



Sociaal Economische Raad
Social Economic Council

To the Minister of Justice
Mr. Dennis L. Richardson MBA
A.T. Illidge road 8
Philipsburg
Sint Maarten

Philipsburg, June 23rd, 2014

Our reference: SER /14/DCB/74

Re: Letter of advice concerning “ Ontwerp Landsverordening Arbeidsovereenkomst”.

Honorable Minister Richardson,

In reply to your request for advice which was received by the Social Economic Council (SER) on Thursday, May 29th 2014, concerning the proposed amendments to the Civil Code in respect of the National Ordinance on Labor Contracts (in Dutch: “ Ontwerp Landsverordening Arbeidsovereenkomst”) the SER informs you as follows:

Background:

The proposed amendments to the National Ordinance on Labor Contracts aim to rectify the Civil Code by substituting Book 7A of the Civil Code with title 10 of Book 7 Civil Code. The bulk of the proposed changes are of a technical nature with a few substantive changes.

The Ordinance was drafted after consultation with various stakeholders before October 10, 2010. The Social Economic Council of the Netherlands Antilles, at that time, also provided its advice¹ on this draft law. Unfortunately the draft law was not presented to the Parliament of the Netherlands Antilles on time (before October 10th, 2010) and consequently the Parliament of Sint Maarten had no authority to resolve to process this draft National Ordinance².

Since then, two additional drafts were added to the initial amendments by the Labor Department of the Ministry of Public Health, Social Development and Labor:

- The draft ordinance on the elimination of abuse of short term labor contracts
- Draft on the rights of employees upon transfer of an enterprise

The SER already offered its recommendation on the draft ordinance on the elimination of abuse of short term labor contracts in its advice of September 2012 (SER advice nr. 2012-001).

Most recently the SER provided government with an unsolicited advice of January 31, 2014 (SER advice nr. 2014 – 001) titled “Flexicurity for Sint Maarten”. The advice provides an integrated approach to dismissal procedures, short term labor contracts and unemployment insurance.

¹ 114/2010- SER, July 6, 2010.

² See Additional Articles Article IV of the Constitution of Sint Maarten.



The SER has the following concerns:

With reference to the articles on the elimination of abuse of short term labor contracts the SER notes that most of its recommendations were followed.

- Article 668a:

However, the newly proposed article 668a still mentions a maximum term. The SER advice 2012-001 as well as the Policy paper of the Directorate of Labor Affairs³ both suggested removing any mention of a maximum term. This would mean that any fourth labor contract between an employer (or his successor) and an employee will automatically be converted into a permanent labor contract, no matter the intervals between the contracts. The risk not to remove any mention of a maximum term in article 668a is that employers might start creating intermissions of more than 3 months between two contracts, which will not solve the core of the abuse problem concerning short term labor contracts.

With reference to the articles on maternity leave the SER remarks the following:

- Article 629a paragraph 3:

“Dagen van arbeidsongeschiktheid ten gevolge van ziekte worden aangemerkt als dagen waarover zwangerschapsverlof wordt genoten.”

The explanatory memorandum explains that maternity leave will be extended from 12 weeks to 14 weeks according to the ILO Maternity Protection Convention No. 102. The way in which paragraph 3 was formulated, creates the impression that any day during her pregnancy, if a pregnant woman is unable to work due to illness, those sick days are being deducted from the 14 weeks maternity leave. Thus, if a pregnant woman is sick during the first trimester in her pregnancy and she is unable to work, those sick days will be deducted from her 14 weeks maternity leave. This can never be the intention of the lawmakers, as the whole idea behind the ILO Maternity Protection Convention No. 102 is to expand the scope and entitlements related to maternity protection at work.

The SER suggests that the lawmakers must have meant that a pregnant woman who is unfit to work during the last 7 weeks before her scheduled due date should take her maternity leave 7 weeks before the due date instead of calling in sick”. If not, for every day the pregnant woman calls in sick, this day will be deducted from het maternity leave.

However, being pregnant has nothing to do with being ill. Sometimes a pregnancy can leave a woman feeling sick. But pregnancy is no illness and should therefore not be treated as such by law. If a woman is ill, she should be treated the same way as her male colleague who is ill. Under no circumstance should a “sick leave” (*ziekte verlof*) be deducted from the maternity leave.

The SER understands the concern of abusing sick leave while being pregnant. But this is not the way to deal with this concern. The SER suggests that the Labor Department introduces the so called

³ See page 20 “Beleidsnota betreffende kortlopende arbeidscontracten”.



Sociaal Economische Raad
Social Economic Council

“*controlerende geneesheren*”, not specifically for pregnant women, but in general. These “*controlerende geneesheren*” then will be in charge of verifying whether someone is sick indeed.

The SER further advises that the 14 weeks maternity leave should be flexible; in the sense that a pregnant woman should be able to choose how she wishes to effectuate the 14 weeks of maternity leave.

Women who are able to work up to the last day before going into labor, should be able to do so. A study by the US National Bureau of Economic Research revealed that a short maternity leave has negative health outcomes for both mother and child. Interestingly, the study also found that it is only when the mother has to go back to work too quickly that her health and the health of her child suffers. The key to a healthy mother and child seems to be not necessarily staying out of the workforce entirely, but rather having the time to transition back to full-time work⁴. Therefore, the law should be flexible in the entire 14 weeks of maternity leave, leaving it up to pregnant women and her gynecologist or midwife, to decide how they want to carry out their maternity leave.

