

SMOKING BANS IN THE NETHERLANDS:

A Mix of Self-Regulation and Regulation by Government¹

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1 Introduction

Self-regulation is supposed to have many advantages. From a literature study, Baarsma and Mulder conclude that self-regulation is seen as cheaper than regulation by government because the sector concerned possesses more, and more specific knowledge than the government; self-regulation is considered to be more effective –because its rules are not imposed from above but are partly developed by the sector itself, the incentive and the readiness to comply are stronger; self-regulation is seen as more flexible – the rules can be established more quickly and the rules are more pliable; and lastly, self-regulation is seen as relieving the administrative bodies' enforcement activities.²

Such an enumeration of advantages overlooks the possibility that it may make a substantial difference who takes the initiative to self-regulation. At the one extreme, the initiative could come from the government, choosing to employ mechanisms of self-regulation as a means of regulation (top-down). At the other extreme, a sector could turn to self-regulation on its own initiative and authority (bottom-up).³ In the latter case, the advantages mentioned above seem much more likely to materialize than in the former. In this chapter, self-regulation processes regarding smoking policies are studied with this difference (bottom-up vs top-down) in mind.

The Dutch history with smoking bans is an example of the optimism felt for self-regulation. Self-regulation was attempted between 1990 and 1999 with respect to smoke-free workplaces in private enterprise and between 2002 and 2007 with respect to smoke-free areas in the hospitality industry. Both self-regulation processes were ended by the government because of their supposed lack of success. It was decided that legal bans were necessary.

This article describes the two self-regulation attempts and their results as they were reported to the authorities, with an emphasis on the self-regulation in the hospitality industrie. The Government deemed these results unsatisfactory and decided to introduce legal bans. These

1 Many thanks to Marieke van der Meij, who did a lot of necessary preparatory work for this article.

2 Mulder & Baarsma 2006: 154 based on Baarsma et al., 2004.

3 Stamhuis 2004: 8; 11.

bans proved to be more effective than the processes of self-regulation. I conclude with some reflections on these counterintuitive findings.

2 The first Tobacco Act: smoke-free public buildings and self-regulation by private enterprise

2.1 Introduction

The Dutch debate on the supposed dangers of tobacco smoke started in the 1950s. Doctor Meinsma, director of the Queen Wilhelmina Fund (KWF, an organization dedicated to combating cancer), called for attention to be paid to the negative aspects of smoking tobacco. An anti-smoking organization was founded in 1974, during his directorate, the Foundation Public Health and Smoking (Stivoro).⁴ Stivoro advocated smoke-free areas and workplaces on the grounds that they would contribute to changing attitudes to smoking.

From the 1980s, publications on ‘passive smoking’ resulted in anti-smoking campaigners winning the argument. ‘Passive smoking’ is seen as a danger to health and an infringement of bodily integrity. Societal pressure to free public places from tobacco smoke and to make them accessible for people with breathing problems increased.⁵

Anti-smoking activities fell on fertile soil. The proportion of male smokers started to decline from about 95 percent in the late 1960s to a little above 40 percent in the early 1980s. The proportion of female smokers, which had always been lower (about 30 percent in the late 1960s), initially increased to above 40 percent in the 1970s and then started to decrease to its previous level in the 1980s.⁶

2.2 Tobacco Act 1990

In late 1984 the Dutch government reacted to these developments with a bill that proposed ‘measures that limit the use of tobacco, aimed especially at the bodily integrity of the non-smoker’.⁷ The bill commenced by considering smoking, in particular cigarettes and rolling tobacco, a threat to health and sought to decrease the danger of smoking for public health. However, the government added, smoking policy could only be effective if the measures fit the changing societal attitudes towards smoking.⁸

The Tobacco Act (entering into force in 1990) forced public bodies to impose on all institutions and services under their control the obligation to take measures to prevent the discomfort of tobacco smoke. Taking measures implied that they ‘set up and keep up a smoking ban’. This smoking ban was intended to protect both employees and users of public institutions and the services. The law did not provide for sanctions. The government considered sanctions to

4 Stivoro emerged from a partnership between the KWF and two other health organizations: the Asthma Fund and the Dutch Heart Foundation.

