual situation of the case concerned, it has to be assessed whether the employer is liable. A number of facts have to be taken into account among which prominent are: (a) the actual relationship between the employer and the person performing the work; (b) the nature of the work done; (c) to which extent the employer actually has a say over the conditions under which the work has to be carried out and the risks attached to that and (d) whether the work has been done as part of the activities the employer usually is carrying out. Again the actual situation, including the practice of the employer in the past, is decisive. This decision has resulted in an extension of the liability of the employer not only to temporary agency workers or posted workers but also to self-employed people acting in the way described. In literature this extension has been criticized as going beyond the scope of the Employment Act that covers only workers with an employment contract. In this respect the decision has been called revolutionary.

77. It is based on the general provisions of the Code Civil: Article 6:160 CC.
78. HR 23 Mar. 2012, JAR 2012, 110 (*Davelaar-Allspan*).
79. Usually, the employer outsources this kind of activities and hires self-employed to let him do that work.

[b] Payments by Virtue of Article 7:629 CC and Social Security Benefits

Under Dutch law, an employee who becomes ill has to rely on his or her employer for an income provision. According to the law governing the individual employment contract, the employer is obliged to continue to pay 70% of the wage for 104 weeks or at least during the first 52 weeks the full statutory minimum wage.[80]

In addition, the Sickness Benefits Act (*Ziektewet* – SBA) provides that an employee who can claim sick pay from his or her employer (see hereafter) does not receive sickness benefit on the basis of the SBA. The rationale of this division of responsibilities was that the legislature assumed that the longer a person remains ill, the more difficult it becomes to get him or her back into work, since the longer one remains inactive, the more one tends to consider oneself to be completely unable to work. For this reason it was considered necessary to make employers and employees pro-active in reducing any periods of sickness, and to ensure that this began even in the early stages of sickness.[81] As a result of the financial effects of the shift of responsibilities, employers are expected to check more carefully whether an employee is rightfully absent or not. Employers can take out private insurance to cover their risk, or they can bear it themselves.

Large companies very often choose for bearing the risks themselves as they have the means (organizationally as well as financially) to do so and are better off. As a result they are directly interested in reducing the costs, so they take their responsibility seriously. Smaller firms mainly opt for the insurance possibility.[82] The SBA serves as a safety net provision only, mainly for the case in which the employment contract is terminated during the 104 weeks' period; in this case the employee may claim sickness benefit amounting to 70% of his or her wages for the remainder of that period.

The SBA is also essential for several categories of persons who are not employees in the sense of the Civil Code, but who are covered by the SBA. Examples are persons who have been put on a par with employees, such as home workers. The Sickness Benefit is still relevant in situations where the person concerned does not have an employer (anymore) or where the legislature found it unjustified that the employer has to pay sick pay.

There are only few grounds on the basis of which an employee is excluded from the right to sick pay; these are defined by the Civil Code. One of these is that the employer does not have to pay sick pay if the employee concerned refuses to carry out suitable work for his or her employer without good reason, provided s/he is capable of doing so. In this sphere the Dutch system has a 'three stages' approach: first, the

80. See also, F. Pennings, 'The responsibility of the modern enterprise in the reduction of sickness and the promotion of reintegration of disabled workers', in *Social responsibility in labour relations* 223–238 (F. Pennings, Y. Konijn & A. Veldman eds., Wolters Kluwer 2008) and F. Pennings, *The New Dutch Disability Benefits Act: the Link between Income Provision and Participation in Work*, in *Too Sick to work?* 95–118 (S. Devetzi & S. Stendahl eds., Kluwer L. Intl. 2011).
81. For further details, see F. Pennings, *The Netherlands*, in *International Encyclopaedia of Laws, Encyclopaedia of Social Security Law* (Kluwer L. Intl, loose leaf).
82. Hereafter we come back to the issue as to whether the objective behind the approach of responsibility and liability is upheld and if so how.

employer has to re-employ the (partly) disabled person in his or her own job. If that is not possible the second stage is re-employment within the firm in a suitable job if necessary by adjusting the workplace to the capacities of the employee concerned. In case this cannot be realized, the employer has to look for suitable work with another employer. If the employee refuses to co-operate that can imply that the employee is not entitled to sick pay (see hereafter).

