



Sociaal Economische Raad  
Social Economic Council

# Amended Letter of Advice

Amendment to the Letter of advice concerning the national decree, containing general measures, regarding the price indexation OV and ZV 2015.

SER /15/DCB/077  
November 5th, 2015



## Information

The Social Economic Council Sint Maarten (“Sociaal Economische Raad”, referred to below as “SER”) is an independent advisory body to the government of Sint Maarten. The SER advises upon request by one or more Ministers (solicited) or on its own initiative (unsolicited) on all important social economic issues.

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## Colophon

Design and print: SER The Netherlands  
Photo cover: SER Sint Maarten

To the Minister of Public Health, Social Development and Labor  
Mr. Rafael Boasman  
Clem Labega Square  
Philipsburg  
Sint Maarten

Philipsburg, November 5th, 2015

## **Amended Letter Of Advice**

**Our reference: SER /15/DCB/077**

**Re: Amendment to the Letter of advice concerning the national decree, containing general measures, regarding the price indexation OV and ZV 2015.**

Honorable Minister Boasman,

On April 9th, 2015 the SER received an advice request concerning the draft national decree, containing general measures, regarding the price indexation National Ordinance Accident Insurance (“Ongevallen verzekering” [OV]) and National Health Insurance Ordinance (“Ziekteverzekering” [ZV])2015

*(in Dutch: “Landsbesluit, houdende algemene maatregelen, van de tot aanpassing van de dagloongrenzen voor 2015, genoemd in de Landsverordening ongevallenverzekering en de Landsverordening ziekteverzekering in verband met de ontwikkeling van de prijsindexcijfers van de gezinsconsumptie ”)*

The Social Economic Council (SER) evaluated the social, economic and legal consequences of the advice request and informed the then Ad Interim Minister of Public Health, Social Development and Labor, Mrs. Bourne- Gumbs, of its conclusions.

However, after the advice was made public according to the law, the (policy department of the) Ministry of Public Health, Social Development and Labor provided the SER with crucial, additional information which was reason for the SER to amend its first advice dated July 2<sup>nd</sup>, 2015 as follows:

## Background OV and ZV:

The National Ordinance Accident Insurance [OV] contains rules about the insurance of employees against occupational accidents. The National Health Insurance Ordinance [ZV] is a form of health coverage that insures the population against meeting the costs associated with ill health.

Among others the OV and ZV regulate the right of the employee to medical treatment and nursing care, financial allowances for occupational disability, the premiums that have to be paid and other responsibilities of the employer and the employee. Every year adjustments are made to the wage limit, based on the increase of the consumer price index (CPI) of August of the preceding year, which is being compared with the CPI of the year prior to the preceding year<sup>1</sup>.

According to the calculations of the Department of Statistics, the cost of living in August of 2014 increased by 2.2 per cent compared to August 2013. The wage limit for August 2014 was set at NAF 252, 94 for a 5-day working week and at NAF 210, 78 for a 6-day working week. This means that – including the 2.2 per cent increase – the wage limit for ZV and OV for 2015 will be set at NAF 258, 50 for a 5-day working week and at NAF. 215, 42 for a 6-day working week.

The OV/ZV wage limit proposal according to the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 is as follows:

	2014	CPI	2015
5-day work week	NAF 252,94	increase	NAF 258,50
6-day work week	NAF 210,78	2.20%	NAF 215,42

## Executive Summary

On April 9th, 2015 the Social Economic Council (SER) received a request to advise on the “Landsbesluit, houdende algemene maatregelen, van de tot aanpassing van de dagloongrenzen voor 2015, genoemd in de Landsverordening ongevallenverzekering en de landsverordening ziekteverzekering in verband met de ontwikkeling van de prijsindexcijfers van de gezinsconsumptie” (in short: **the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015**).

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<sup>1</sup> Article 8, paragraph 3 of the OV and article 1b ZV

However, while drafting its advice on this matter, the SER noticed an official publication in the Daily Herald of May 26th, 2015 under the Government Info Page, page 18, that the “*Landsbesluit, houdende algemene maatregelen, van de 15de mei 2015, tot wijziging van het Gevarenklassenbesluit ongevallenverzekering in verband met de vaststelling van een premiepercentage voor de ongevallenverzekering en tot aanpassing van de daglonen, genoemd in de Landsverordening ongevallenverzekering en de Landsverordening ziekteverzekering in verband met de ontwikkeling van de prijsindexcijfers van de gezinsconsumptie*” (in short: **the published national decree, containing general measures, with regard to the hazardous work categories**) became effective.