Lastly, the SER once again emphasizes the importance of increasing the awareness among employees with regard to their (new) rights and entitlements. Especially among temporary employees (recent immigrants are overrepresented and find themselves in a by definition more vulnerable position. Awareness of one’s rights as a citizen is an essential part of integration in society. Government, the labor unions and other NGO’s have a specific role and responsibility in this field.

The SER has reached consensus on the following:

That it is indeed desirable to amend the Civil Code by substituting Book 7A of the Civil Code with title 10 of Book 7 Civil Code.

Advice:

The SER has taken notice of the request concerning the proposed amendments to the Civil Code with regard to the National Ordinance on Labor Contracts. Pursuant to the SER meeting on this topic, the SER **unanimously** advises:

- To once again take into account the recommendation of SER advice 2012-001, as they relate to The “Ontwerp Landsverordening Arbeidsovereenkomst”
- To once again take into account the recommendation of SER advice 2014-001, as they relate to The “Ontwerp Landsverordening Arbeidsovereenkomst”
- To amend article 629a paragraph 3, first sentence in such a way that pregnant women, together with their gynecologist or midwife, can determine how they wish to effectuate the 14 weeks maternity leave.

⁴ NBER Working Paper 17121, July 2011 “Early Maternal Employment and Family Wellbeing”.



Sociaal Economische Raad
Social Economic Council

- To delete article 629a paragraph 3, second sentence and instead introduce “*controlerende geneesheren*” who will verify whether someone is ill.
- To encourage employees to assert their rights and entitlements under the existing rules; encourage the dissemination of standardized information on their legal rights – to be provided by government - in a language the employee commands. The responsibility to provide this information should be shared by employers, labor unions and government.

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,

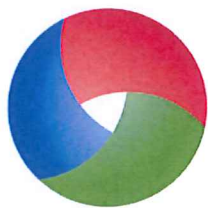
Oldine V. Bryson- Pantophlet
Chairlady

Gerard M.C. Richardson
Secretary-general

Cc: The Honorable Minister of Public Health, Social Development and Labor, Mr. V.H.C. de Weever.

Attached:

- SER advice nr. 2012-001. “Draft ordinance short term labor contracts”
- SER advice nr. 2014-001 “Flexicurity for Sint Maarten”.



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

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.¹

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.²

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.*"³

¹ Wikipedia, "Flexicurity" article, retrieved March 2013.

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

³ 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.⁴

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)

⁴ 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 cessantia⁵ 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)

⁵ 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.⁶ 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.

⁶ 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.⁷

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	<ul style="list-style-type: none"> • Permit declined <p>The employer may resort to scenario C (dissolution)</p>
	<ul style="list-style-type: none"> • Permit granted <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>

⁷ 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"> The employee does not accept the termination 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"> Payment of wages due (Re-)admission to work
		<ul style="list-style-type: none"> Employee accepts termination Employee seeks (full) compensation according to Civil Code art. 1615o and 1615r (no "kantonrechttersformule")
SETTING ASIDE (DISSOLUTION) OF A LABOUR CONTRACT		
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"> Serious reasons, (see also immediate dismissal 1615p) OR 	If the court accepts the serious reasons > no compensation for employee
	<ul style="list-style-type: none"> Changed circumstances (most often adverse business-related factors, falling sales, decreased revenues) 	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.⁸

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.

⁸ 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 "kantonrechttersformule" 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”⁹ 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.

⁹ 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 2012¹⁰. 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.

¹⁰ 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)

Collective dismissal	Permit remains mandatory	Employer submits mandatory social plan	DAAB assesses social plan	<ul style="list-style-type: none"> • SP accepted -> dismissal permits • Changes indicated -> back to start • SP rejected -> no permits • OR: Referral to individual procedure
Individual dismissal with notice (Regular/irregular)	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"> • No further action OR • Grant of financial support to employee for legal fees when filing case based on <ul style="list-style-type: none"> ○ 1615o/r (irregular dismissal) ○ 1615s (manifestly unreasonable)
		Both parties accept arbitration: verdict is binding	DAAB performs arbitration: If economic grounds established ->	<ul style="list-style-type: none"> • Dismissal with or without compensation
			If non-economic grounds ->	<ul style="list-style-type: none"> • Dismissal with or without compensation OR • Return to work with/without comp
Individual dismissal with immediate notice (ontslag op staande voet)	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"> • Possible grant of financial support to employee for legal fees when filing case based on <ul style="list-style-type: none"> ○ 1615o/r (irregular dismissal) ○ 1615s (manifestly unreasonable)
Dissolution based on Civil Code article 1615w	No change			<ul style="list-style-type: none"> • Legal verdict with possible compensation based on “kantonrechttersformule”

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.¹¹
- 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:

¹¹ 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 administering 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 Alcalá-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)



Sociaal Economische Raad
Social Economic Council

SER advice nr.