5 See for example Hayes, 1984.

6 Stivoro 1997.

7 Second Chamber of Parliament 1984/85, 18 749, 1-3. The Tobacco Act 1990 is not the first law that enacted smoking bans. Former regulation, however, did not aim to protect non-smokers; it was enacted for other reasons, such as preventing fire (for example in cinemas).

8 Second Chamber of Parliament 1984/85, 18 749, nos. 1-3: 7-8.

be too far-reaching because of their inflexibility.⁹ Imposing the same obligation on private enterprise was also viewed as too far-reaching. Private enterprise could voluntarily follow the example of the government.¹⁰

2.3 Self-regulation regarding smoke-free workplaces in the private sector

The Labour Foundation¹¹ is the most important organization that considered developing smoking policies necessary. To initiate this policy the Foundation published a ‘Recommendation to employers and employees’. This Recommendation advised enterprises to express the changing societal beliefs regarding smoking so that their acceptance by employees (smokers and non-smokers) would be as general as possible. The Foundation considered a smoking ban across all private enterprise too far-reaching and unnecessary.¹² To support the introduction of smoke-free workplaces, the Foundation developed a step-by-step plan. With respect to smoking policies the Foundation referred to two ‘inextricable’ elements: house rules to prevent the discomfort of tobacco smoke and initiatives to convince smokers to quit the habit.¹³

Almost a decade later, the Foundation published a new recommendation regarding smoking policies.¹⁴ The Foundation expressed that tobacco smoke not only causes health problems but also influences employee performance negatively – smoking can cause absence, illness and diminished productivity. Furthermore, unresolved disputes with respect to the exposure to tobacco smoke may disturb relations in enterprises. In the Foundation’s view smoking is a ‘matter of manners’.¹⁵ In this second recommendation the Foundation placed more emphasis on the financial interests of enterprises in smoking policies.¹⁶

2.4 Results of the smoking ban and self-regulation

At the end of the 1990s the findings of research into the effectiveness of the smoking ban became public. One such study concerned schools. It showed that a great deal had been accomplished in schools – smoking occurred in about eight percent of classrooms and cafeterias and in about ten percent of halls. The government, however, was not satisfied with these results and announced increased controls. It also announced the intention to propose that Parliament include a sanction for offences against the smoking ban into the Tobacco Act.¹⁷

In 1997 and 2000 the self-regulation of smoking policies in private enterprise was also studied.¹⁸ These studies tried to establish how many businesses (of five or more employees) had a smoking policy. The research showed that in 2000, 53 percent of businesses had such a

9 Second Chamber of Parliament 1986/87, 18 749, no. 9: 18. The Government also took the position that these institutions and services should of course comply with governmental regulations.

10 Second Chamber of Parliament 1985/86, 18 749, no. 6, p. 8-9.

11 A foundation which provides a forum for employers and employees for the discussion of issues in the field of labour and industrial relations.

12 Stichting van de Arbeid, 1992.

13 GBW 1997. The GBW (Centre for the promotion of health on the shop floor) is an initiative of the Asthma Fund, the Dutch Heart Foundation and the KWF.

14 Stichting van de Arbeid, 2001.

15 In 1996 the Foundation published its opinion that smoking near to a non-smoker could be considered undesirable behaviour (Stichting van de Arbeid, 1999: 6).

16 According to an expert from the GBW a smoker is absent from work considerably more often than a non-smoker (GBW, 1997).

17 Second Chamber of Parliament, 1996/97, 24 743, no. 14.

18 Spijkerman & Samadhan, 1998; Spijkerman & Van den Aamele, 2001.

policy (51% in 1997). However, only some of the businesses surveyed had taken measures to protect non-smokers: 74 percent of the 53 percent (that is 39% of all businesses). In 2000 all businesses showed an upward trend. A more detailed look at the findings shows that the business-to-business services sector towered above the rest (55% of these businesses had a smoking policy) and the hospitality sector was at the bottom (25% of these businesses had such a policy).

