



**Sociaal Economische Raad**  
**Social Economic Council**

**SER advice nr.**  
**2014 – 001**

# Flexicurity for Sint Maarten

*Advice on an integrated approach to dismissal procedures, short term labor contracts and unemployment insurance*

Philipsburg, January 31, 2014

*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.*

*The SER was established by law (“Landsverordening Sociaal- Economische Raad”) in 2010.*

*The SER consists of representatives of employees’ and employers’ organizations as well as independent experts. The objective of the SER is to achieve a broad concept of wealth in Sint Maarten by offering quality advice and reaching consensus on social economic issues.*

*For more information, please visit our website [www.sersxm.org](http://www.sersxm.org)*

## Table of Contents

Introduction .....	2
1 Background and history .....	3
1.1 The concept of 'flexicurity' .....	3
1.2 Current legal framework .....	4
2 Flexicurity challenges in Sint Maarten .....	6
2.1 The current context: too little flexibility <i>and</i> too little security .....	6
2.2 Dismissal regulations.....	8
2.2.1 Dismissal by giving notice (permit required) .....	8
2.2.2 Dissolution of the labor contract by court .....	9
2.3 Temporary contracts.....	10
2.4 Unemployment benefits, cessantia .....	11
3 Flexicurity proposals for Sint Maarten.....	12
3.1 Revision of dismissal regulations .....	12
3.1.1 Civil Code .....	12
3.1.2 Dismissal regulations .....	12
3.1.3 Creation of a Dismissal Assessment and Arbitration Board (DAAB) .....	13
3.2 Addressing the abuse of temporary labor contracts .....	15
3.3 Dispense with cessantia while respecting entitlements accumulated to date.....	16
3.4 Introduction of an unemployment benefit (UB) .....	16
4 Summary of SER advice.....	18
5 Sources and acknowledgements .....	20
5.1 Sources.....	20
5.2 Acknowledgements.....	21
Appendix 1. Calculation of unemployment benefit premium percentage.....	22

## Introduction

On September 17, 2012 the SER advice on the “Draft ordinance on temporary labor contracts” was presented to parliament. When drafting this advice, the SER realized that the issue of temporary contracts is closely intertwined with other labor market- related issues like dismissal regulations and questions of unemployment. One immediate link is the assumption that employers make (too much) use of temporary contracts, because of the circumstance that it is overly complicated to fire an employee once he or she is in permanent service.

Therefore, the SER decided to review these different labor market questions in conjunction with each other, and to pursue a more far-reaching and comprehensive unsolicited advice on temporary labor contracts, and on the other hand the question of permanent contracts and dismissal laws. On the other hand, simplifying dismissal procedures naturally brings to the forefront the questions of job security, social and economic security for the employee. In any case, a balanced approach should be followed between – on the one hand - making labor relations more flexible and therefore promoting employment, efficiency and economic growth and – on the other hand – improving the social and economic security of employees, taking the opportunity to propose some long-discussed, sometimes long overdue revisions and additions of our social security system.

In the idea of “flexicurity” the SER found a fitting concept in which flexibility and increased security are reconciled, a concept with which extensive experience has been gained in Europe and elsewhere over the past decades. Flexicurity is to be distinguished from the classic ‘welfare state’ model, in that it has a far more dynamic approach to employment and unemployment. While flexicurity allows more flexibility in ending a labor relation, it also pro-actively transitions workers to new jobs, enhances their labor market chances, while it still guarantees solid social security.

This advice seeks to translate a number of core elements of flexicurity to the specific Sint Maarten situation, fitting our socio-economic realities while connecting to our existing legislative framework.

By choice of the SER board, some elements of ‘flexicurity’ are not immediately covered in this advice. Issues like permanent education (lifelong learning), strategies to actively promote reintegration of the unemployed into the labor market, and better connections between education and prospective employment are possible topics for future advice.

Furthermore, the crucial flexicurity dimension of a – second tier – pension arrangement (additional to AOV) is the subject of a separate SER advice.

# 1 Background and history

## 1.1 The concept of 'flexicurity'

The question of achieving a balance between the interest of the employer in terms of flexibility of the labor contract on the one hand, and the interest of the employee in terms of social and economic security in the same labor relation, is not new, nor is it limited to Sint Maarten.

The term "flexicurity" was coined in Denmark in the 1990s. The roots of the concept are in the continental European tradition of mutual recognition of opposing interests between employers and workers. In this tradition, labor unions and business sector usually resolve their differences through bargaining and compromise, often in long-standing negotiating institutions, of which the SER is an example. Government is often involved in these negotiations; however legislation is seen as confirmation of compromise reached between social partners, rather than a means of enforcing such compromise.

In the original Danish definition, flexicurity was comprised of

1. Flexibility in the labor market,
2. Social security and
3. An active labor market policy with rights and obligations for the unemployed.<sup>1</sup>

The European Commission adopted the "flexicurity" concept as a cornerstone of European social policy as of 2005 and beyond. Flexicurity is seen as well as a means to revive and revise the less successful 2000 Lisbon strategy, in which the EU originally set its sights on a knowledge-based economy in view of the increased global competition. In its original form, the EC considers flexicurity as an integrated strategy to simultaneously enhance flexibility and security in the labor market. In their keystone report "*Towards Common Principles of Flexicurity*" of July 2007 the European Commission defines flexicurity and recognizes four policy elements:

1. Flexible and reliable contractual arrangements;
2. Comprehensive lifelong learning strategies;
3. Effective active labor market policies;
4. Modern social security systems providing adequate income support during employment transitions.<sup>2</sup>

At the same time, the European social partners (labor unions and business community) in a joint 2007 statement recognize the necessity for a flexicurity-type development in the report Key challenges facing European labor markets: a joint analysis of European social partners. Adding to the four points of the EU definition of flexicurity a fifth item: "*A social dialogue contributing to a negotiated balance between flexibility and security, improving the smooth functioning of the labor market and the adaptability of enterprises and workers.*"<sup>3</sup>

---

<sup>1</sup> Wikipedia, "Flexicurity" article, retrieved March 2013.