Illness denotes a process-wise event consisting of a disruption of physical or mental functions of a human being accompanied by a decrease in the level of power of performance. The case law further shows that a person who is not able to do his or her work owing to a lack of education or experience is not incapacitated as a result of illness or infirmity. Limitations in connection with low intelligence, slight build, advanced age or maladjusted disposition of an insured person may therefore not be considered as illness or infirmity either.

The fact that an insured person is incapacitated to work has to be assessed on the basis of 'his or her work'. In general, this is the work the insured person did lastly – i.e., before ceasing that work due to illness or infirmity – and which s/he actually did. Relevant is, therefore, not the work agreed on by contract by the insured person and his or her employer or the work that would be done after the insured person had been declared healthy.

The criteria for sickness under the Civil Code and the Sickness Benefits Act are basically the same and thus imply that a person is ill if s/he is incapable of doing his or her work as a direct and objectively medically determined consequence of illness.[83] Infirmity is also considered as illness. Relevant is, therefore, whether a person cannot do his or her work as the result of sickness. If the cause is elsewhere the person is not considered ill. Furthermore, the illness must be medically determinable. So, if doctors cannot find an objective reason for the symptoms expressed by the employee, there will probably be no illness or infirmity. Because of the outcomes of the strict conditions, there were many complaints of persons whose complaints were accepted as real by the doctors, but they were not considered ill as no medically objective reason could be found. A solution to this problem has been found by a court decision. The Central Appeals Court[84] has developed an additional criterion: if several independent doctors (meaning that they do not work for the applicant) confirm unanimously that a person has certain deficiencies, the person can be considered as ill despite the lack of objective medical data.

In current discussions on sick pay entitlement, reporting sickness due to conflicts at the workplace play a large role. For instance, if an employee has problems with his

83. There is relatively little case law on the definition of sickness in relation to sick pay due by the employer. One reason is that labour law disputes are not so easily brought before court as social security cases (as long as it is not a dismissal case). Another reason is that, before a dispute on whether a person is sick can be brought before the court, s/he has to ask the benefit administration for an expert opinion. This opinion often solves the dispute. A well-known problem in this respect is that an employee has reported ill due to a dispute at workplace, usually with his or her supervisor. As such this reason is not sufficient. By medical examination it has to be established that the person is medically ill.

84. The highest court in social security cases.

or her supervisor, s/he may report ill. For this purpose guidelines called *Werkwijzers* are made, which help doctors to reduce sickness and to encourage reintegration into work. These guidelines are not binding, but they are useful as they give guidance in their approach.[85] These guidelines go to the extreme to keep the employee out of the 'sickness area', but seeking alternative solutions, such as change of working place or supervisor.

[C] Reintegration Efforts Required of the Employer and Employee

As said before, the characteristic Dutch approach in the field of health and safety at work is the allocation of responsibility on the employer as well as the employee. Reintegration of workers suffering from the consequences of occupational accidents or diseases and therefore only partially able and capable to work, is a basic part of the health and safety policy. One of the main instruments to improve the working conditions of the employees on enterprise level is that both the employer and employee have statutory reintegration obligations. For that reason we also discuss the issue of reintegration obligations mentioned in the law.

[1] Act on the Employment Contract

These obligations can be mainly found in the *Wet Verbetering Poortwachter* (the Gatekeepers Act[86]), which requires employers and employees to undertake reintegration efforts in case of illness if incapacity for work is expected to last for a long period.[87]

Thus, if an employee is expected to be ill for more than six weeks, the employer and employee are obliged to make a plan for reintegration. The plan can entail, for instance, that the workplace of the employee is adjusted to his or her impairments and/or that training or work experience in another job have to be tried. Subsequently the employer and employee have to meet on a regular basis to see how the reintegration efforts are proceeding and if the plan has to be adjusted. One party can oblige the other to co-operate, if necessary by invoking legal means before court.