2.5 Public opinion on smoke-free workplaces

The desirability of smoking policies became clear from research carried out by Stivoro/NIPO: more than two-thirds of the employees questioned (67%) answered that they had been exposed to tobacco smoke at work and 43 percent of them considered this annoying. Of Dutch people over fifteen, 73 percent considered 'passive smoking' damaging and 82 percent took the position that you should be able to do your job without being disturbed by tobacco smoke.¹⁹

3 A legal smoking ban for workplaces

3.1 Introduction

In the late 1990s the government took the position that the results of self-regulation of smoke-free workplaces in private enterprises were too weak,²⁰ and on 10 April 1999 the government proposed changing the Tobacco Act 1990. One of the changes was the addition of Article 11a. This article obliges employers to take measures to permit employees to do their work without being disturbed by tobacco smoke.²¹ Another important change in the Tobacco Act regarded the implementation of sanctions in cases of violation of the law. The administrator or the employer rather than the smoker were made liable for punishment as the parties under an obligation to take the measures required in the law.²²

This decisive stance did not signify that government had decided to take the lead. In the explanatory notes to the Bill the Government suggests choosing a regulatory framework that matches societal changes in attitudes to smoking.²³

The Tobacco Act 2002 (2002 is the year the law entered into force) creates the possibility of excluding areas within businesses and institutions and of exempting certain sectors from the prohibition.²⁴ The best known exception regarded the hospitality industry.²⁵ This industry had

¹⁹ *StivoroVisie*, May 2000.

²⁰ Second Chamber of Parliament 1998/99, 26 472, no. 3.

²¹ A reduction in the percentage of smokers in the Netherlands is the central goal of the proposal (Second Chamber of Parliament 1998/99, 26 472, no. 3: 7). The importance of smoke-free workplaces is emphasized by the ruling of the District Court of Breda in 2000. The court recognized the right of an employee to a smoke-free workplace. (LJN: AA5611, *Rechtbank Breda*, 82307/KG ZA 00-150). The court refers, among other things, to Article 4.9 of the Law on Working Conditions, which obliges an employer to organize labour so that the health of the employee is not harmed. According to the District Court this means that the employer is obliged to guarantee that a non-smoking employee can do his or her job and rest in areas which are free from tobacco smoke.

²² There are two types of sanctions: sanctions by administrative law and sanctions by criminal law. The Food and Consumer Safety Authority (VWA) is charged with the supervision of administrative law.

²³ Second Chamber of Parliament 1998/99, 26 472, no. 3: 2.

²⁴ Such a provision already existed in the Tobacco Act 1990.

²⁵ *Staatsblad*, 2003, no. 561: 6.

often been referred to in parliamentary debates as a sector that was not ready for a smoking ban. The sector itself, through its agency the Royal Dutch Hospitality Industry (KHN), never concealed its opinion that a smoking ban in the sector was impossible.²⁶ Self-regulation was considered the means by which discomfort from tobacco smoke in this sector could be restricted.

3.2 Results of the Tobacco Act 2002

In May 2004 the Minister of Health, Hoogervorst, reported the first results of the new policy to Parliament. Research conducted by the trade union FNV showed progress with respect to the implementation of smoke-free workplaces. Four out of five businesses had adjusted their smoking policies and about 70 percent of non-smoking employees were protected against tobacco smoke. With respect to smoke-free public transport, Hoogervorst noted that its implementation was carried out without any problem.²⁷