<sup>2</sup> EC "Towards Common Principles of Flexicurity: More and better jobs through flexibility and security" July 2007, page 12. Contains COM(2007)359 final.

<sup>3</sup> Key challenges facing European labor markets: a joint analysis of European social partners, 18 October 2007, page 53.

Furthermore, after the 2008 global financial and economic crisis, flexicurity became increasingly prominent in the EU as a direction to help economic recovery and renewed growth. For instance, in the 2011 “Euro-plus pact” a covenant among a number of EU members to promote fiscal responsibility and economic competitiveness among more stringent lines than the 1998 “Stability and Growth pact” (well known for its fiscal deficit and public debt limits for member states) explicitly mentions “flexicurity” as the first attention point to promote employment.<sup>4</sup>

On a global level, the Organization for Economic Cooperation and Development (OECD), an international organization tending more towards the employers’ point of view, praised the “flexicurity” models of Denmark and Austria (notwithstanding the important differences between the two) as early as their 2007 Employment outlook.

With regards to flexicurity, the Sint Maarten situation (based on the former Netherlands Antilles legislation) is a hybrid: job security is relatively high, with several safeguards against random dismissal and an intricate system of permits and legal procedures for termination. This part of our legislation is carried over from the post-world war II Dutch situation. On the other hand, the Netherlands Antilles (while copying the Dutch 1950s AOV and pension related regulations) missed out on the Dutch developments WW (unemployment insurance) and WAO (disability insurance) systems. Summarizing; while job protection is high, our social security framework is incomplete and somewhat lopsided.

## 1.2 Current legal framework

As far as the flexicurity elements in this advice are concerned, the following legal regulations are most relevant:

The labor contract (arbeidsovereenkomst) is regulated in the (former Netherlands Antilles) Civil Code, book 7A:

- Civil Code, book 7A, articles 1613 – 1615x

In addition to the Civil Code, the termination of a labor contract is regulated by a separate ‘Dismissal Ordinance’:

- Landsverordening beëindiging arbeidsovereenkomsten  
Landsverordening houdende bijzondere regels ten aanzien van de beëindiging van arbeidsovereenkomsten (Sint Maarten AB 2013, GT no. 750; previously Netherlands Antilles PB 1972 no. 111)
- Article 6 of the LV beëindiging arbeidsovereenkomsten in further regulated by a National Decree entailing general measures (LB-ham; Sint Maarten AB 2013, GT no. 209)

The institution of a Labor office is regulated by the following ordinance:

- Landsverordening houdende de instelling van een arbeidsbureau (Sint Maarten AB 2013, GT no. 343; previously Netherlands Antilles P.B. 1946, no. 109)

---

<sup>4</sup> EUCO 10/1/11 rev 1. Page 17

An ordinance regulating temporary labor agencies (uitzendbureaus) was introduced in the Netherlands Antilles in 1983. However, it was never implemented in Sint Maarten during the Netherlands Antilles era. The ordinance entered into force in 2013.

- Landsverordening op het ter beschikking stellen arbeidskrachten (August 1, 2013, Sint Maarten AB 2013, no. 28). The text of this law is not adapted to the Sint Maarten situation post- 10/10/10.

The cessantia<sup>5</sup> system is regulated by the following ordinance:

- Cessantia landsverordening

Landsverordening tot het vaststellen van nieuwe regels inzake een verplichte eenmalige uitkering aan de werknemer, bij ontslag buiten zijn toedoen (Sint Maarten AB 2013, GT no. 529; previously Netherlands Antilles PB 1983 no. 125)

---

<sup>5</sup> The term “cessantia” in this advice is spelled in accordance with the Dutch (legal) sources and therefore with double s. In Papiamentu/o sources the term is spelled as “cesantia” after the Spanish language.

## 2 Flexicurity challenges in Sint Maarten

### 2.1 The current context: too little flexibility *and* too little security

In more than one way, the Sint Maarten labor market lacks flexibility.

First, there is too little voluntary labor market mobility. Because of the low level of AOV entitlement, the great differences in employer-bound pension schemes and the difficulty of transferring those, employees with a permanent contract tend to stay with the same company until retirement. The most important example of this phenomenon is of course government, which is the largest single employer in our country as well as the employer with one of the most favorable –non-transferable– pension schemes.

This lack of voluntary mobility effectively divides our already tiny labor market into even smaller isolated compartments. The cessantia system, having a dual purpose of dismissal retribution and retirement benefit, compounds the rigidity of the labor market by actively discouraging employees to change to a different employer; accumulated cessantia entitlements in the event of dismissal evaporate, while in the final years before retirement almost the entire retirement benefit would be cancelled upon changing jobs.

From the macro point of view of optimal use of human resources in our economy, as well as from the micro points of view of career development for the worker and recruitment of optimum personnel for the employer, our economy badly needs more voluntary labor market mobility.

Secondly, according to many, the Sint Maarten labor market also lacks the flexibility for employers to dismiss workers in case of reduced production or output, technically known as ‘external numerical flexibility’. In the present situation, employers cannot freely do this; a permit system is in place, requiring the company to motivate and supply evidence of reduced output and revenue. This type of flexibility covers among other factors ‘normal’ business cycle reductions of personnel (in case of an economic downturn) but may also be intertwined with the strong seasonal patterns in our economy, related to the annual tourism cycle. Some employers are of the opinion that, because of the limitations and conditions on laying off employees in times of economic adversity, they are forced to absorb too large a share of the economic risk of the employee. As the argument goes, this may make them reluctant to hire in the first place, leading to missed business opportunities, hence reduced economic growth as well as failed employment opportunities.