2012 - 001

Philipsburg, September 14th, 2012

Draft Ordinance short term labor contracts

Advice on the Draft Ordinance on the elimination of abuse of short term labor contracts

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

Table of Contents

Introduction	2
1 Background and history	3
1.1 SER history on the topic of temporary contracts	4
1.2 Current legal framework	6
2 Extent of the temporary labor contract problem	7
2.1 Motives for the use of temporary contracts	7
2.2 Trends in the prevalence of temporary contracts as a proportion of the labor force	7
2.3 Abuse of temporary contracts	9
3 The draft ordinance on the “Elimination of abuse of short term labor contracts”	11
4 Alternative solutions	14
5 Advice and recommendations	15
5.1 Advice	15
5.2 Recommendations	15
6 Sources	17

Introduction

This advice is a solicited advice at the request of the Sint Maarten parliament. The request originates with the National Alliance faction and reached the SER through the then chairlady of parliament, drs. G.R. Arrindell.

It is noteworthy that presently the SER ordinance does not explicitly provides for the SER advising on initiative draft ordinances, i.e. ordinances originating in parliament. Nevertheless it seems suitable to proceed in the spirit of the law and honor this advice request.

The draft ordinance “Landsverordening houdende wijziging van Boek 7A van het Burgerlijk Wetboek” (Landsverordening oneigenlijk gebruik van kortlopende arbeidsovereenkomsten) or “Ordinance on the elimination of abuse of short term labor contracts” constitutes:

- The addition of a new article 1615fb, to the Sint Maarten Civil Code;
- The announcement of two decrees (LB-ham’s) further elaborating the rules put forward in article 1615fb. Drafts of the applicable decrees are not included;
- A penalty clause, stipulating that transgression of article 1615fb is to be considered a crime (misdrijf) punishable by incarceration or a monetary fine;
- A clause stipulating the obligation of the Minister of Labor and Social Affairs to report to parliament annually about the execution of this law.

This initiative ordinance is part of a long-standing discussion on the topic of temporary labor contracts and the latest stage in an equally long process of rendering the labor market regulations more flexible.

It is the intention of the social economic council to follow up this advice with a broader unsolicited advice in the field of labor market regulation. Next to issues of temporary contracts, this advice will tackle the rules on dismissal and dissolution of labor contracts, the coordination of initial education, permanent education and the needs of the labor market, while at the same time addressing the job security and quality of life guarantees for employees. It will be a first contribution to a concept of ‘flexicurity’ on Sint Maarten.

1 Background and history

During the 1980s and 1990s the worldwide trend of 'deregulation' became prominent in the industrialized world, and reached the Netherlands Antilles as well. This trend was based on the conviction that decreasing government interference in the markets that constitute our economy would promote economic development. A more flexible approach towards labor contracts and the termination thereof was an important element of the global deregulation trend.

Concurrently, the general approach to labor relations changed during the late 20th and early 21st century. Lifelong employment with one employer is no longer the overriding goal, nor the ambition of the younger generation entering the labor market. Frequent changes of work environment and hence employment have come to be regarded as positive career attributes by employers and employees alike. The movement towards more dynamic and temporary labor relations has therefore become a permanent feature of the labor market in developed nations.

More flexible labor contracts can be seen as positive and conducive to economic development, provided this trend is accepted and carried by both sides of the labor market and the effects are fairly balanced between the two. At the same time however, there is no denying that certain advantages of permanent contracts, such as pension plans, and indirect benefits such as credit worthiness are compromised by the trend towards temporary employment. These issues will have to be addressed to ensure employees the quality of life they are entitled to and to ensure stable long-term labor relations. The recent introduction in Aruba of a compulsory pension plan for each employee, with contribution by both parties, regardless of the duration of each contract or the number of contracts an employee has during his or her career, is an example of a solution that reconciles flexibility of the labor market and long-term security for the employee.

In the 1990s in the European Union the term 'flexicurity' was coined to describe the combination of a flexible labor market and security for employees. The concept originated in Denmark and quickly became a familiar policy concept in the EU. According to the EU definition " *“Flexicurity” is the strategy which aims to simultaneously strengthen flexibility and security for the benefit of both parties in an employment relationship. (It) has been recognised as one of the key objectives for European labour markets in the context of the European Employment Strategy and the Lisbon Strategy.*“¹

In the 1990s in the Netherlands Antilles, lack of flexibility in the labor market became recognized as one of the factors hampering economic development. Therefore a host of recommendations and advices were brought forward, entailing wider possibilities for temporary contracts, and more liberal rules for contract termination.

The report of the Inter-American Development Bank of 1997, compiled by the UK based De Montfort University, recognizes a number of key factors contributing to a rigid labor market and therefore causing unemployment.² First off, a large informal market without any regulations co-exists with a very rigid formal labor market. Labor and business laws are qualified as outdated. Heavy bureaucracy causes long delays in processing labor applications. A mismatch between supply and

¹ EU 2008, p. 3

² IADB, pages 43-45

demand is caused by an inadequate education system, and is fueled by a high percentage of drop-outs. Labor productivity is low compared to the wage level. A lack of trust and a confrontational attitude exist between business, labor unions and government. In the same breath, the IADB advises the (then Netherlands Antilles) SER to take the lead in addressing these issues. Little is said about Sint Maarten specifically, apart from highlighting the lack of data and drawing attention to the large proportion of informal labor market constituted of immigrant labor. The report follows up with a host of recommendations pertaining to the flexibilisation of the labor market. In a follow up summary by the IADB it is stated that *“A key element of economic recovery will therefore require the urgent elimination of regulations and institutional mechanisms which inhibit competitive functioning of the labor market. The strategy should aim to forge greater consensus and/or compromise among the trade unions, Government and the private sector on the desirability of a flexible labour market as a precondition to achieving competitiveness and sustainable private sector led development.”*³ These observations, though fifteen years old now, and pertaining to the Netherlands Antilles in general, sound surprisingly current and applicable to the present day Sint Maarten situation.

