



Ministry of the Interior and
Kingdom Relations
The Netherlands

4 July 2011

Dear Mr Bounds, dear Mr Malyshev, dear Mr Konvitz,

Thank you for inviting our comments on the Draft OECD Recommendation on Regulatory Policy and Governance.

On behalf of the Dutch *Risk and Responsibility Programme* I would like to offer you the following comments and suggestions.

Our reaction to OECD's draft recommendation 9

We very much welcome OECD's initiative to broaden the Recommendations. Including a recommendation on the regulatory aspects of risk provides a precious opportunity to address dilemmas surrounding one of the most powerful obstacles to rational regulation.

Because, in a nutshell, 'No matter how sensible your story about risk assessment and better regulation is, it doesn't stand a chance against the magic word SAFETY with all its powerful emotions, from the hope of redemption to the fear of disaster.' (*Key Messages OECD Regulatory Policy Conference, Paris 28-29 October 2010, p.29*)

In recent decades the Dutch government, like many other OECD governments, has come under increasing pressure to protect citizens and businesses from all possible risk. Whenever a new risk becomes apparent or a serious incident occurs, the virtually standard response of society and politicians is to call for drastic government measures in order to prevent any possibility of risk in the future. The government often anticipates this response and thus contributes inadvertently to the general conception that government indeed has the role of society's principal risk safety net. This expectation often results in disappointment with government's apparent failure to act effectively. In the Netherlands, this phenomenon has recently been called 'risk-regulation reflex'. The term describes the reflex of over-regulation in response to a possible risk or incident. An added element of this reflex is to place the responsibility for removing or compensating risk with government as a matter of fact.

As soon as a policy issue is connected to safety or security, it is taken out of the rational bureaucratic environment and treated in a political way. A wholly rational response to risk often will not stand up to the political pressures which are often put on government surrounding a risk or an incident.

Introducing our programme

The Dutch *Risk and Responsibility Programme* aims to broaden the perspective and repertoire for all levels of government to deal with risks and incidents in a more proportionate and transparent manner. Part of the remit is to develop a Cabinet vision on the role of government in regard to risks. Several Cabinet ministers attach great importance to this programme, as do several of their local and regional counterparts. The programme aims to create an interface between rational regulatory practice and the political side of policy interventions based on risks and incidents. An initial project produced the Day of Risk Conference and publications such as *Safety above all? Essays on causes and effects of the risk-regulation reflex*. These essays are the basis on which the programme is being developed at present. The programme runs until the end of 2012 and includes a collaboration between six ministries and debate among 'risk actors' such as politicians and journalists.

In our book of essays (see Summary Analysis), we have identified a number of entrenched beliefs which seem to be at the heart of the irresistible pull of the risk-regulation reflex. We have also outlined some possible avenues for solutions which we will be investigating together with six ministries and with other risk actors.

Useful elements our programme has identified so far

The Risk and Responsibility programme is not even halfway its course. Even so, several elements have already been identified which may turn out to be useful for the Dutch government to consider when responding to a newly emerged risk or an incident. This use may extend to other OECD-governments.

- An incident or a newly perceived risk triggers a non-rational response, especially from journalists and politicians, therefore governments would be well advised not to limit their response to a rational answer. Empathy with victims and those confronted with new risks should be clearly demonstrated.
- Even so, the public may not necessarily be asking for measures to prevent any risk to ever materialise, nor may they be clamouring for 100% safety (as is often assumed by politicians and the media).
- Various safety policies are based on assumptions about the Dutch citizens' risk perception. For example, the assumption that a major accident is ten times less acceptable than several smaller accidents which result in the same number of casualties; this has been laid down in a Dutch safety norm. Another assumption is that it is not acceptable to differentiate risk levels according to region (built-up areas with hazardous industry versus rural areas), or according to its voluntary nature. Some preliminary research suggests that citizens don't make such distinctions when they consider risks, not even risks which generate much concern.
- Risks and incidents tend to narrow the public debate to a moral issue (safe versus unsafe). In such a climate, government is easily put in a position where the only viable response is to announce strict measures to show its resolve to guarantee more safety. Such measures may help diminish public anxiety but in western societies where safety levels are already high, they are often mainly symbolic. It is therefore important that the debate be widened to include questions such as: how can more safety be achieved? What side effects could there be on civil rights and other values, and is the cost reasonable? When a government tries to widen the debate it can easily be met with suspicion about its motives. Therefore an independent voice within society may be better suited to bring up the other side of the argument. It is definitely in the interest of society to prevent costly symbolic measures.
- In order to prevent hasty safety measures with a poor cost-benefit ratio, it is vital that government is allowed to take the time to assess the need for new interventions (because the accident may for instance have been due to human error). Any quick measures would preferably be temporary and a date would be set beforehand when to review their effectiveness, costs and possible side effects so as to make an informed decision about further implementation. Among the Dutch SGs there is support to introduce a three month cooling-down period after an incident, in which no new regulation will be initiated.
- A strict interpretation of the precautionary principle may give the public the impression that all risk can be averted. Accidents will inevitably happen, however, making governments vulnerable to the accusation of having failed to prevent them. Also, new risks will be always be discovered, after which governments may be seen as having deliberately withheld previous information about their existence. All this contributes greatly to the mechanisms described above.
- It could be considered whether risk should always be regulated by government at all. Regulation mechanisms between non-governmental risk actors such as

(united) consumers and producers may be a more effective alternative for some risks, especially if the existing government measures are mainly symbolic in nature. Regulation always has a cost and contributes in a way to unsafety because this money cannot be spent on other measures inside or outside the domain in question.

- Another factor is that legal precedents reinforce a shift towards risk liability, which in the Netherlands contributes to an expanding government role by default.