Apart from dismissal on economic grounds, there is the category of cases where there is a mismatch between employer and employee, for instance when the employee is not performing his/her tasks properly. Also in these cases, the procedures to let an employee go are seen as overly complicated. On the other hand, in the same cases there needs to be sufficient protection for the employee, as the motives for dismissal may be far more subjective than in cases of ‘economics’.

In the middle of the flexibility and security debates is the question of the use and abuse of temporary contracts. There is relatively wide acceptance of the use of temporary contracts in relation to seasonal (tourism) services, hence the popular term “six month contracts”. However, there is concern about and almost universal rejection of the serial use of temporary contracts in cases where the employment is permanent, at least within the boundaries of normal business risk.

The impression exists however, that employers “flee” into the use of temporary contracts because of the difficulty in firing an employee once he or she is granted permanent employment. Another factor in this respect is employers using a temporary contract as an “extended trial period”.

Moreover, apart from the considerations of employers to choose between offering temporary or permanent to an employee, there is the question of the seasonality of unemployment. To a certain extent, seasonal unemployment is a structural and almost unavoidable characteristic of our economy. The recognition by many stakeholders of a shared responsibility for the welfare of seasonal workers during the low season gives rise to the idea of an unemployment benefit to cover this forced seasonal unemployment partially or entirely. Another direction to alleviate the problem of seasonal unemployment would be to relax the permit system for temporary entrance and exit of immigrant seasonal workers to the country.

The other side of the flexicurity equation consists of the social security situation of employees in Sint Maarten. Mention was already made of the low level of AOV entitlement, combined with the hard-to-transfer secondary pensions (covering only a minority of employees, mostly (semi-) government and a few private enterprises).

The introduction of some type of unemployment insurance has been subject of debate for many years in the Netherlands Antilles and recently in Sint Maarten as well. If flexicurity is taken seriously, this building block of social security is indispensable. The main questions are of course what the extent of such a benefit should be in the Sint Maarten context in terms of *depth* (what part of the lost wages is covered) *length* (timespan of the payment) but also *scope* (Who exactly is covered? Is everyone covered, for instance, regardless of age or residence status?).

Unemployment insurance is where the Sint Maarten social security system is perhaps most defective; at this moment there is no real unemployment benefit in place at all. However, a certain level of insurance against the risk of business-related unemployment is necessary to compensate for flexibility in dismissal regulations. If not, the individual risk of unemployment caused by business factors would be shifted to the employee entirely. In the Dutch system for instance, the business-related unemployment risk (to the extent that it is covered) is seen entirely as part of the risk of doing business and therefore the WW-premium is covered by the employers alone. Employees do not contribute to the premium. The insurance aspect lies in the risk being collectivized among businesses in the same branch of industry. Companies in a branch of industry with a higher incidence of unemployment therefore pay a higher premium percentage. All of this in a framework of a certain universal depth (insurance benefit as percentage of the lost pay) and length (timespan of the benefit, which is in turn related to the employment history of the worker).

Outside the direct dismissal-related security, improvement of AOV and transferability of secondary pensions are essential flexicurity measures as well, as they have a very important bearing on the objective and subjective security of an employee. The future of AOV has been the subject of a 2012 SER advice, while second-tier pensions are handled in a separate SER advice expected in 2013.

In the paragraphs below, the current situation in Sint Maarten will be described in the fields of dismissal regulations, temporary contracts and unemployment benefits.



## 2.2 Dismissal regulations

Leaving aside the possibility of voluntary dissolution of a labor contract, where an amicable solution is reached, terminating a labor contract on the initiative of the employer can follow two basic tracks.

One is dismissal by giving notice. In this case a dismissal permit has to be requested through the Labor Affairs Department. The other is a legal procedure through the Court of First Instance. Exceptions exist; e.g. dismissal during a trial period, dissolution in case of bankruptcy of the employer, or reaching the end date of a temporary contract. Immediate dismissal for an urgent reason (ontslag op staande voet) is in a separate category that may or may not lead to a court case from the employee's side. We focus here on "ordinary" dismissal tracks initiated by the employer, that are either based on business reasons or on a (non-urgent) mismatch between employer and employee.

### 2.2.1 Dismissal by giving notice (permit required)

Following the Dismissal Ordinance, in all cases where the employer seeks to terminate a labor contract by giving notice, the employer needs to apply for a dismissal permit with the Secretary-General of the ministry of Health, Social Development and Labour. This does not include immediate notice (Dutch: ontslag op staande voet). The original background to this legislation is the post-World War II situation in the Netherlands, where emergency laws were implemented to temporarily regulate the labor market in the postwar economic recovery situation. As it turned out, in the entire Kingdom of the Netherlands the successors of these laws are still in place over 65 years later, despite decades of discussions and negotiations to change or abolish them, in the Netherlands as well as in the other Kingdom territories. In the governing program of the current Dutch government (Rutte-II) of late 2012 revision of the permit system is again put on the agenda. Initial responses are mixed and reluctant.

In Sint Maarten, application by an employer for permission to dismiss one or more employees is advised upon by a Dismissal Committee comprised of a chairperson, two representatives of labor unions and two of the business community. In 2012, 68 dismissal requests were handled, of which 40 (59%) were granted, 15 were denied and 13 withdrawn.<sup>6</sup> The view of many entrepreneurs is, that the dismissal permit procedure often takes longer than the legal maximum of six weeks, and is generally considered too time consuming, while the outcome is not always transparent.

In summary, the dismissal permit procedure is seen by many as outdated, time-consuming and is often regarded as a disincentive to grant an employee permanent employment.

---

<sup>6</sup> Labor affairs department 2013, p. 5/6 table of dismissal requests.