1.1 SER history on the topic of temporary contracts

It is no surprise therefore that the Netherlands Antilles SER covered the temporary labor contract issue in an extensive advice as early as 1998.⁴ The general tendency of this advice is to promote a flexible labor market while at the same time ensuring the legal position and long term security of employees. A more flexible approach to labor is understood to ensure the efficient allocation of available labor at the moment and in the place it is needed. This of course reduces labor costs, and increases labor productivity.

Economic literature on the topic of labor flexibility distinguishes primarily between internal and external flexibility.⁵ Internal flexibility is defined as the optimal allocation of existing personnel within a given business. Increases in this type of flexibility imply for instance making the work times during a day, a week or a year more flexible, increasing efficiency by ensuring that the employee is deployed when work is available, decreasing idle time. Another aspect of internal flexibility consists of broadening the competencies of each employee, making him or her able to be deployed in more different tasks or positions in the organization. This usually implies additional schooling and training, and again the efficiency gain hinges on avoiding idle time or avoiding extra hands to be hired. This would require changes in the Civil Code, the Labor regulation (Arbeidsregeling) etc. External flexibility on the other hand applies to the labor relation itself, the number and the nature thereof, for instance working with more zero-hour contracts, using temp agencies, freelance contracts and the like.

In the formal part of the economy, the proportion of fixed (including self-employed) to flexible labor contracts was 75-25 during the 1990s⁶, even then showing a high degree of rigidity.

³ IADB 1997 (2) p. 15

⁴ SER 1998

⁵ SER 1998, p. 5.

⁶ SER 1998, p. 7.

To promote internal flexibility, the SER in 1998 advised to: Loosen the overtime restraints, (Arbeidsregeling 1952, since replaced in 2000) for instance by increasing the possibility for time-back instead of paying out overtime; increase the possibilities for evening and night shift labor; promote schooling of existing employees to increase the possibilities of flexible deployment throughout the company; financing of training programs through a tax levied on all companies, to finance schooling programs and promote full cooperation of all businesses. Furthermore, job mobility is advised, to promote employees changing jobs and seek for the best match between supply and demand at all times, while incentives for Antilleans to return home, reversing the current 'brain drain' are suggested as well. Finally, in 1998 the discussion was prevalent about abolishing the obligation for the employer to apply for a permit to terminate an employment contract. The majority of the SER wanted to keep this obligation in place. Without this 'preventive' dismissal permit, the only way for the employee to fight dismissal would be through the Court of Law, which was seen as insufficient protection, due to the costs of legal representation and the lengthy process involved.⁷

Furthermore, to promote external flexibility, the SER advised to first limit the possibilities for abuse of sequential temporary contracts. Limits were set to so-called 'draaideurconstructies' (revolving door arrangements). The council recommended an increase of the intermission between two temporary contracts from one to two months (this eventually became three months) in connection with the rule that every fourth temporary contract would become indefinite. Also, the suggestion to legally convert into a fixed contract any sequence of temporary contracts spanning 36 months with intermissions shorter than 3 months, made it into law. Finally, an exception is made for extension of a three year or longer contract, which can be prolonged once by maximum three months, without creating an indefinite contract.

On a related topic, the maximum timespan for a temporary worker through an agency was suggested to be increased from 6 to 12 months, which was included in the law as well.

The SER suggestion to introduce in the Civil Code a wage guarantee for all labor contracts – including zero-hour or standby contracts was not followed up on.

In the year 2000 the Labor regulation 1952 was replaced, making significant changes possible in internal flexibility of labor, by setting new rules for work hours, overtime and compensation thereof, breaks, on-call time, public holidays and youth labor.

The discussion on short-term contracts continued in the first decade of the 21st century. One of the most notable contributions was the Policy paper drafted by the Netherlands Antilles Directorate of Labor in 2007⁸. Important suggestions are the introduction of a Labor Court or Court of Arbitrage to simplify the judicial process in dismissal cases. Furthermore, there is an explicit plea for more enforcement, inspection and control. Changes in the dismissal regulations are proposed as well, although no consensus on this score was attained between employers' organizations and labor unions.

⁷ SER 1998, p.34

⁸ DirAZ 2007

1.2 Current legal framework

As of 2012, the most applicable laws and regulations constituting the legal framework surrounding the issue of temporary contracts are the following. These are all transferred as of 10/10/10 from the Netherlands Antilles legal system. Sint Maarten as a country has introduced no new laws or amendments yet in this field.