An assessment of whether the reintegration activities have been sufficient takes place three months before the employee applies for disability benefit.[88] The employee has to produce a report on the reintegration activities which have taken place. If the employer's actions are considered insufficient by the benefit administration, his or her obligation to pay wages is extended (by up to a maximum of twelve months). Note that this is in addition to the already existing obligation to pay wages during twenty-four months. If it is the employee who has not co-operated satisfactorily, s/he can be

85. The guidelines are made by Stichting STECR, Expertisecentrum Participatie. This is a centre of experts. The guideline on conflicts at work is the *Werkwijzer arbeidsconflicten*.
86. The purpose of this Act was to narrow 'the gate' to the Disability Benefits Act.
87. Of course, in most cases of illness, such as fevers, etc. no measures are necessary.
88. Actually this is after one year and nine months of continuous sickness, since the waiting period for being eligible for disablement benefit is twenty-four months.

refused disability benefit for a certain period. In serious cases of non-co-operation dismissal is possible.[89]

Thus the new system introduced a serious activation system in the period prior to the claim for disability benefit. The purpose of the introduction of this feature was not only to reduce the costs of sickness and disability benefits,[90] but it is even more important objective is to give to both employer and employee an incentive to improve the working conditions in terms of combating unhealthy and unsafe working conditions. It therefore contributes to the aim of prevention.

[2] The Disability Benefits Act

The *Wet werk and inkomen naar arbeidsvermogen* (WIA – Disability Benefits Act) makes a distinction between persons: (a) who are permanently disabled to at least a level of 80% and (b) those who are either not permanently disabled, or who are permanently disabled to a lower extent. The former group (group a) deserves, in the view of the legislature, a generous disability benefit, and activation measures are not considered relevant for them.

The second group (group b) is made subject to conditions and rules meant to reinforce their activation and therefore should contribute to the main aim: prevention of illness and disability due to unhealthy and unsafe working conditions.

To be eligible for benefit the worker has to be at least 35% disabled.[91] Persons in this category, if they satisfy qualifying conditions, first receive a wage-related benefit, the duration of which depends on their employment record. After this period (or immediately, if they do not satisfy the qualifying conditions), they receive a benefit to supplement their wage, if they are still earning an income corresponding to at least 50% of their remaining earnings capacity; if they earn less (or nothing) they receive a (low) benefit.

Relevant to whether a person is disabled is whether his or her earnings capacity is reduced. This a two-tier assessment. A claimant's remaining earnings capacity is defined as the wage which s/he can earn by doing 'generally accepted work which s/he is capable of doing with his or her strength and competence' despite his or her illness or infirmity. The determination of earnings capacity thus requires a medical assessment but also an ergonomic assessment by a job expert.

The *medical assessment* is done by a medical expert (a doctor)[92] who has to assess whether the claimant suffers from illness or infirmity. The doctor has to list the effects of the illness or infirmity on the claimant. For this, a specific scheme is used,[93]

89. This is an exemption to the general rule of the prohibition of a dismissal during twenty-four months of sickness (Article 7:670(1) 1 CC).
90. As a result the sickness rate has been reduced. But one has to be careful by pointing this policy as the only factor for lower sickness rates.
91. Under the previous law the percentage was much lower: 15%.
92. Working for the benefit administration.
93. This expert uses a specific system, the so-called Claim Assessment and Control System For the selection of jobs (*Claim Beoordelings- en Borgingssysteem* (CBBS). This system contains a – non-exhaustive – survey of existing jobs (about 10,000) and indicates which skills (education

standardizing the practice of assessing claimants and to reduce differences in outcomes resulting from the assessment procedures themselves. In this system, it is not the limitations of claimants to do work which are important, but their ability to work.

Six aspects are relevant: social functioning, adaptation to the environment's requirements, dynamic activities, stationary attitudes and working times. The first two categories are mainly meant to assess the abilities of people with psychical problems.[94] The findings are laid down in a list showing the capabilities of the claimant and presented to the so-called jobs expert.

Obviously, if the limitations are so serious that the person concerned is not able to work at all, no further investigations are required: s/he receives a full benefit. In all other cases the job expert, on the basis of the outcomes of the medical investigation, investigates which types of work the person in question can still do despite his or her medically indicated limitations. It does not matter in this respect whether the person in question has a real chance of being employed in this work, in other words whether there are any vacancies. This is because the law explicitly stipulates that whether the person in question can actually obtain the labour in question should not be considered. We already saw in the introduction how sensitive this issue of considering labour market factors had become.