## 2.2.2 Dissolution of the labor contract by court

Following the Civil Code article 1615w the employer can seek dissolution of the labor contract. This article pertains to so-called “serious reasons” (gewichtige redenen). In 2012, 81 cases pertaining to dissolution (setting aside) of a labor contract appeared before the Court of First Instance in Sint Maarten.<sup>7</sup>

Table 1 below aims to give an overview of the most important ways in which – from the point of view of the employer – termination of a labor contract can be reached. The purpose of this overview is to give clarity as to the situations in which the employer may be required to pay compensation to the employee.

Some scenarios have been excluded, specifically those that have no Court involvement:

- Agreement to terminate by mutual consent;
- Dismissal by giving notice during a trial period;
- Termination by reaching the end date of a temporary contract or by dissolution criteria included in the (temporary) contract being met;
- Termination by law in case of death of employee or employer;
- Termination on the grounds of Civil Code article 1615x (non-compliance or breach of contract) is left out for practical reasons, as this article is very seldom invoked.

*Table 1. Selected elements of the current dismissal procedures and regulations*

TERMINATION OF A LABOUR CONTRACT		
Overview of possible actions from the point of view of the employer, and selected court procedures		
BY GIVING NOTICE		
COURSE OF ACTION BY EMPLOYER	FOLLOW-UP	
A	<p>Regular dismissal with notice (length of notice according to Civil Code art 1615i)</p> <p>The employer applies for a dismissal permit by the SG of the Ministry of Public Health, Social Development and Labour (Dismissal law). Only after the permit is granted, dismissal can be given and the notice period starts. Filing period is deducted from notice period leaving minimum 1 month notice.</p>	<ul style="list-style-type: none"> <li>• Permit declined</li> </ul> <p>The employer may resort to scenario C (dissolution)</p>
	<ul style="list-style-type: none"> <li>• Permit granted</li> </ul> <p>Employee can challenge dismissal in Court on grounds of being “manifestly unreasonable” (kennelijk onredelijk). (1615s)</p> <p>If granted: Compensation “naar billijkheid” for the real damages. (no “kantonrechttersformule”)</p>	
	<p>Employee can challenge irregularities in the dismissal (e.g. non-compliance with length of notice period) and Court can grant</p>	

<sup>7</sup> Number supplied by the office of the clerk of the Court of First Instance

			compensation for damages involved (e.g. wages due based on notice period).
B	The employer gives immediate notice of dismissal (ontslag op staande voet) according to Civil Code art. 1615p, 1615o based on URGENT reasons. NO permit required.		<ul style="list-style-type: none"> <li>The employee does not accept the termination</li> </ul> Employee seeks nullity of the termination on grounds of absence of urgent reason, therefore absence of the required permit, <ul style="list-style-type: none"> <li>Payment of wages due</li> <li>(Re-)admission to work</li> </ul>
			<ul style="list-style-type: none"> <li>Employee accepts termination</li> </ul> Employee seeks (full) compensation according to Civil Code art. 1615o and 1615r (no “kantonrechttersformule”)
<b>SETTING ASIDE (DISSOLUTION) OF A LABOUR CONTRACT</b>			
C	The employer applies for dissolution (setting aside) of the labor contract based on Civil Code art. 1615w. Based on:		
	<ul style="list-style-type: none"> <li>Serious reasons, (see also immediate dismissal 1615p) OR</li> </ul>		If the court accepts the serious reasons > no compensation for employee
	<ul style="list-style-type: none"> <li>Changed circumstances (most often adverse business-related factors, falling sales, decreased revenues)</li> </ul>		Compensation for employee according to the so-called ‘kantonrechttersformule’ Amount of compensation = A x B x C A = Weighted years employment B = Monthly wages C = Correction factor for responsibility/ gravity

### 2.3 Temporary contracts

Referring to SER advice 2012-001 “Advice on the draft ordinance on the elimination of the abuse of short-term labor contracts” a number of important measures need to be taken to prevent misuse of temporary contracts. These measures are crucial as well to make the flexicurity package in this advice feasible.

Even though the number of temporary labor contracts in the labor market in relation to permanent ones is by no means high, the complaints and grievances about abuse of these contracts are serious and persistent. There are strong indications that the cardinal legal limitations of short term contracts, i.e. *the fourth contract becomes permanent by law, as long as the time between subsequent contracts was no longer than 3 months, and each sequence of temporary contracts adding up to more than 36 months in total becomes permanent by law*, are often ignored.<sup>8</sup>

As this advice proposes relaxation of dismissal rules, the incentive for employers to hire employees on a temporary basis, certainly for a second or third time, should be reduced considerably, and therefore overall use of temporary contracts should diminish.

<sup>8</sup> Paraphrased from Civil Code, article 1615 fa

## 2.4 Unemployment benefits, cessantia

In the current situation Sint Maarten knows no real unemployment insurance. In terms of flexicurity, the existing cessantia benefit is neither fish nor fowl. It is neither a real unemployment benefit nor a proper retirement insurance. Worse even, it contains important adverse incentives for employees, making them stay with one employer so as not to lose accumulated (potential) cessantia benefits. These effects are caused by the employer-bound nature of cessantia. Moreover, the nature of cessantia is more that of a dismissal compensation (bound to one particular employer) instead of an insurance against the risk of unemployment (relative to the employee's employment history in general). If however, cessantia is seen as compensation for dismissal by one particular employer, it duplicates with the provisions to that effect in the Civil Code and further jurisprudence (including the so-called "kantonrechtersformule" applied in case of dissolution of the contract).

From the point of view of the employer the cessantia law is unwieldy as well; from the nature of the provision, the cost involved are highly unpredictable and the effects therefore hard to handle from a business perspective. A prudent business owner should create reserves against the eventuality of having to fire an employee and having to pay cessantia, or, alternatively, to pay cessantia upon the employee reaching pensionable age. However, if the employee voluntarily changes jobs, or leaves before retirement, no cessantia will need to be paid at all and the provision reverts to the profit & loss account. In terms of predictability of costs, cessantia plays havoc with business administration.