In late 2004 the Food and Consumer Product Safety Authority (VWA) checked for the first time a considerable number of businesses with respect to smoking bans.²⁸ The report shows that the law was not complied with in 32 percent of businesses. In sum, 30 reports and 1141 written warnings were issued, mostly in the industry (47%) and construction (26%) sectors. Checking workplaces, such as offices, production halls or shops, led to the conclusion that smoking took place in 21 percent of businesses. The construction and industry sectors were the worst offenders – smoking at the workplace was still common in around 33 percent of these businesses. Checking other areas, such as stairs, cafeterias and meeting rooms, showed that 17 percent were not smoke-free. To sum up, 76 percent of businesses met the requirements of the Tobacco Act 2002 – about 44 percent through a total ban on smoking and about 33 percent through a smoking ban complemented with special rooms in which smoking is allowed.²⁹

The VWA concluded that the construction and industry sectors needed special attention and checked them again (industry in 2005 and construction in 2006). This second round showed that both sectors had made progress – compliance rates had been increased to about 75 percent.³⁰

In late 2006, the VWA checked about 1400 businesses. Its conclusion was that workplaces and collective areas were smoke-free in about 86 percent of businesses. At the sector level the proportion of smoke-free businesses varied from 76 percent in industry to 100 percent in healthcare.³¹

26 KHN, 2003: 8.

27 Second Chamber of Parliament 2003/04, 29 200 XVI, no. 233.

28 The VWA checked ten different sectors: construction; culture, recreation and other services; financial enterprise, industry, agriculture; hunting, forestry and fishery; social security; public services; repair workshops for consumer commodities and trade; public transport, storage and communication; and rental and business-to-business services.

29 VWA, 2004.

30 VWA, 2005; VWA, 2006.

31 Intraval & VWA, 2006.

3.3 Public opinion on smoking

TNS/NIPO research confirmed the findings of the VWA. The percentage of non-smokers who stated they were disturbed by tobacco smoke regularly or very often had been decreased from 40 percent (in late 2003) to 28 percent (in mid 2005).³² Furthermore, it became clear that both smokers and non-smokers supported smoking policies in greater numbers. On average, 84 percent of Dutch people (smokers 72%, non-smokers 89%) took the position that employees should have the opportunity to do their jobs without being disturbed by tobacco smoke.

4 Self-regulation in the hospitality industry

4.1 Introduction

The Minister of Health exempted the hospitality industry from the obligation under Article 11a of the Tobacco Act in the ‘Exceptions to the smoke-free workplace Order’.³³ This exception only applied to areas accessible to customers. Meeting rooms, changing rooms and the like for employees had to be smoke-free. From the outset, the Minister was clear that the exemption would only be temporary. The Government’s ultimate goal was a 100 percent smoke-free hospitality industry. In the interim a process of self-regulation, overseen by the KHN and another hospitality industry organization, was to be in effect.

4.2 The step-by-step plan

The KHN opted for a system in use in England.³⁴ Under this system a notice is placed at the front of a bar, restaurant or hotel announcing the smoking policy of the establishment (smoke-free, partly smoke-free, etc.) This system is thought to stimulate market processes and to make manifest the societal support of smoking policies. Bars and restaurants in particular would benefit from such a system.³⁵

With respect to self-regulation, the opinions of the Minister and the KHN differed. The Minister thought of self-regulation as a short-term step towards legislation, the hospitality industry bringing the law into force in phases.³⁶ The KHN considered self-regulation

[a]n autonomous, voluntary action of a industry to realize concrete and societal goals to avoid (inflexible and hardly effective) regulation by government and to gain societal support for the goals concerned.

The KHN noted the usual advantages of self-regulation: the sector has the specific knowledge necessary to draw up a regulation, or can get this information more cheaply than the govern-

³² Koolhaas & Willemsen, 2005.

³³ *Staatsblad*, 2003, nr. 561.

³⁴ In the meantime (since 1 July, 2007) Great Britain has enacted a smoking ban in public places, including the hospitality industry.

³⁵ In addition to this system, the KHN considered education about smoking policies and the possibilities of ventilation. However, on the basis of research reports from RIVM/TNO the Minister did not credit the reduction of tobacco-smoke disturbance by ventilation: ‘with ventilation a complete reduction of the risks is not possible’ (Second Chamber of Parliament 2005/06, 303300 XVI, no. 144). Ever since, Dutch Ministers of Health have rejected ventilation as a solution.