In light of the (published) national decree, containing general measures, with regard to the hazardous work categories becoming effective, the Social Economic Council (SER) evaluated the social, economic and legal consequences of the advice request and informed the then Ad Interim Minister of Public Health, Social Development and Labor, Mrs. Bourne- Gumbs, of its conclusions.

However, after the SER advice was made public according to the law, the (policy department of the) Ministry of Public Health, Social Development and Labor provided the SER with crucial, additional information which was reason for the SER to amend its first advice dated July 2nd, 2015. As a consequence, the SER observed that:

1. The SER was not included in the process to advise on the (published) national decree, containing general measures, with regard to the hazardous work categories.
2. There is a conflict with legislations; the two national decrees, containing general measures, as mentioned above are in conflict with each other.
3. There is a conflict in figures.
4. Executing a law before it is effective is a serious infringement on the rule of law and can lead to irreparable consequences which should not be borne by parties that have no influence on the matter.

[See attached elucidations for complete explanation summaries for each of these subjects]

## **Advice:**

The SER regrets that it was not part of the advisory process with regard to the (published) national decree, containing general measures with regard to the hazardous work categories. Due diligence is lacking, which can result into irreparable consequences. The SER renders its advice in this case with reference to serious legal

irregularities that should be resolved as soon as possible to avoid more social, economic and legal ramifications.

Therefore, pursuant to the SER meeting on this topic, the SER unanimously advises as follows:

1. That the SER is at the Minister's disposal to offer its advice on all significant matters of a social economic nature.
2. That due diligence should always be carried out when drafting laws; i.e. the elucidation attached to the draft national decree, containing general measures OV and ZV 2015 should contain correct (financial) information.
3. That the (published) national decree, containing general measures with regard to the hazardous work categories does not reflect the actual premiums collected by SZV in 2015 and this breach should be solved as soon as possible.
4. That the National Ordinances OV and ZV were not amended correctly in 2010, when transitioning from Netherlands Antilles to country Sint Maarten. The process of changing these Ordinances (taking the latest national decree, containing general measures, from before 10-10-2010 into account) should start as soon as possible.

We trust to have informed you sufficiently herewith.

Should you require any additional information after reading the above, please feel free to contact us at your earliest convenience.

Respectfully,

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Oldine V. Bryson- Pantophlet  
Chairwoman

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Gerard M.C. Richardson  
Secretary-General

Attached: Elucidation to this advice

## ELUCIDATION

### **1. No advice from SER**

The statutory task of the SER is to advise the government on all important matters of a social economic nature. The (published) national decree, containing general measures, with regard to the hazardous work categories did not reach the SER for advice, even though this is an important matter of social economic nature. This (published) national decree, containing general measures, with regard to the hazardous work categories retro- actively as per 2010 set the wage limit for 2015 at a different amount than the SER received in its advice request. The newly proposed wage limits for 2015 (being NAF 258,50 for a 5-day work week and NAF 215,42 for a 6-day work week) in the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 do not correspond with the amounts (being NAF 252,94 for a 5-day work week and NAF 210,78 for a 6-day work week) mentioned in the (published) national decree, containing general measures, with regard to the hazardous work categories. Whereas this (published) national decree, containing general measures, with regard to the hazardous work categories is legally applicable at this moment. This has social, economic and legal consequences that could have been avoided, had the SER been involved in this advisory process.

### **2. Legal Problem: Conflicting National decrees, containing general measures**

- I) According to the law, it is proposed in the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 that the wage limits OV/ZV for 2015 increases with 2.2% (since the CPI in 2014 increased 2.2% compared to the CPI in 2013). It is further proposed that the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 goes into effect retro- actively as per January 1st, 2015.

According to the calculations of the Department of Statistics, the cost of living in August of 2014 increased by 2.2 per cent compared to August 2013. The wage limit for August 2014 was set at NAF 252, 94 for a 5-day working week and at NAF 210, 78 for a 6-day working week. This means that – including the 2.2 per cent increase- the wage limit for ZV and OV for 2015 will be set at NAF 258, 50 for a 5-day working week and at NAF 215, 42 for a 6-day working week.