In conclusion, although the Sint Maarten system of social insurance comprises – among others – a general pension (AOV), financial assistance (onderstand) and different insurance systems against medical costs, a general unemployment insurance is strangely missing from our system.

## 3 Flexicurity proposals for Sint Maarten

### 3.1 Revision of dismissal regulations

#### 3.1.1 Civil Code

The provisions in the Civil Code regarding the ways in which an employment contract can be ended are generally considered complicated and time-consuming. There is a long history of proposals to streamline, adapt or at least edit these provisions. Such changes however are best addressed in a Kingdom-wide setting, taking into account the principle of concordance of legislation within the Kingdom (Dutch: concordantiebeginsel). Furthermore, as many points of criticism of the Civil Code addresses form rather than substance of the Code, such proposals are kept outside the scope of the current advice.

#### 3.1.2 Dismissal regulations

Another long-standing issue is the Dismissal Ordinance (Dutch: Landsverordening Beëindiging Arbeidsovereenkomsten). The roots of this law are in the immediate post-World War II situation in the Netherlands, where “temporary” emergency legislation was introduced to protect employees against unjustified dismissal in the chaotic postwar economy. The current Sint Maarten legislation was introduced in the former Netherlands Antilles in 1972. The years that have passed since, have not yielded an adequate alternative, most of all because stakeholders on the labor side were understandably reluctant to give up a known protection mechanism in favor of an untested alternative.

If the current dismissal law with the related dismissal commission is dissolved, a new system has to be created to guarantee sufficient protection of the employee against unfair dismissal.

A new system is proposed based on the following principles:

- Creating a clear, fast and predictable path for the employer in case of dismissal with notice of an employee, provided the grounds for dismissal are economically unavoidable or otherwise reasonable, and these grounds are well-founded and well-documented;
- Ensuring adequate legal protection for the employee, generally considered the weaker party in cases of dismissal, against unnecessary or unreasonable dismissal. It is recognized that the high cost of legal representation works to the detriment of the employee;
- Creating incentives for employer and employee alike to reach agreement without the necessity of a court case;
- Creating incentives for employers to consistently apply professional human resource management, so that dismissal cases become less frequent, but if necessary, will be well-founded and well documented, contributing to fast and clear-cut procedures.
- Staying as close as possible to the Civil Code (as opposed to adding another legislative layer, as the Dismissal Ordinance does);

- Guaranteeing freedom of choice in the course of action to be followed for employer and employee, i.e. leaving all existing legal avenues open;
- Creating a clear distinction between dismissal for business and economic reasons on the one hand (individual or collective), and dismissal for reasons related to the person of the employee on the other hand.

### 3.1.3 Creation of a Dismissal Assessment and Arbitration Board (DAAB)

It is advised here to create a “Dismissal Assessment and Arbitration Board” (DAAB) composed of representatives of labor unions and the business community, that will serve as assessor and/or arbitrator in the cases outlined below. A model for the composition of such an entity, and many applicable internal procedures, could be derived from the 2003 Curaçao “Dismissal Arbitration Board”<sup>9</sup> blueprint, an institution that operated briefly in the island territory of Curaçao during that year.

Apart from actual dismissal cases, the DAAB could also play a role in arbitration in case of other grievances regarding employment contracts and related matters, aimed at the prevention of escalation of contract-related disputes into disruption of the labor relation.

In cases of collective dismissal the permit system stays in place, and the DAAB will assess the quality of the (mandatory) social plan, prior to giving or declining permission to give notice to the employees involved. This is very similar to the procedure currently in place in cases of collective dismissal.

In cases of individual dismissal with notice, the notice period will start immediately, and is no longer suspended by a permit request. The employee has the option of submitting his/her case to the arbitration board. If the time between the employer giving notice and the employee submitting the case to the DAAB exceeds five working days, the excess time is not eligible for financial compensation. If both parties agree to arbitration, the outcome is final and binding for both parties, and its stipulations such as financial compensation will be made legally enforceable by court order. Important difference with the current situation is, that there is no longer a *preventive* assessment of each dismissal case.

The arbitration process needs to be speedy so as not to delay the dismissal process. As speed is in the interest of the employer, a maximum decision time needs to be set, counting from the moment the employer has submitted all information the DAAB deems necessary. The DAAB will hear both parties and perform other necessary steps to reach a verdict. The result depends on the nature of the dismissal; first of all on the question whether the grounds of dismissal are business/economics related or connected to the person of the employee. The more well-documented the employer’s case is, the faster the DAAB can operate. In this way the employer should be incentivized to carry out an overall well-founded human resource management, so if needs be, the employer would be able to submit a well-prepared dismissal case.

---

<sup>9</sup> See Dismissal Arbitration Board 2003

Should the employer decline arbitration, the DAAB will assess the case, and based on its findings, may decide to grant the employee financial support to cover the cost of legal support when filing a case against the dismissal based on the civil code. This way, the employer is stimulated to accept arbitration, while the employee is suitably protected. The court case scenario is obviously a last resort; the idea is for employer and employee to either go the way of arbitration or reach an amicable solution before the necessity of legal procedures arises. The possibility for the DAAB to award financial support for legal representation is an important distinction with the 2003 DAB in Curaçao. The lack of incentive for employers to opt for arbitration is said to have caused the failure of the Curaçao model.

In arbitration, the DAAB may or may not impose compensation to the employee to be paid by the employer, or in non-business related cases also impose resumption of the labor relation. For the employer the option of seeking dissolution through article 1615w of the civil code is left open however.