- Civil Code, Articles 1615e – 1615x
- Landsverordening beëindiging arbeidsovereenkomsten (PB 1972, no. 111)
 - LB ham van 13 maart 1990 ter uitvoering van artikel 6 van de Landsverordening beëindiging arbeidsovereenkomsten.
- Landsverordening houdende vaststelling van nieuwe regels inzake arbeidsduur, arbeidstijden en overwerk (Arbeidsregeling 2000) (PB 2000, no 67)
- Landsverordening flexibilisering arbeidswetgeving (PB 2000, no. 68)
- Landsverordening houdende regelen met betrekking tot het ter beschikking stellen van arbeidskrachten (PB 1989 No. 73)
 - LB ham van 25 oktober 1996 ter uitvoering van artikel 8 van de Landsverordening op het ter beschikking stellen arbeidskrachten

2 Extent of the temporary labor contract problem

2.1 Motives for the use of temporary contracts

According to the 2007 policy paper of the Directorate of Labor, employers are driven by a number of motives when choosing to fill vacancies temporarily⁹. The first motivator is nature of the activities involved. Large part of production is seasonal (e.g. tourism) or project oriented (e.g. construction). Moreover, products and markets change fast, so permanent production and hence employment can seldom be guaranteed. This factor is compounded by the fact that permanent contracts are unattractive due to the heavy requirements for dismissal. The second motivator is the increased cost of doing business, driving employers to risk aversion and avoidance of the possibility of having to pay permanent employees in the absence of work. The third factor mentioned is the perceived deteriorating work ethics and insufficient education or competencies. In other words, employers act cautiously, wanting to use an ample trial period before hiring an employee permanently.

2.2 Trends in the prevalence of temporary contracts as a proportion of the labor force

The drafters of the proposed ordinance pertain there is a twofold problem that needs to be addressed through this proposal. On the one hand it is stated that employers offer employees temporary contracts, where the demand for labor is in fact of a permanent nature. On the other hand, it is maintained that sequential temporary contracts are offered with breaks of more than three months, in order to avoid the conversion of the fourth contract into a permanent one. It is not made clear however, what the extent of both phenomena is, nor are any statistics or verifiable sources provided.

The most recent systematically collected data set available is the 2009 Labor force survey, compiled by the then Netherlands Antilles CBS.¹⁰ The Antilles CBS used four sub-categories of temporary workers; those in part-time contracts, casual workers (no definite timespan), temporary contracts shorter than 6 months, and finally temporary contracts of 6 months or longer. For the sake of comparison, we add these four categories together as “temporary workers”. If we take these “temporary workers” as a proportion of the labor force, their share actually dropped from 21.4 to 19.7% from 2003 to 2009. By contrast, the fraction of permanently employed remained stable 63.8 to 64.0% of the total labor force over the same period with larger percentages in 2005 and 2007. The remainder of the employed population consists mainly of employers and self-employed persons. Specifically, the number of employers and self-employed rose from 13.7% to 14.8% of total employed; from 2,214 to 3,145 persons, quite a dramatic increase in absolute terms.

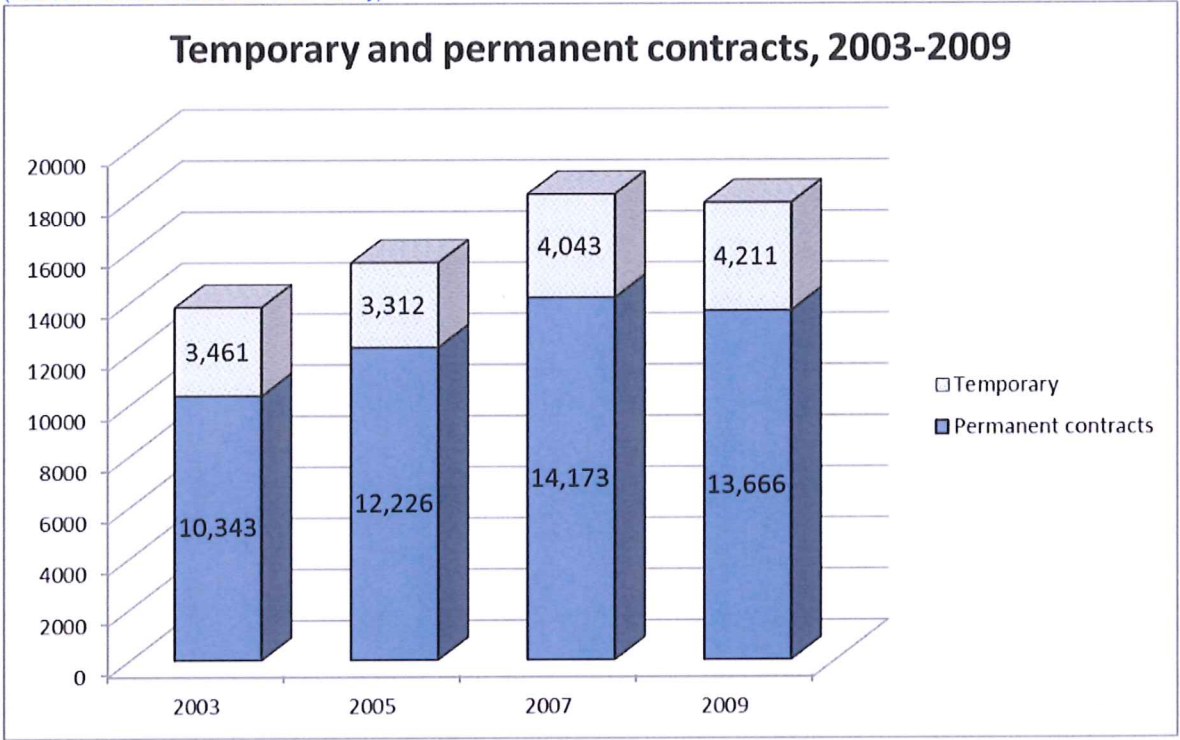
Testing the hypothesis of a shift from permanent to temporary *contracted* employment, we have to ignore for a moment the self-employed, the employers and miscellaneous categories in the total workforce and focus on those in a contractual labor relationship. As a percentage of those in a contractual labor relationship, be it temporary or permanent, the permanent fraction rose from 74.9 to 76.4%, a very high percentage by any international standard. The remainder is then of course

⁹ DirAZ 2007, p. 15, 16

¹⁰ Labour Force Survey 2009.

temporarily employed, dropping from 25.1 to 23.6%. The intervening years show even lower temporary percentages. This trend is illustrated in Figure 1.