³⁶ KHN 2003: 10.

ment; self-regulating bodies are more flexible and less bureaucratic; the costs for formulating rules are lower and are paid by the sector itself; and the administrative costs are low because the sector itself is responsible for monitoring and maintaining compliance.³⁷

In addition to these arguments, the KHN took the position that self-regulation is better able to precipitate a cultural shift. Bluntly imposing a smoking ban in the hospitality industry would lead only to a lack of understanding and civil disobedience.³⁸

From the outset it was clear that the KHN and the Minister did not agree on the content of the policy. The KHN did not go along with the Minister in his opinion that the hospitality industry had to be 100 percent smoke-free in 2007. In its view the Minister asked too much of the sector because its percentage of smokers was higher than elsewhere. Furthermore, the KHN took the position that the one-man businesses are beyond the scope of self-regulation and asked for an exception for bars smaller than 100 square meters.³⁹

The version of the step-by-step plan that was accepted by the Minister stated the following goals: in 2007 all establishments should have a notice at their fronts, in 2008 75 percent of all bars and all restaurants should have smoke-free areas, furthermore 80 percent of fast-food establishments and 75 percent of discos should have such areas; 95 percent of hotels should offer a smoke-free breakfast option and all hotels should offer smoke-free rooms. In addition to all this, half of all the fast-food establishments and all ice-cream parlours should be free from tobacco smoke.⁴⁰

On the occasion of the presentation of the step-by-step plan to Parliament, Minister Hoogervorst took the position that its goal was to get employers, employees and visitors used to a smoking policy and thereby to ease the coming into effect of a smoke-free hospitality industry. He undertook to provide an overview of the results each year.⁴¹

The results for 2005 were published in July 2006 (table 1).

37 KHN, 2003: 11.

38 KHN, 2003: 11.

39 KHN, 2003: 32.

40 Letter from M.H.J. Claes (chair of KHN) to Minister Hoogervorst, 26 August, 2004.

41 Second Chamber of Parliament 2003/04, 29 200 XVI, no. 278: 3.

Table 1: results 2005

	Sector	2005 Targets	2005 Results	Target Achieved
Notice at front		50%	28%	No
Smoke-free areas	Bars	25%	11%	No
	Restaurants	25%	20%	No
	Discos	25%	9%	No
	Hotels smoke-free rooms	40%	84%	Yes
	Hotels smoke-free breakfast	20%	78%	Yes
	Fast-food	25%	21%	Yes
Smoke-free	Fast-food	20%	5%	No
	Ice-cream parlours	40%	33%	No

Minister Hoogervorst was disappointed by these results. However, he granted the hospitality industry a second chance. If the targets were not met in 2006, he would consider withdrawing the exception. The table of results for 2006 shows that the sector caught up:

Table 2: results 2006

	Sector	2006 Target	2006 Results	Target Completed
Notice at front		85%	59%	No
Smoke-free areas	Bars	40%	47%	Yes
	Restaurants	50%	58%	Yes
	Discos	40%	21%	No
	Hotels smoke-free rooms	75%	97%	Yes
	Hotels smoke-free breakfast	40%	87%	Yes
	Fast-food	50%	67%	Yes
Smoke-free	Fast-food	30%	14%	No
	Ice-cream parlours	70%	55%	No

The table shows that the hospitality industry achieved the required results. However, it was too late. A few months before the results were announced a new cabinet was formed. This new government, Balkenende IV, stated in its coalition agreement that it would ‘achieve a smoke-free hospitality industry in its term, in dialogue with the sector’.⁴²

The new Minister of Health, Klink, immediately started talks with the KHN. The KHN took the position that the sector was ready for a new approach. It proposed making hotels, restaurants and fast-food establishments smoke-free from 1 January, 2008. Bars and discos would need more time: according to the KHN, they could be smoke-free from January 2011.