Although every case is unique with regards to persons and circumstances, parameters and guidelines as well as maximum amounts will be set for the compensation awarded to the employee. These parameters will be very different for cases on economic grounds compared to cases where dismissal is based on individual causes. As dissolution through court (based on article 1615w of the Civil Code) is the ultimate option from the point of view of the employer, it stands to reason to take the expected outcome of applying the “kantonrechttersformule” as a maximum for the compensation awarded. Compensation (even if nil) however is in all cases separate from and additional to the obligation to pay out the legal notice period as stipulated by the Civil Code.

In cases of dismissal with immediate notice (ontslag op staande voet) the employee may submit a request for assessment to the DAAB leading to possible financial support for a court case challenging the dismissal based on the civil code. This is currently possible through the office of labor affairs, and will be put in the hands of the DAAB. Although arbitration is not the goal in this case, the DAAB will hear employer and employee both, again incentivizing the employer to submit a well-documented case file. The aim is to simultaneously offer the employee protection and at the same time avoid fortuitous court cases.

In cases of the employer requesting court for the labor contract to be dissolved (set aside) based on article 1615w of the Civil Code the situation remains unchanged, and the court may grant the employee compensation based on the so-called “kantonrechttersformule”. This scenario does not involve the DAAB. The number of dismissal-related court cases was 81 in Sint Maarten in 2012<sup>10</sup>. The aim of the introduction of the arbitration Board should be to reduce this number significantly.

As a complementary measure, it is important to fiscally recognize the income-suppletion nature of dismissal compensation paid out by the employer. Taxation laws should be amended to allow stretching out severance pay over time to avoid a very high tax rate being applied to a one-time lump sum payment.

---

<sup>10</sup> Data provided by the Court of First Instance, Sint Maarten.

Table 2. Overview of proposed new dismissal regulations including role of the Dismissal Assessment and Arbitration Board (DAAB)

<b>Collective dismissal</b>	Permit remains mandatory	Employer submits mandatory social plan	DAAB assesses social plan	<ul style="list-style-type: none"> <li>• SP accepted -&gt; dismissal permits</li> <li>• Changes indicated -&gt; back to start</li> <li>• SP rejected -&gt; no permits</li> <li>• OR: Referral to individual procedure</li> </ul>
<b>Individual dismissal with notice (Regular/irregular)</b>	Arbitration instead of permit. Notice period starts immediately. Employee may request arbitration ->	Employer rejects arbitration	DAAB assesses dismissal case	<ul style="list-style-type: none"> <li>• No further action OR</li> <li>• Grant of financial support to employee for legal fees when filing case based on <ul style="list-style-type: none"> <li>○ 1615o/r (irregular dismissal)</li> <li>○ 1615s (manifestly unreasonable)</li> </ul> </li> </ul>
		Both parties accept arbitration: verdict is binding	DAAB performs arbitration: If economic grounds established ->	<ul style="list-style-type: none"> <li>• Dismissal with or without compensation</li> </ul>
			If non-economic grounds ->	<ul style="list-style-type: none"> <li>• Dismissal with or without compensation OR</li> <li>• Return to work with/without comp</li> </ul>
<b>Individual dismissal with immediate notice (ontslag op staande voet)</b>	Possible financial support for employee (presently possible through Labor office)	Employee may request assessment by DAAB	DAAB assesses case, may grant financial assistance	<ul style="list-style-type: none"> <li>• Possible grant of financial support to employee for legal fees when filing case based on <ul style="list-style-type: none"> <li>○ 1615o/r (irregular dismissal)</li> <li>○ 1615s (manifestly unreasonable)</li> </ul> </li> </ul>
<b>Dissolution based on Civil Code article 1615w</b>	No change			<ul style="list-style-type: none"> <li>• Legal verdict with possible compensation based on "kantonrechttersformule"</li> </ul>

### 3.2 Addressing the abuse of temporary labor contracts

In line with the earlier advice on short term labor contracts (SER 2012-001, September 2012), the SER reiterates that the legal rules and regulations are in itself sufficient, but the compliance as well as the enforcement is deficient.



In order for the other proposals in this advice to be viable, these concerns need to be addressed concurrently.

- Require every labor contract to be in writing. Lack of written proof of a labor relationship makes enforcement of rules by government agencies difficult, and compromises the position of the employee, especially in case of legal action.<sup>11</sup>
- Increase of control by the labor inspection (arbeidsinspectie) on compliance with the existing legal rules regarding (subsequent) temporary contracts. The recently launched Labor Market Information System (LMIS) should be a helpful tool in this respect.
- Increase the inclination towards compliance by employers by: simplifying the bureaucratic procedures where possible; dissemination of information regarding the rules and generally building a culture of compliance. This should be achieved not only by government pressure but also by self-regulation of the private sector.
- Increase the consciousness among employees with regards to their rights and entitlements. Especially among temporary employees (recent) immigrants are overrepresented, finding themselves in a by definition more vulnerable position. The labor unions – and other NGO's - have a specific role and responsibility in this field.

### **3.3 Dispense with cessantia while respecting entitlements accumulated to date**

Due to its deficient nature and its adverse effect on the labor market, the current cessantia arrangement needs to be abolished. All entitlements accumulated (years worked) up to the 'cut-off date' will be respected and can be invoked in due time. In this way, the adverse labor market effects of cessantia (the dis-incentive to change jobs) will be eliminated immediately, while the entitlements accumulated to date will stay in place. The cessantia fund managed by SZV, which is currently used to pay out cessantia to employees in case the employer is unable to pay, e.g. in case of bankruptcy, will be of limited use once cessantia is phased out. This fund can be used as starting capital/ financial buffer for the newly to be established unemployment benefit.

Dispensing with the cessantia benefit in case of dismissal motivated by retirement can be postponed until the introduction of a general second-tier pension scheme, and/or the introduction of a mandatory retirement age.