The OV/ZV wage limit proposal according to the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 is explained below:

	2014	CPI	2015
5-day work week	<b>NAF 252,94</b>	increase	<b>NAF 258,50</b>
6-day work week	<b>NAF 210,78</b>	2.20%	<b>NAF 215,42</b>

However, while drafting its advice on this matter, the SER noticed an official publication in the Daily Herald of May 26th, 2015 under the Government Info Page, page 18, and in the National Gazette of June 12th, 2015 that the “Landsbesluit, houdende algemene maatregelen, van de 15de mei 2015, tot wijziging van het Gevarenklassenbesluit ongevallenverzekering in verband met de vaststelling van een premiepercentage voor de ongevallenverzekering en tot aanpassing van de daglonen, genoemd in de Landsverordening ongevallenverzekering en de Landsverordening ziekteverzekering in verband met de ontwikkeling van de prijsindexcijfers van de gezinsconsumptie” (in short: the (published) national decree, containing general measures, with regard to the hazardous work categories) became effective.

This (published) national decree, containing general measures, with regard to hazardous work categories amends the National Ordinance OV as follows:

- In article 5, paragraph 11 and article 8, paragraph 4 of the OV NAF 176,90 is amended to NAF 210,78 and NAF 212,28 will be amended to NAF 252,94. (see article 2 under A of the (published) national decree, containing general measures, with regard to hazardous work categories)
- Article 2B makes exceptions for 10-10-10 until 31 December 2010
- Article 2C makes exceptions for the period 1 Jan. 2011 - 31 Dec. 2011
- Article 2D makes exceptions for the period 1 Jan.- 31 Dec. 2012
- Article 2E makes exceptions for the period 1 Jan. 2013 - 31 Dec. 2013

Thus,

	2010	2011	2012	2013	2014	2015
5-day work week	<b>NAF 197,10</b>	<b>NAF 227,94</b>	<b>NAF 235,23</b>	<b>NAF 246,29</b>	<b>NAF 252,94</b>	<b>NAF 252,50</b>
6-day work week	<b>NAF 164,25</b>	<b>NAF 189,95</b>	<b>NAF 196,03</b>	<b>NAF 205,24</b>	<b>NAF 210,78</b>	<b>NAF 210,78</b>

These same amounts apply for the National Ordinance ZV.



Nowhere does the (published) national decree, containing general measures, with regard to hazardous work categories mention that this (published) national decree is only valid for 2010 until 2014. There is, for example, no end date indicated. This means that after all the exceptions, the amounts of NAF 252, 94 and NAF 210, 78 continue to be valid (after 2014), thus also for 2015. So, today (in 2015) the amounts legally applicable are NAF 252, 94 and NAF 210, 78. (Please bear in mind that the draft national decree, containing general measures, with regard to the indexation of ZV/ OV was not law at the time of drafting the advice and still to this day is not legally applicable).

The above- mentioned thus concerns the (published) national decree, containing general measures, where the SER was not asked to render its advice.

In addition, there was another national decree, containing general measures, where the SER was asked to render its advice on, which was the draft national decree, containing general measures regarding the price indexation OV and ZV 2015.

According to this draft national decree, containing general measures regarding the price indexation OV and ZV 2015, the proposed premiums are as follows:

	2014	CPI	2015
5-day work week	<b>NAF 252,94</b>	increase	<b>NAF 258,50</b>
6-day work week	<b>NAF 210,78</b>	2.20%	<b>NAF 215,42</b>

The amounts of NAF 258, 50 and NAF 215, 42 have been collected by SZV as of January 1<sup>st</sup>, 2015. But the (published) national decree, containing general measures, with regard to hazardous work categories (which is thus legally applicable), has set the amounts at NAF 252, 94 and NAF 210, 78.

The SER would like to emphasize that this conflict has nothing to do with the date/ year (2015) of publishing the national decree, containing general measures, with regard to hazardous work categories. The two national decrees simply conflict with each other, because the (published) national decree, containing general measures, with regard to hazardous work categories sets the wage limit for 2014 and onwards at NAF 252, 94 and NAF 210, 78, whereas, the draft national decree, containing general measures regarding the price indexation OV and ZV 2015 (not yet applicable law) sets the wage limit for January 2015 onwards at NAF 258, 50 and NAF 215, 42, and the amounts for 2015 have already been collected as of January 1<sup>st</sup>, 2015.