An important factor in this respect is what has to be understood by 'the work s/he still can do'. The Act uses the expression: 'generally accepted work'. That means: all work can be taken into account for this purpose, not only suitable work (for instance, the work the person did before). From among the jobs the person can do which match these criteria, the job expert has to choose those in which the claimant would earn the highest wage. A special decree (*Schattingsbesluit* – Assessment of Work incapacity Decree) provides more specific guidelines. The concept is used in a rather wide way. There are only minor exceptions.[95]

Persons who are incapacitated at a level of less than 35% are not eligible for benefit. It was the view of the legislature that their incapacity rate is so low that they should in any case be able to remain in work. That implies that in these cases the employer remains responsible for this category. In some collective agreements provisions have also been included to keep such individuals in work, and the ability to dismiss these workers because of their disability has been limited.[96]

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and experience) are required to hold such a position, and what mental or physical requirements the job has. The assessment is more detail regulated. On the one hand, guaranteeing that only realistic job types are selected to determine the earnings capacity and on the other hand that the scope of jobs to be used in the evaluation is not too narrow. For that reason, three different job types which the claimant can do, have to be taken. Another criterion is: those job types have to be taken which have the highest income, as this will lead to a higher earnings capacity and thus a lower benefit.

94. They concern concentration of attention, ability to show one's feelings, and ability to cope with conflicts and to co-operate.
95. An example of such an exception is jobs which hardly exist on the labour market. If there is a functional age limit for specific work on account of the law or a collective labour agreement, this work may also not be considered as 'suitable' work for this person to be taken into account.
96. B. Barentsen, *Wet werk en inkomen naar arbeidsvermogen* (Deventer: Kluwer, 2006).

[3] The Relation to Dismissal Law and Unemployment

In order to keep these reintegration measures as effective as possible, the dismissal law was adapted to this approach. The prohibition of dismissal of sick employees (during two years of sickness) is meant to encourage the employer to actively look for adaptations of the work place, to jobs available and to the organization of the work in his or her enterprise. This is considered as a contribution to better working conditions for those employees suffering from accidents at work or occupational diseases.

Some examples of how this system functions, will illustrate this. If there are, for instance, psychosocial problems, the employer has, on the basis of his or her duty of care to find a solution, for instance by reorganizing the work. S/he is obliged to do so under the general rule of the CC that he has to be 'a good employer'. Of course it depends on the situation what can be exactly required from the employer.[97] If the employer has made a 'reasonable' offer, the employee has to consider it seriously and cannot refuse without very good reasons.

As already stated, persons who are ill are, generally speaking, protected against dismissal by Article 7:670 CC. An exception applies, however, if they refuse to co-operate in the reintegration efforts or if they refuse suitable work. Dismissal is, however, allowed only if it is an adequate measure; first other measures have to be tried, such as suspension of payment of sick pay.

The public decree on dismissal (*Ontslagbesluit)* has a similar regulation: a permit to dismiss sick employees will be refused.[98] As an exemption to the general ruling a dismissal permit is granted only if reintegration into work is not deemed likely within twenty-six weeks.[99] Whether attending training would enable the person concerned to re-integrate is also considered in these cases.

The other possibility of terminating the employment contract: by dissolution of the contract by the court (Article 7:685 CC), is still open to the employer because the general prohibition of dismissal of Article 7:670 CC and the Decree on dismissal is not applicable to this way of terminating. The possibility to dissolve the employment contract is restricted in this way that the court has to make sure whether the request of dissolving is related to the prohibition to dismiss the employee. So if the request is linked to the sickness of the employee, a dissolution has to be refused.[100]

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97. According to the Dutch employment law system, an employer has to continue to pay the full wage, in case the employee remains available for work that s/he can do, and the employer does not make use of it (Article 7:628 CC) unless the employee refuses the work offered which can be considered as 'suitable' work for this employee. The employer has adapted the work or the workplace to the extent that reasonably could have been expected from him of her.
98. In short it has to be noticed that according to this decree dismissal is only possible when the employer has received a permit to do so from the administrative authority (in case the agency that also decides about claims for unemployment and disablement benefits).
99. This is based on a special decree (Article 5.2) annexed to the Decree on dismissal. The Dutch dismissal system is complicated: although the employer receives in this case a permit he cannot give notice to the sick employee due to the general protection against dismissal of sick employees during two years. This is in line with the obligation of being obliged to continuous payment of the wages during two years.
100. If the employer has a reason for terminating the contract by the court without a connection to the illness, the court is free to dissolve the contract. Usually the employee is granted a