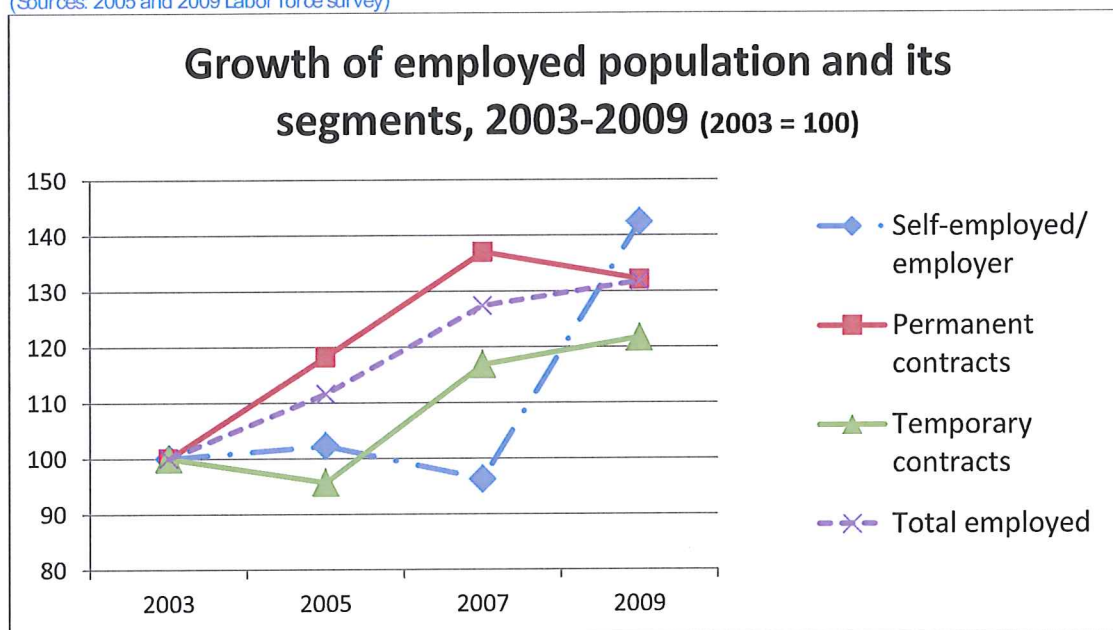
Figure 1 Temporary and permanent contracted labor 2003-2009
 (Sources: 2005 and 2009 Labor force survey)



In terms of growth compared to the base year 2003, the self-employed/ employer category increased most (42.5%) while other relevant categories grew with equal pace or slower than the total employed population (31.8%). Notably, the temporary category increased with only 21.7%, clearly shrinking in importance, while the permanent category grew 32.1% exceeding the growth of the overall population slightly. This development is shown in figure 2.

In conclusion, we have to observe that none of the indicators show any trend towards more use of temporary contracts, not as a percentage of the total employed population, nor as a fraction of total contracted employees. The only significant trend is towards more self-employed/ employers.

Figure 2 Indices of employed population and its segments 2003-2009
 (Sources: 2005 and 2009 Labor force survey)



2.3 Abuse of temporary contracts

As to the first type of abuse of temporary contracts – as stated by the authors of the draft ordinance -, which is the hiring of employees on a temporary basis where the need for labor is permanent, it is very hard to see the basis of this abuse in the data available. With a percentage of permanent contracts as high as it is on Sint Maarten, it is difficult to see how more than the current 76% of the available positions would in actual fact have to be qualified as permanent. The abuse in question would then pertain to a fraction of the 24% who are now employed on a temporary basis. This of course does not take into account the informal part of the economy. Furthermore, this type of abuse assumes that the employee hired would indeed prefer a permanent contract over a temporary one, and that employees would by definition be disadvantaged by a temporary contract.

The second type of abuse brought forward by the drafters of this ordinance, is the hiring of employees on sequential temporary contracts, with at least one interval longer than three months. This is a specific type of evasion of the law that could certainly be qualified as abuse. For obvious reasons, it is very hard to support the occurrence of this type of abuse with quantitative data. Theoretically, a full data base of labor contracts on Sint Maarten would be needed in order to filter out the occurrence of several contracts between the same employer and employee regardless of the time past between two instances. In any case, stakeholder interviews indicate that the problem of straightforward breaking of the law is far more significant. This entails hiring the same person multiple times temporarily, with little or no interval, while ignoring the obligation to make the fourth contract permanent. Enforcement of the law seems to be the overriding issue here, not the provisions of the law itself.