Arguments made about the lengthy legislative procedures before a national decree, containing general measures, becomes effective, are not justified. The (published) national decree, containing general measures, with regard to hazardous work categories determined that today the amounts should be NAF 252, 94 and NAF 210, 78. But in reality, today the amounts being collected are NAF 258, 50 and NAF 215, 42.

II) The wage limits mentioned in the (published) national decree, containing general measures, with regard to hazardous work categories do not correspond with the wage limits in the OV and ZV.

The National Ordinance OV (AB 2013, GT. No 801) is legally applicable per 10- 10-2010.

The National Ordinance ZV (AB 2013, GT. No. 802) is legally applicable per 10- 10-2010.

The amounts set in these ordinances are NAF 164, 25 and NAF 197,10.

The additional articles of the Constitution of Sint Maarten states under Article 1 paragraph 1:

“ De op het tijdstip van inwerkingtreding van deze Staatsregeling geldende Landsverordeningen, landsbesluiten, houdende algemene maatregelen en andere besluiten van regelgevende aard van de Nederlandse Antillen, alsmede eilandsverordeningen en eilandsbesluiten, houdende algemene maatregelen, van het eiland gebied Sint Maarten blijven van kracht, totdat zij met inachtneming van de Staatsregeling zijn gewijzigd of ingetrokken”.

The National Ordinances OV and ZV were changed in 2010, so these Ordinances (AB 2013, GT. No 801 and AB 2013, GT. No. 802) are legally applicable.

Had these National Ordinances not been changed in 2010, then the Netherlands Antilles versions would still be valid, along with all national decrees, containing general measures, of 2009 as stated in Article 1, paragraph 1 (additional Articles of the Constitution of Sint Maarten).

But now the National Ordinances were changed stating the amounts NAF 164, 25 and NAF 197, 10.

The Ministry of Public Health, Social Development and Labor mentions the national decrees of 2009 where the amounts were amended (NAF 176, 90 and NAF 212, 28). However, this means that there is conflict in 2 laws: The National Ordinance of 2010 and the national decree of 2009.

When there are conflicting laws, the following rules apply:

Lex specialis [“speciaal voor algemeen”]

Lex superior [“hogere wet voor lagere wet”]

Lex posterior [“jong voor oud”]

Thus, legally: the National Ordinances OV and ZV of 2010 apply.

Therefore, the SER stated that there is no legal basis to increase NAF 197, 10 to NAF 212, 28 and the amount of NAF 164, 25 to NAF 176, 90.

Thus, even though the already published national decree, containing general measures with regard to the hazardous work categories mentions different amounts for different years leading back to 2010, legally there is no basis for that, thus the amounts applicable should be the amounts mentioned in the National Ordinances OV and ZV (AB 2013, GT. No 801 and AB 2013, GT. No. 802): NAF 164, 25 and NAF 197, 10.

However, after this advice was made public, the SER received additional information from the Ministry of Public Health, Social Development and Labor<sup>2</sup> where it is clear that there were valid national decrees, containing general measures, from the time of the Netherlands Antilles. (P.B. 2009, no 43 and P.B. 2009 no. 44) Therefore, the SER can now conclude that while transitioning into country status, the National Ordinances were not amended properly. The National Ordinances OV and ZV should have been amended, stipulating the most recent amounts from the national decree, containing general measures<sup>3</sup>. The only reason why it is justified to change amounts in a National Ordinance via a national decree, containing general measures, is because (the process of changing a National Ordinance is a lengthy one and) in this case, it concerns systematically changing amounts<sup>4</sup>. Whenever there is an opportunity for amending the relevant National Ordinance, this should be done, taking the most recent national decree, containing general measures, into account. However, this opportunity was missed in 2010 when the National Ordinances ZV and OV were amended.

Even though the Ministry of Public Health, Social Development and Labor is not the institution responsible for the error in the National Ordinances OV and ZV, (the policy department of) this Ministry was aware that the National Ordinances OV and ZV mention incorrect amounts, yet this crucial information was not provided to the SER (at the time the SER was busy drafting the advice) nor was it mentioned in the elucidation to the national decree, containing general measures.