### **3.4 Introduction of an unemployment benefit (UB)**

To provide the necessary security for the employee who loses his/her job for reasons outside his/her influence, an unemployment benefit insurance needs to be introduced. Eligibility for such a benefit will depend on certain conditions. The cause of unemployment must be outside the responsibility or influence of the employee.

The following parameters are proposed:

---

<sup>11</sup> See for instance the Aruba Civil Code, where it is mandatory for a labor contract to be in writing; Article 1613x section 1, cited in DirAZ 2007, p 23.

- Premium payment for unemployment benefit (UB) is mandatory for each employee. An exception for employees who are also managing director and major shareholder (Dutch: directeur-groootaandeelhouder) will be made.
- The entire UB premium is to be paid by the employer.
- Each employee who has been paying UB premium is entitled to the benefit.
- Premium is levied as a percentage of income, similar to the ZV/OV. Premium will be levied over the annual income to the same maximum as ZV/OV, i.e. presently up to NAf. 64,035
- Entitlement to UB is contingent upon the unemployment being involuntary and outside the responsibility of the employee. Dismissal for cause (e.g. misconduct, breach of rules, not functioning properly) makes the employee ineligible for UB.
- The maximum timespan of UB entitlement is three months. The actual duration depends on the employment history of the employee.
- Provisions have to be made to ensure the UB provides an equitable coverage for seasonal workers who are subject to recurrent unemployment.
- The amount of UB is 70% of the average wage over the last 12 months, up to 70% of the maximum UB premium base, i.e. the maximum entitlement is 70% of NAf. 64,035 = NAf. 44,824 annually.

Based on the parameters listed above, preliminary calculations show that a 3 month unemployment benefit is financially feasible through a 3.35% premium levy on the employees income. (See appendix 1 for calculation). It is considered reasonable for the employer to carry the full premium of the 3-month unemployment insurance, as the employers can reduce part of their business risk by being able to dismiss employees faster in case of a business downturn. Moreover, as the cessantia is simultaneously abolished (in terms of new entitlements) no new provisions will have to be made, amounting to a roughly 2% reduction in labor costs. It stands to reason however that if in a later stage the length of the entitlement would be increased above three months, both employer and employee would contribute to the premium connected to that additional coverage.

By the same token, it is reasonable to differentiate the level of premium between branches of industry, depending on how much each type of business contributes to unemployment. This has special relevance to seasonal unemployment, the effects of which should be carried primarily by the branches causing it.

This calculation incorporates – as assumed overhead costs - the average operational costs of SZV incurred in administrating similar social insurances. This calculation also assumes that each unemployed person is eligible to the full three months of UB. As the real entitlement may be less, the real premium may therefore be lower. On the other hand, schemes such as this depend on macro-economic circumstances. High unemployment due to adverse trends in the global economy may make a higher premium percentage necessary, or a lower benefit.

If cessantia is dispensed with and an unemployment benefit is introduced, a transition period is unavoidable, in which an employee who is dismissed may be entitled to a mix of previously accumulated cessantia rights as well as an unemployment benefit under the new system, depending on his/her employment history since the date of introduction of the new benefit.

## 4 Summary of SER advice

To reach a solution on a number of interconnected issues in existing labor market regulations, which are in turn related to certain shortcomings in our system of social security the SER advises unanimously the following package of *flexicurity* measures:

- Revision of the dismissal procedures and regulations
  - Suspend the Dismissal Ordinance. There will be no more preventive assessment of dismissals, i.e. no more dismissal permit requirements, except in cases of collective dismissal, where the DAAB will assess the social plan, and grant or decline dismissal permits.
  - Instate a Dismissal Assessment and Arbitration Board (DAAB), handling arbitration in cases of dismissal with notice, as well as granting financial aid for legal representation of the employee in selected cases, primarily when the employer declines arbitration.
  - When both parties agree to arbitration, the verdict of the DAAB is binding and made legally enforceable. In case the employer declines arbitration, the DAAB may grant the employee financial assistance for legal representation to challenge the dismissal in court, based on the merits of the case.
  - The possibility for the employer to file for dissolution (setting aside) of the labor contract according to article 1615w of the civil code remains unchanged. In these cases, the court may use the “kantonrechttersformule” to establish compensation to the employee.
  - Tax legislation should be amended to allow one-time severance pay (awarded by DAAB, by Court or otherwise), to be fiscally spread out over time to avoid the high tax rate applicable to lump sum payments.
- Strict enforcement of the existing rules regarding temporary labor contracts
  - In connection with the other points contained in this advice, the SER reiterates its advice on short term labor contracts (SER 2012-001, September 2012).
  - It should be stipulated by law that all labor contracts should be in writing
  - Improve the knowledge about the rights and duties of employers and employees regarding temporary contracts and enhance the culture of compliance.
  - Increase of control and enforcement of compliance with the rules regarding subsequent temporary contracts, specifically that the fourth temporary contract is converted by law into an indefinite contract when the intervals are three months or less, and the rule that two or more temporary contracts exceeding a total of 36 months become permanent as well.
- Replace cessantia with an unemployment benefit (UB)
  - Dispense with the cessantia system. Change the cessantia ordinance, so that all accumulated entitlements are respected and kept in place, but no new entitlements are created as of the date of entering into force of the changes. As is the case presently, a change of employment will dissolve all existing cessantia entitlements accrued by the employee.
  - Create an unemployment benefit insurance based on an entitlement of 70% of the average wage earned (capped at the ZV/OV level of Naf 64,035 annually) , over a maximum of 3 months, the duration being dependent on employment history.
  - If applicable to repatriating immigrant workers, lump sum pay-out of unemployment insurance should be made possible.