42 Second Chamber of Parliament 2006/07, 30 800 XVI, no. 149: 3.

5 Smoking bans for the hospitality industry

5.1 Introduction

In 2008 TNS NIPO looked at the public support for smoking bans in the hospitality industry. They found that a majority of the industry's customers supported such a ban (62%, a little less than in 2006 when 65% of the population supported it). The majority of those against were smokers (72%). More than half of those questioned wanted a smoking ban in the near future. With respect to restaurants this was 60 percent. A vast majority of the supporters of a smoking ban took the position that the government should be more decisive and force the hospitality industry to be smoke-free in 2011.⁴³

The 'Exceptions to the smoke-free workplace Order' was withdrawn on 1 July, 2008. From that day on the hospitality industry⁴⁴ was also subject to Article 11a of the Tobacco Law. A second order also came into force that day: 'Smoke-free workplace, hospitality industry and other areas Implementation Order'. Provision 3 of this Order prescribes that the entire hospitality industry, and not only those businesses with personnel, should become smoke-free.⁴⁵ Minister Klink argued that research in other countries showed that a strong decrease in turnover as a result of the smoking bans is not to be expected. In his opinion there were no arguments for distinguishing different parts of the hospitality industry with respect to the measures imposed. Such differences could lead to distortion of competition and thus to litigation.⁴⁶

5.2 Compliance rates

As distinct from the introduction of earlier smoking bans, like the smoking ban in public transport and the smoke-free workplace, the VWA announced immediate compliance checking.

In late September 2008, the VWA published its first report on compliance rates:⁴⁷ the smoking ban in most parts of the hospitality industry – hotels, restaurants and fast food establishments – was very successful from the point of view of the legislator. In these parts compliance was almost total: 94–99 percent. One part that lagged behind was the so-called 'wet part' (pubs, bars and the like). However even there the VWA found compliance rates of 79 percent.

From 1 July on, this 'wet part' expressed objections, a protest that grew during the first three months of the bans. Bar owners argued that their turnover had decreased to such an extent that they had no other choice than to put the ashtrays back on the tables. They did not agree with the distortion of competition argument and became more resolute in their protest against the smoking ban. Minister Klink reacted by threatening that the VWA would check on these recalcitrant bar owners more often and that the VWA would apply administrative fines from

43 http://www.tns-nipo.com/pages/nieuws-pers-vnipo.asp?file=persvannipo\rtl_rookvrije_horeca07.htm

44 Defined as organizations run by entrepreneurs or companies required to register with the Hospitality and Catering Trading Association (Bedrijfschap Horeca en Catering).

45 *Staatsblad*, 2008, 122. This can be done on the basis of Article 10 the Tobacco Law.

46 Second Chamber of Parliament 2006/07, 30 800 XVI, no. 149: 3.

47 VWA, 2008.

that moment on.⁴⁸ In November 2008 the Minister announced that those businesses violating the smoking ban systematically would be prosecuted under the Economic Offences Act.⁴⁹

In January 2009 the compliance rates for the first six months were published. Two sources were used. On the one hand are the findings of the VWA. Between 1 July 2008 and the beginning of January 2009, the VWA carried out more than 14,000 inspections. From October these inspections were especially concentrated on those businesses which did not comply with the bans. The results of these activities were that some 2,500 measures were imposed, 80 percent of them on bars.⁵⁰ On the other hand, the research institute Intraval inquired into compliance in six cities. From this research it is evident that 90 percent of all 42,500 businesses in the hospitality industry comply with the bans. A large majority of the ‘wet part’ also complies – 77 percent. About 2,500 of the 11,000 bars, pubs and similar do not comply with the smoking ban. This number has not changed much since the first three months of the smoking bans.⁵¹