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<sup>2</sup> This information was received on September 9th, 2015.

<sup>3</sup> See “Aanwijzingen 36 en 37 Regeling van de Minister- President van 27 juni 2013, houdende vaststelling van de Aanwijzing voor de regelgeving van Sint Maarten, AB 2013, No.26

<sup>4</sup> See “ Aanwijzing 26 Regeling van de Minister- President van 27 juni 2013, houdende vaststelling van de Aanwijzing voor de regelgeving van Sint Maarten, AB 2013, No.26

### 3. *The national decrees, containing general measures are using conflicting figures disruptively*

The (published) national decree, containing general measures, and the draft national decree, containing general measures, are using conflicting figures that become disruptive.

- I) With the information now provided to the SER regarding the error made while transitioning to country status and not including the amounts of the latest national decree, containing general measures, it is correct that SZV collected the exact amounts it was supposed to collect legally, except for 2015. The (published) national decree, containing general measures, with regard to hazardous work categories sets the wage limit for 2014 and onwards at NAF 252, 94 and NAF 210, 78, whereas, the (draft) national decree, containing general measures, regarding the price indexation OV and ZV 2015 (not yet applicable law) sets the wage limit for January 2015 onwards at NAF 258, 50 and NAF 215, 42.

The (published) national decree, containing general measures, with regard to hazardous work categories determined that today the amounts should be NAF 252, 94 and NAF 210,78. But in reality, today the amounts being collected are NAF 258, 50 and NAF 215, 42.

	2014	2015
draft national decree, containing general measures	NAF 252,94	NAF 258,50
published national decree, containing general measures	NAF 210,78	NAF 215,42

- II) This is still a conflict in figures.

The information under “Financiële paragraaf” in the Elucidation to the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 is not correct. According to the elucidation on the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015, with this proposed increase of the wage limit, it is expected that 75 extra (main) insured persons will fall under the scope of the OV, and that the increase will have a positive effect on the fund. Regarding the ZV increase, a similar result has been predicted. The SER comments that this statement is not true for the OV, since the ability of being insured under the OV has nothing to do with (increasing) the wage limit. Unlike the ZV, it does not matter for the OV whether someone earns more or less than the wage limit. In order to be insured for ZV, one’s income must not exceed the wage limit. For the OV, however, the wage limit is not a determining factor.

The third paragraph under “Financiële paragraaf” states:

“Met onderhavige verhoging van de loongrenzen komen 75 extra hoofdverzekerden onder de werking van de Landsverordening ziekteverzekering. Hun gezamenlijk inkomen bedraagt op basis van de gegevens waarover SZV beschikt NAF 4,97 miljoen. Hiermee komt de werkgevers en werknemersbijdrage die extra wordt geïnd uit op NAF 621.000,-....De conclusie is dan ook dat op basis van deze inschattingen de verhoging van de loongrens een positieve uitwerking heeft voor het Ziekenfonds. Een vergelijkbaar gevolg is te zien in het kader van de Landsverordening Ongevallenverzekering”.


See article 8, paragraph 4 National Ordinance OV:

“wanneer het dagloon van de werknemer voor wie een 6-daagse werkweek geldt meer dan NAF 164, 25 en van de werknemer voor wie een 5-daagse werkweek geldt meer dan NAF 197, 10 bedraagt, is over het meerdere geen premie verschuldigd”.

This means that the ability to be insured under the OV has nothing to do with (increasing) the wage limit. Unlike the ZV, it does not matter for the OV whether someone earns more or less than the wage limit. In order to be insured for ZV, one's income must not exceed the wage limit. In order to be insured for OV, the wage limit is not a determining factor.

For this reason, the SER stated that the information under “Financiële paragraaf” in the Elucidation to the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 is indeed not correct. The SER would like to comment that it is peculiar that the Ministry now states that it does not share the SER's view on this matter. When the SER did call the Policy Department of the Ministry of Public Health, Social Development and Labor via telephone during the time of drafting this advice, the Policy Department admitted that this information under “Financiële paragraaf” in the Elucidation to the draft national decree, containing general measures, regarding the price indexation OV and ZV 2015 was erroneous.

Furthermore, the SER would like to point out that the information in an Elucidation [“Nota van Toelichting”] to any law should always be true and correct and should never be taken lightly.



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