[D] Administrative Remedies

A main task of controlling whether the obligations have been respected by the employer – and the employee – is attributed to the labour inspectorate. As described above (section 10.04) works councils as well as trade unions can exercise a checking function as well. But apart from that possibility, the responsibility for supervision and enforcement rests upon a public body. The ARBO allocated that task to the labour inspectors who act on the responsibility of the government, i.e., the Minister of Social Affairs (Article 24 ARBO). In principle and in practice the labour inspectorate has a certain discretionary power as to the application of the means and ways of control and enforcement. The final responsibility rests on the Minister of Social Affairs. The enforcement policy is in practice determined by the developments in the various industries, actual events and signals from the various industries. Choices are made also in the light of policy directions. Next to checking the implementation of the Act the labour inspectorate has also a role to play in providing all relevant information on the policy to be pursued. The labour inspectors focus their inspection activities on enterprises and sectors with high risks and repeated or continuing violations. There are also random checks. Another field of special attention concerns enterprises that operate in the grey areas or with suspect illegal activities.

To remedy effectively a dangerous situation the labour inspectors can make use of two powers attributed to them. First, we mention the less severe one: an order to the employer to fulfil his or her obligations and to take the necessary measures. The second goes further: the inspector can order to suspend the activities of the enterprise or a part of it where the dangerous situation exists.[101]

The main line of sanctioning is either criminal or administrative. As said above the enforcement by administrative means is preferred over criminal ones. The labour inspector reports and notifies to the public prosecutor if a criminal procedure has to be started.[102] This way of enforcement is not very often used. The Government prefers enforcement by the parties themselves or by the labour inspectors via the administrative way. There is hardly any case of prosecution of the employer or the company violating the health and safety rules.[103]

The administrative lane consists of two directions. The traditional one is to sanction the offender with a fine. The severity of the sanction depends on the nature of the offence. In case of a serious offence the sanction could be imprisonment or more likely high fines. This is applied when a serious danger to the employee or other persons (clients, suppliers) has occurred and the employer reasonably could have known. A milder way of reacting is at stake when the employer has infringed the obligations that are listed in the Act (Article 33 ARBO). The fine that can be imposed

compensation set by the court. The amount can depend on the circumstances of the case. The court uses, generally speaking, a kind of an internal guideline.

101. The payment of the wages is not suspended.
102. It is up to the prosecutor to decide whether s/he proceeds to prosecute.
103. In April 2012, the public prosecutor has started a preliminary procedure accusing a company of neglecting safety rules in a chemical enterprise which has caused a fatal accident.

can vary dependent on the seriousness of the offence.[104] A second category of offences are the so-called directly fined facts. They are listed in a special regulation. A direct reaction is the normal way of acting by the labour inspectors, usually consisting of giving an order and to impose measures to be taken immediately. The third category concerns the 'other fined facts'. They can be handled in an informal way: the inspector indicates the problems raised and trusts the employer will remedy the situation voluntarily; in this case no fine is imposed. The formal way of reacting consists of two phases: a warning or an order is to be followed by a report of the offence and measures.

A final sanction has been introduced in 2007: the administrative coercion. This instrument is aiming at undoing the infringement or to prevent either the continuation or the repetition of the infringement. A penalty will be imposed on the employer when the latter does not respect an order given by the inspector. This instrument is strengthening the power of the inspector of imposing orders on the employer if the employer does not respect and does not comply with the order. An administrative coercive measure will be imposed when there is a reasonable presumption that the employees are endangered or the imposition of a fine turned out not to be effective.

When an administrative sanction has been imposed the administrative procedural law has to be applied. Since this procedural law differs from the criminal procedural law in the sense that is less severe, this way of administrative sanctioning is preferred. The law on giving evidence is less strong. A second differing characteristic is the two-phases-procedure: the procedure starts with a complaint that provides the enforcement body[105] with the possibility to reconsider the measure imposed and therefore the seriousness of the offence. When it maintains its view the offender can go to the administrative court.