A cautionary note however is required with respect to the available data. Only the formal part of the economy is measured, while it stands to reason that abuse is to be found more often in the informal part of the economy. Data from the Netherlands Antilles era suggests that the informal – hard to

measure - part of the economy is relatively large in Sint Maarten, certainly the largest of the former Antilles. This would point to giving priority to 'formalizing' the economy as soon and as comprehensively as possible. Needless to say that introducing new regulations will not in itself affect the informal part of the economy, and will hence not tackle the problem at hand. Worse even, businesses in the formal part of the economy will perceive to be hit with new layers of bureaucracy, possibly eroding the existing level of compliance.

3 The draft ordinance on the “Elimination of abuse of short term labor contracts”

This chapter will deal with the content of the draft ordinance and the measures contained therein, from a socio-economic impact perspective. Purely legal considerations will only be dealt with tangentially, as they are covered by the advice of the Advisory Council.

Article I - Section 1

Section 1 of the first article of the draft ordinance entails the introduction in the Civil Code of a new article 1615fb. This article contains the obligation of any employer, prior to hiring an employee on a temporary contract, in a case where the need for labor is permanent, to request a permit for engaging in a temporary contract by the Minister of Labor and Social Affairs.

This provision raises a number of questions that are not sufficiently answered in the draft law;

- How is an employer to determine whether the position he is hiring for, is “not temporary in nature”. Even the LB ham mentioned later in this ordinance, does not address this question, as the LB ham only considers the criteria based on which a permit would be granted, not the necessity to apply for a permit in the first place. As a consequence, one may assume that by default, a permit is needed for every instance where an employee is hired on a temporary basis. Such a permit requirement is currently not in existence.
- If a permit is requested for a temporary hiring, what are the eligibility criteria applied by the Minister of Labor? How does the Minister determine whether a permit will be granted? This question is addressed in the LB ham announced in article II.2. However, this LB ham has not been drafted or attached to the draft ordinance.

A blanket permit requirement for temporary hiring constitutes a sizable addition to the bureaucratic procedures employers are confronted with. Moreover, by its nature it delays the act of hiring an employee, possibly by several weeks, simultaneously harming the interest of the entrepreneur, who cannot react quickly to business opportunities, and that of the worker, who sees gainful employment and therefore income delayed for the same amount of time.

The SER is of the opinion that this section does not contribute to the solution of the problem at hand, and has important detrimental social economic side effects.

Article I - Section 2

The second section of Article I adds a provision, voiding any labor contract, concluded without the necessary permit (as per Section 1).

This provision can only be qualified as counter-productive from a social economic point of view. By voiding the contract, the employee is left in the cold, while the employer is penalized anyway by provisions later on in the law.

The SER is of the opinion that this section does not contribute to the solution of the problem at hand, and has important detrimental side effects, harming the interest of the employee.

Article I – section 3

The third section entails an addition to the existing Article 1615fa. Article 1615fa currently states that any fourth temporary labor contract is legally converted into a permanent one, if the intervals between contracts one through four were all less than 3 months in duration. The proposed Article I section 3 effectively removes the limitation of the three months interval. As a consequence, any fourth contract between the same employer and employee becomes a permanent one.

It is hard to see why the drafters did not opt for a straightforward amendment to Article 1615fa, - removing any mention of a maximum term - and instead adding this clause in a different Article 1615fb. This was suggested already in 2007 in the policy paper of the Directorate of Labor Affairs.¹¹

The effect of this section probably only tackles a marginal problem, i.e. employers going through the trouble of actually creating intermissions of more than 3 months between two contracts. The core of the abuse problem is the non-compliance with the existing contract-chain rules.

Article II – section 1

This section announces a decree (LB ham) that would stipulate the criteria to be used by the Minister of Labor, to determine whether a temporary contract would be permitted. There is no draft decree attached to this proposed ordinance however. Without this decree (LB ham), the proposed ordinance is as good as inoperative. It will create a legal obligation for employers, without handing the Minister of Labor the tools to implement the law. Furthermore, the basic question is not answered, how to determine whether the obligation to *apply* for a permit does or does not exist. In other words, how is an employer to determine whether the position he/she is recruiting for is 'not of a temporary nature' (niet van tijdelijke aard).

Article II – section 2

This section announces a decree (LB ham) that will exclude certain categories of labor contracts (assumed to be branches of industry, or types of positions) for which no more than three consecutive temporary contracts can be made regardless of the time between these contracts. As it follows from Article I that in effect any fourth contract becomes a permanent one, it is unclear what the added value of this stipulation is. An elucidation to this section of Article II is not attached to the draft ordinance.

Article III

Article III entails a penalty clause for cases in which employers do not comply with the requirements of Article I. It is assumed here, that this obligation pertains to the requirement in section 1 of Article I i.e. to apply for a permit in case of hiring an employee temporarily.

Issues of legal formalities e.g. the question whether this ordinance, not being part of the penal code, is the right place for a penalty clause, are not covered in this advice. However, the SER feels that the introduction of a penalty of this magnitude for an essentially economic transgression should be dealt with in a comprehensive way, covering the full range of issues/ trespasses pertaining to the

¹¹ DirAZ 2007, p.20.

compliance with labor laws. To address one detail out of this range separately constitutes a disproportionate measure and sends an inconsistent signal.