Specific suggestions concerning draft recommendation 9

Our reaction brings us to the following text suggestions.

9.1, add after first sentence:

“Risk creates non-rational reactions, therefore governments would be well advised not to limit their response to a rational answer. At the same time, it is advisable that public anxiety should not lead to disproportionate interventions. One element to ensure this is to create a cooling-down period in which no new regulation is initiated, or to only introduce temporary measures of which the effectiveness, costs and possible side effects will be reviewed before a set date.”

9.6, rephrase as:

(additions are underlined)

“Where the precautionary principle is adopted, guidance should be provided concerning the extent to which it will be followed, with special attention to the costs and benefits of regulation based on it. Guidance should also be provided as to how this principle can be applied to assist in the evaluation of regulatory alternatives.”

Add 9.7:

“Governments and regulators would be well advised to consider whether certain risks need not necessarily be regulated by the government but can be dealt with at least as effectively by other parties within society. Guidance on these considerations could be provided by a vision on government’s role regarding risks.”

Further background on the Risk and Responsibility Programme

The Dutch *Risk and Responsibility Programme* aims to broaden the perspective and repertoire for all levels of government to deal with risks and incidents in a more proportionate and transparent manner. A first step is to provide insight into the mechanism and effects of the risk-regulation reflex. To this end, the programme will draw on examples and analyses from the Netherlands and abroad and additional instruments will be developed where necessary. The programme also aspires to increase public support for government dealing with risk proportionately and transparently. Last but not least, the programme has been commissioned to develop a Cabinet vision on the role of government in regard to risks. If possible, a generic framework will be created for risk acceptability and the distribution of risk responsibility. Such a framework would constitute a valuable touchstone for government responses and would also help clarify for politicians and the public precisely what, in principle, may be expected from government. The programme runs until the end of 2012.

In the programme team, five ministries are represented. The team also includes Ira Helsloot, professor of Crisis Contingency and Physical Safety at VU Amsterdam

University, and Michel van Eeten, professor of Public Administration at Delft University of Technology. Donald Macrae is adviser to the programme.

We hope these thoughts can contribute to establishing a solid and valuable OECD Recommendation on risk and regulation. If you feel the need for clarification of any of our comments or suggestions, we would be very happy to provide this.

We are also interested to hear if OECD is still considering carrying out a study on risk based strategy designs for regulation.

Kind regards,

Jan van Tol
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Ministry of the Interior and Kingdom Relations

Enclosed:

- *Plan of approach Risk and Responsibility Programme (2011)*
- *Workplan Insight Line Risk and Responsibility Programme (2011)*
- Jan van Tol, 'Summary analysis of the risk-regulation reflex. Entrenched beliefs and six possible avenues for solutions' translated from: *Veiligheid boven alles? Essays over oorzaken en gevolgen van de risico-regelreflex* (Boom Lemma, The Hague 2011) [Safety above all? Essays on causes and effects of the risk-regulation reflex]

See also the programme's web pages in English:

www.vernieuwingrijksdienst.nl/onderwerpen/interdepartementale/overheid-voor-de/risico's-en/international-page

9. Risk and Regulation

(version 25 May 2011)

1. Regulation is often developed as a measure to respond to a perceived risk. In such cases, the design of regulatory solutions should be risk based and targeted based on an assessment of the risk that they are designed to address. Governments should have developed systems for applying scientific principles to the estimation of risks. Whenever relevant, policy proposals should be examined for their potential risk-risk tradeoffs, where a reduction in risk in one area inadvertently gives rise to an increased risk in another area.

2. Risk assessment, risk management and risk communication are part of a cycle of responsive regulation. Risk assessment is a key analytical tool to identify and assess the extent of a likely hazard and to estimate the probability and consequences of negative outcomes for humans, property or the environment. Risk management refers to the design and implementation of actions and remedies to address risks through a consideration of potential treatments and the selection of the most appropriate course, or combination of courses, of action. Risk communication is fundamental to the entire risk policy cycle, and assists in identifying the nature and extent of the risks as well as educating and informing the public about risks when making risk tradeoffs. Improving public understanding of the nature of the risks and the risk management measures can increase the public acceptance of the risk elements that cannot be reduced through further management.

3. Furthermore, as demonstrated by the international financial crisis, the risk assessment and management systems of regulators have to be explicitly designed to take into account the consequences of systemic risk and of rare catastrophic events. This is complex but will involve having systems to incorporate the lessons of past crisis and of narrowly averted events.

4. Questions for discussion:

- What is the appropriate scope for guidance on risk methodologies – what should be included?
- Who should be responsible for developing this guidance?
- How can governments ensure that regulators incorporate the features of systemic risk into their risk models?

Box 9. Draft recommendation on risk and regulation

9. Apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.

- 9.1 Governments should develop guidance on the methodologies for risk assessment, management and communication concerning the use of regulation to achieve public and environmental protection.
- 9.2 Regulators should develop, implement and review regulatory compliance strategies against risk based criteria.
- 9.3 Regulators should seek independent review of risk assessments and cost-benefit analyses accompanying major regulatory proposals.
- 9.4 Evaluate the likely effectiveness of risk strategies against their capacity to identify and inform regulatory actions that will help to avoid or ameliorate systemic risks. Ensure that risk systems incorporate lessons from past events, including failures and close calls.
- 9.5 Governments should promote the use of risk based approaches in the design and enforcement of regulatory compliance strategies to increase the likelihood of achieving compliance goals and to minimise the imposition of costs on businesses and citizens through compliance and enforcement procedures.
- 9.6 Where the precautionary principle is adopted, guidance should be provided as to how it can be applied to assist in the evaluation of regulatory alternatives.