§10.06 CONCLUDING REMARKS

In the introduction, we put the issue of health and safety not only in the perspective of protection of the employees but also in terms of citizenship. Citizenship involves the persons having the rights and duties to participate in society. Dutch health and safety law recognizes the primary duty of care lies with the employer, in accordance with the EU Law. But it goes further, as we have shown. The introduction of self-responsibility and consequently self-regulation by the parties involved, points to what we have called citizenship in a double sense: (a) individual citizenship: emphasizing the responsibility of the employer and the (individual) employee reflected in sets of rights and duties for both of them; and (b) collective citizenship by involving the representatives of, in

104. The amounts at present vary between EUR 9,000 and EUR 22,500. In case of recidivism the (administrative) fine can be increased by 50%. This sanction can be combined with one of the orders mentioned above: an order to take measures or an order of suspension. This will be the case when very dangerous situations have occurred, more in particular when it is a life threatening situation.

105. That is the Minister of Social Affairs. Research has shown that only a minority of the employers have started the complaint procedure: less than 10%. In around 20% of the cases the employer has won the case. The number of court cases is accordingly low.

particular, the employees in the process of norm-setting. At the end of this exercise we did in the previous paragraphs we will draw some conclusions.

In order to be able to assess whether the Dutch law on the one hand has transposed the Framework Directive in a correct way and second, whether and if so how the citizenship approach has been materialized, it is necessary to read not only the legal texts but also to look at the objective of the directive to be pursued.

Without doubt, the general approach of the Framework Directive has been taken very seriously by the Dutch legislature. Obviously, prevention is the main objective of the law on this issue. It had already opted for this approach before the Directive came into force. Second, the 'duty to care' to be fulfilled by the employer is a main characteristic (also) of the Dutch law and approach. So far so good. But apart from this more formal assessment we also have to assess the Dutch law and practice from the point of view of an effective policy and ruling of the matter at stake. This is also an important requirement of EU Law. A last criterion for assessing the correct implementation of the EU law is the enforcement procedures and their effectiveness. On this point one can really doubt whether the Dutch law is in compliance with EU law. The 'modest' role of the labour inspectorate, in qualitative as well as in quantitative terms, points to it.

In order to give a final assessment of the Dutch system we sketch the system in its specific Dutch features.

[A] Responsibilities have Shifted

In the Netherlands a shift of responsibility from the State to social partners as well as to the individual employer and the employees has taken place. That is part of the general tendency in labour law (and not only on this field) of deregulation and emphasizing the instrument of self-regulation. Clear examples of this approach are: the role of Arbo-catalogues as the detailed and more tailored regulations of health and safety at work. The acts and even the regulations on lower level have a general framework nature expressing the goals to be reached. The more concrete design has been left to the parties that are more directly involved and affected by the regulations.

In this respect, it has to be noticed that there is nothing new under the sun. The Netherlands is following the EU approach as to the use of the inventory and evaluation of risks as an instrument on enterprise level. But it went further as we have shown.

[B] The Role of the Workers' Representatives has become more Important

The shift to self-regulation corresponds to the wish of increasing the role of workers' representatives in the design and the application of effective regulations on this field. Again the Arbo-catalogues are a good example, as well as the regulations in the Arbo Act and in particular the Works Council Act on the role of works councils. More in particular, the right to consent of the works council on various topics related to a health and safety policy in the enterprise underlies this approach. Since it is not only law in the

books, it appears to be effective. Survey research has to give more evidence that this is the case.

[C] Financial Incentives are Used

Another typical Dutch feature is the use of the instrument of the (financial) incentive and permeates – one could say – the whole system. It seems to be effective in the sense that it influences the behaviour of the parties involved. We have shown this influence in section 10.05 where we discussed the system of sanctions and remedies. As a consequence of this approach and based on a deliberate policy aiming at an effective reintegration of ill employees, including those suffering from the consequences of accidents at work and occupational diseases, the law imposes on the employer primarily a set of obligations that should result in better working conditions. Consequently that should contribute to the main goal of the European policy and law on this field. Although it is very difficult to prove that this system works, it seems to be successful to the extent that the sickness rate has been reduced and good practices of prevention and reintegration are known.