Furthermore, as this ordinance deals with contracts in the civil realm, a provision along the lines of the Aruban civil code article 1613x, opening the possibility for the Court to grant the employee financial compensation would seem more fitting.¹²

¹² See for instance the Aruba Civil Code, quoted in DirAZ 2007, page 23

4 Alternative solutions

Focussing on the advice at hand and the perceived problems addressed therein, the SER would bring the following alternative solutions forward:

- Increase of control by the labor inspection (arbeidsinspectie) on compliance with the existing legal provisions. One of the conditions for successfully enforcing the existing rules is of course upgrading and strengthening of this part of the government organisation. This also entails the connection of databases in different government services, making them more up-to-date, accessible and fit for cross-referencing. The 2011 annual report of the Inspectorate for Labor mentions a total manpower of four, of which one is covering the entire area of labor regulations.¹³ The report does not mention violations in the field of temporary contracts as an inspection objective. Compliance with the temporary contract rules should become one of the main focal points of the labor inspection. Related to this, industries with known issues in this field should get most attention. Also, efforts should be directed towards the informal part of the economy, as opposed to increased control of known and registered companies.
- 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.¹⁴
- 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. Awareness of one's rights as a citizen is an essential part of integration in society. Next to government the labor unions – and other NGO's - have a specific role and responsibility in this field.

¹³ Inspectorate 2012, p. 14

¹⁴ See for instance the Aruba Civil Code, Article 1613x section 1, cited in DirAZ 2007, p 23.

5 Advice and recommendations

5.1 Advice

The unanimous advice of the SER on the different components of the proposed ordinance is as follows:

Regarding Article I, all three sections are regarded as inopportune, for reasons of undue increase in bureaucracy (section 1), counterproductive effects (section 2) and ineffectiveness regarding the problem at hand (section 3).

Regarding Article II, sections 1 and 2, the (draft) LB-hans announced are not attached to the draft ordinance. Without those however, the ordinance becomes hard to apply in any practical sense. Moreover, Article II is only relevant in relation to Article I.

Regarding Article III, the SER regards this kind of penalty applied to an economic transgression alone inadvisable. It creates a legal and economic imbalance between the handling of this particular issue and other labor related rules.

Article IV is relevant only in relation to the previous articles.

Summarizing, the SER unanimously advises not to submit the proposed ordinance in its current form.

5.2 Recommendations

To address the immediate problem(s) the draft ordinance is aimed at, the SER recommends the following:

- Strengthen enforcement of the existing rules pertaining to temporary contracts, reinforce and upgrade the labor inspection in terms of manpower, assets and organizational structure, refocus the labor inspection towards compliance with the temporary contract rules and making the informal economy visible;
- Increase knowledge of and compliance with said rules among employers;
- Encourage employees to assert their rights and entitlements under the existing rules; encourage the dissemination of standardized information on their legal rights – to be provided by government - in a language the employee commands.¹⁵ The responsibility to provide this information should be shared by employers, labor unions and government.

To address the more general issues related to increased flexibility of the labor market, the SER recommends the following:

- Create a set of penalties related to transgressions against all labor laws that is consistent, internally and externally proportional and conducive of compliance with the law.
- Start the design of a system of *flexicurity* that on the one hand recognizes the necessity and the reality of a more flexible labor market, while at the same time ensuring temporary employees a degree of long term financial and economic perspective that would be comparable to that of a permanent contract.

¹⁵ DirAZ 2007, p 21.

- It is generally recognized that strict dismissal laws make employers reluctant to hire permanently, and opt for temporary contracts instead. Recognizing this effect, and accepting the general tendency towards more flexible labor relations, the laws on termination of labor contracts should be revised.
- Concurrent with the revision of dismissal laws however, the legal and socio-economic position of workers on a temporary contract should be strengthened.
- To make dynamic careers within the same company and between companies feasible, and to stimulate individual and collective socio-economic development, permanent schooling and life-long learning should be incorporated in all labor relations.

It is the intention of the social economic council to contribute to the recommendations contained in this advice, by following up with a broader unsolicited advice in the field of labor market regulation. Next to issues of temporary contracts, this advice will tackle the rules on dismissal and dissolution of labor contracts, the coordination of initial education, permanent education and the needs of the labor market, while at the same time addressing the job security and quality of life guarantees for employees. It will be a first contribution to a concept of 'flexicurity' on Sint Maarten.

6 Sources

DirAZ 2007

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

EU 2008

Report of the Mission for Flexicurity, Council of the European Union, Brussels, 12 December 2008. 17047/1/08 REV 1 (en)

IADB 1997 (1)

The Netherlands Antilles. Policies and strategies for promoting sustainable growth; final report for Inter-American Development Bank by De Montfort University (UK), August 21st, 1997

IADB 1997 (2)

Policies and Strategies for Promoting Sustainable Growth and Development In the Netherlands Antilles; Summary of report and proposals for action. Inter-American Development Bank, Regional Operations Department 3. September 4, 1997

Inspectorate 2012

Annual report 2011 Towards a powerful and transparent supervision. Inspectorate Ministry for Public Health, Social Development and Labor – Sint Maarten, Sint Maarten, 2012

Labour Force Survey 2005

Results Labour Force Survey Sint Maarten 2005, Central Bureau of Statistics, Netherlands Antilles 2005

Labour Force Survey 2009

Results Labour Force Survey Sint Maarten 2009, Central Bureau of Statistics, Netherlands Antilles 2009

SER 1998

Initiatiefadvies inzake flexibilisering van de arbeid met zekerheid voor werknemers, Sociaal Economische Raad Nederlandse Antillen, Willemstad 1998