- Preliminary calculations show that such an entitlement can be funded by a 3.35% premium on wages, to be carried by the employer. Differentiate the premium percentage by branch of industry, depending on the incidence of lay-offs and seasonality in each branch. The current cessantia fund managed by SZV, which will be of limited use once cessantia is abolished, could be used as starting capital and floating fund for the unemployment benefit.
- **Safeguard the integrated nature of the advice**

The SER wishes to stress the interconnected nature of the elements of this flexicurity advice. Different elements of this advice are to the advantage of different stakeholders in the socio-economic field. The total proposal is the result of a balancing of interests and mutual compromise. Therefore, from a policy implementation point of view, this advice has to be seen as an integrated package, in the sense that individual elements cannot be separated from the total without harming the essence of the advice, and damaging the unanimity of the advice.

Furthermore, as broad as the present flexicurity advice may be, it is still interconnected with other elements of social security and economic regulation not included in this advice. For instance, as the present cessantia system functions as a type of faux retirement benefit as well, it is of the utmost importance that a general mandatory second-tier pension benefit be implemented to compensate for the absence of the cessantia. Introduction of such a pension system will be the subject of a separate SER advice.

## 5 Sources and acknowledgements

### 5.1 Sources

- **Boasman 2012**

**Dismissal Ordinance**, Lecture at the Seminar on Labour Law organized by David Kock Legal, Rafael A. Boasman, Thursday August 30, 2012, Divi Resorts, Little Bay.

- **DirAZ 2007**

**Beleidsnota betreffende kortlopende arbeidscontracten**, Directie Arbeidszaken Nederlandse Antillen, Willemstad december 2007

- **Dismissal Arbitration Board 2003**

**Arbitration Rules of the Dismissal Arbitration Board of the Territory of Curaçao**. Dismissal Arbitration Board, Final Version, May 5, 2003.

- **European Commission 2007**

**Towards Common Principles of Flexicurity: More and better jobs through flexibility and security**, Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, June 27, 2007 COM(2007) 359 final.

- **Labor Affairs Department 2013**

**Statistical overview – 2012**. Ministry of Public Health, Social Development & Labor; Labor Affairs Department, 2013.

- **Labour Force Survey 2009**

**Results Labour Force Survey Sint Maarten 2009**, Central Bureau of Statistics (Netherlands Antilles) 2009.

- **Minister van SZW 2012**

**Hoofdlijnennotitie aanpassing ontslagrecht en WW**, Minister van Sociale Zaken en werkgelegenheid, Kamerbrief June 18, 2012.

- **Rhuggenaath e.a. 2008**

**Labor Force Development Policy And Structural Proposal, A Herculean Proposal with Herculean Tasks!** Eugene Ruggenaath, Marilyn Alcala-Wallé, Humphrey Davelaar, Curaçao, June 2008

- **Van Veen 2012**

**Labour Law**, Lecture at the Seminar on Labour Law, Mr. René van Veen, Thursday August 30, 2012, Divi Resorts, Little Bay.

- **SER Nederland 2012**

**Flexibiliteit in arbeidsverhoudingen: de stand van zaken**. Anne Wouters-Megens, SER Nederland, 5 september 2012

## 5.2 Acknowledgements

The SER wishes to acknowledge the contributions and kind cooperation of the following persons and organizations:

### Chamber of Commerce Curaçao

- John H. Jacobs
- Rinke Karman

### Former commissioner of Labor of the Island Territory of Sint Maarten

- Michael Ferrier

### Government of Aruba:

- Central Bureau of Statistics (CBS)
- Martijn Balkestein
- Herry Koolman

### Government of Curaçao:

- Ministry of Social Development, Labour and Welfare, Policy Department
- Jeroen Jansen

### Government of Sint Maarten:

- Department of Statistics (STAT)
- Makini Hickinson
- Maurette Antersijn
- Saskia Thomas-Salomons
- Department of Labor Affairs:
- Peggy-Ann Dros-Richardson
- Department of Labor:
- Rafael Boasman
- Len Dijkstra
- Martin Holterman-Hodge

### Joint Court of Justice

- Maritsa James-Christina
- Zunilda Monzon

### SZV Social & Health Insurances

- André Lievaart

### Tripartite committee members

- Brian Deher
- Jim Rosen
- Paul van Vliet

### Windward Islands Teachers' Union (WITU)

- Claire Elshot

## Appendix 1. Calculation of unemployment benefit premium percentage

ESTIMATE OF PERCENTAGE UNEMPLOYMENT 3 MONTHS OR LESS		
<i>Source: data of the 2009 labor market review</i>		
less than 1 month	182	6.6%
1 to 3 months	987	35.7%
4 to 6 months	565	20.5%
7 to 9 months	156	5.7%
10 to 12 months	249	9.0%
longer than 12 months	582	21.1%
unknown	43	1.5%
Total (excluding not reported)	2,764	100.0%
Less than one month	6.6%	
The category 1 to 3 month effectively measures 1.0 months to 3.5 months		
To estimate the percentage in the class 1.0 to 3.0, $2/2.5 * 35.7\%$	28.6%	
TOTAL estimate percentage unemployed =< 3.0 months	35.2%	
ESTIMATE OF PREMIUM PERCENTAGE UNEMPLOYMENT BENEFIT		
Number of premium paying employees		
Estimate based on 2009 labor market review (21,379)	21,000	(1)
Tax inspectorate 2013 number of unique employees wage tax = 21,000		
Number of unemployed		
Estimate based on 2009 labor market review (2,764)	2,500	(2)
Percentage of unemployed =< 3 months (2009 Labor market survey)	35.2%	(3)
Number of unemployed =< 3 months (3)*(2)	880	(4)
Unemployed =< 3 months as % of working pop. (4)/(1) * 100%	4.19%	(5)
Entitlement as a percentage of wage earned	70%	(6)
Premium % needed for coverage entitlement (5)*(6)	2.93%	(7)
SZV operational costs as percentage of entitlements paid out	14.20%	(8)
TOTAL premium %		
for entitlement + operational costs (7) * (1+(8)/100)	3.35%	(9)