[D] The Criterion of Sufficient Protection

A benchmark to assess whether the current Dutch system respond sufficiently to another objective of the directive – protection of the workers against the possibility to be exposed to dangerous and unhealthy working conditions – has to be established as well. Our investigation makes clear that this is the case. That is the result of the multi-level system. More in particular, the more concrete lower level regulations – the Arbo-catalogues – and the way these regulations are applied by the parties themselves contribute to the positive result. Another ground for that conclusion is the – until now existing – confidence in the functioning of this system in society. The role which the directly involved and affected people and organizations play is a crucial element.

[E] The Concept of Health and Safety

A satisfying development is also the rather broad meaning and interpretation of the concept of health and safety. The case law of the courts as well as the rulings of the parties concerned in the Arbo-catalogues are contributing to that, although even the catalogues are – till now – rather vague in wording. Actually the courts seem to play a more important role in terms of imposing serious duties on the employer to take measures to avoid the occurrence of physical and more particularly psychosocial risks. Psychosocial risks are recognized as risks to be covered by the whole body of regulations on health and safety, although there is still more to be achieved. A special problem appears to be the multi-causal disablement due to partly accidents at work and occupational diseases and partly private circumstances. The responsibility seems to become unclear which is detrimental for the employees affected.

[F] Enforcement and Control

A last remark has to be made on the shift of responsibilities from the state to the 'market'. In order to be able to check effectively whether the rules are respected by the employers, a well-functioning labour inspectorate seems to be necessary.[106] Apart from the problem of understaffing of the Dutch labour inspectorate, at least compared to the far majority of the other EU Member States, supervision of the norms is very limited, since it is nearly fully left to private actors. One can wonder whether in this way the Netherlands meets the requirements of the EU legislation. The instrument of the administrative coercion seems promising, but it remains to be seen how this instrument will be used.

From the perspective of protection of the employees, it can be concluded that the objective is achieved in the Dutch system except perhaps when we look at the enforcement and control issues. The reliance on financial remedies and sanctions to be used by the employees as one of the most important and strongly emphasized means is innovative and challenging but at the same time risky from the point of view of the values and interests of the employees. The workers' representatives are playing a crucial role since the labour inspectorate is understaffed and therefore restricted in their task as controller directed by the state. A positive point from the effectiveness perspective is the main role that Arbo-catalogues are playing. The tailored nature of these instruments increases their effect and their effectiveness. But again this depends upon the activation capacity of the employees' representatives or (if they do not exist) of the employees themselves and of the employer(s). If the latter is neither facing nor fearing financial incentives there seems to be apart from employees' pressures a lack of means of coercion.

When looking at the Dutch system from the citizenship perspective, we have to assess whether this approach and the way the Dutch law makers are applying this concept are taken seriously and are consistent. It can be stated that in any case, from the formal aspects of the laws, employers and employees have been given a large responsibility to define the rules applicable to their enterprise. Within the framework of the goal provisions in the statute laws there are actually no limits to what they can agree. Collective (industrial) citizenship appears to be guaranteed and provided with potentially effective instruments. But that depends mainly on the operational power of the employees' representatives and the willingness of the employer to deal and wheel with them. We refer here to the role of works councils on enterprise level and trade unions as parties to the Arbo-catalogues.

If assessed in respect of the individual employees, the picture is somewhat diffuse. Certainly they have been given some instruments which enforce their position. We refer to the possibility to claim compensation and reintegration efforts to be

106. J. Popma, Inkrimping Arbeidsinspectie in strijd met ILO Verdrag 81, ARBAC, November 2011; and J. van Drongelen, 'Een nieuwe Arbeidsinspectie: tussen behoud en vernieuwing', in *Sociaal Recht: tussen behoud en vernieuwing,* eds. W. Plessen et al. (Zutphen: Paris, 2011), 143 et seq.

made by the employer. The last are the most important from the point of view of recognizing effectively the notion of citizenship: the employee has a right to reintegration and the employer is obliged to made serious efforts to make the reintegration actually possible which can include an obligation to adapt the organization of the work to the capacities and possibilities of his or her employees including the employee suffering from damages due to unhealthy or unsafe working conditions. The threat of such claims influences the deployment of general policies in this field and, more important the taking of preventive measures. However, it has to be noted that these instruments lie more in the area of compensation than in prevention.

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