6 Reflections

Compared to regulation by government, self-regulation is seen as cheaper, more effective, more flexible and as saving administrative costs. This article makes clear that many of the advantages attributed in the literature to self-regulation as a whole are also found with respect to self-regulation of smoking policies. Ministers pointed to the need to take existing norms into account, instead of imposing them, and to the flexibility and effectiveness of self-regulation. Societal organizations such as the Labour Foundation and the KHN are also convinced of the advantages of self-regulation – they took the position that it is better not to apply the most severe measure, a legal ban, immediately. They considered regulation by government as too rigid and therefore hardly effective, and thought that social support for smoking bans was more easily gained through self-regulation. The arguments regarding the accessibility of knowledge and of lower costs were also raised with respect to self-regulation of smoking policies.

However, the article also points out that the advantages attributed to self-regulation barely materialized in the case of smoking policies. Self-regulation of smoking policy is characterized neither by speed nor by flexibly drafted rules; it can only barely be associated with the formulation sector-specific norms and with incentives and a readiness to comply with the rules. Two reasons come to mind to explain these findings: the advantages do not occur in cases of top-down self-regulation and the self-regulation process was not given enough time.

48 Second Chamber of Parliament 2008/09, 22 894, no. 199.

49 <http://www.minvws.nl/kamerstukken/pg/2008/handhaving-rookvrije-horeca.asp>. In 2009 two bars were prosecuted on this ground. The cases have clarified that the legal grounding of the smoking bans in bars without employees is unsound (LJN: BH9853, District Court Breda; BI3572, Court of Appeals 'sHertogenbosch; BJ1286, Court of Appeals Leeuwarden (Van der Meij 2009).

50 Notably on small bars and pubs in city centres.

51 This number demonstrates that there is a considerable group of businesses which do not comply with the rule without being explicitly against. RKN (Save the Small Entrepreneurs in the hospitality industry – an organization that articulates its opposition to the smoking ban) has some 1,100 members. A small study conducted in Groningen shows the same results – only some of the bars that allow smoking, especially bars in the town centre, communicate this policy.

Self-regulation with respect to smoking policies is clearly an example of top-down self-regulation. The Government decided the norm to be implemented in advance – do not disturb others by smoking – a norm later complemented by a diminution in the proportion of smokers in society. Moreover, the Government also decided how the new norm should be established – by prohibiting smoking in certain places. Other methods of preventing discomfort such as ventilation, were rejected categorically – i.e. flexibility did not play a role at all. The only thing left to businesses and organizations to decide was how to palm off the norm onto their employees and customers. The case therefore suggests that the advantages attributed to self-regulation do not occur in top-down regulation.

Both in 1999 and in 2006, ministers decided that self-regulation yielded too few results. In the earlier case the Health Minister had not been explicit as to which results he expected and in the later case he changed expectations during the process. We do not know what would have occurred if the sectors had been given more time. This suggests that we cannot draw definite conclusions on the merits of self-regulation of smoking policies.

Fortunately, there is another way of looking at the process that provides a more satisfactory answer to the question of whether self-regulation is better than direct regulation by government – namely by looking at whether the legal bans imposed were less effective and more expensive than the smoking policies resulting from self-regulation.

The effectiveness of legal bans versus self-regulation can be assessed by comparing compliance rates. For example, after a year the rather soft demand of notices at the front of each establishment in the hospitality industry was complied with in only half of the cases, and smoke-free areas had only been implemented in large numbers in hotels. With respect to the legal bans: overnight (30 June 2008) 90 percent of the hospitality industry, and even 77 percent of the supposed most problematic sector – the ‘wet part’ – were smoke-free. There is only one conclusion possible: the legal ban achieved more (quantitatively and qualitatively) than self-regulation did.

Apparently these results were not caused by the enforcement activities of the administrative bodies. The lack of substantive enforcement is obvious with respect to the smoke-free workplace. Leaving aside the hospitality industry, the VWA conducted some 9,000 inspections between 2004 and 2007. This is very few considering the magnitude of the sectors: for example, in 2005 only one out of fourteen industry enterprises was visited by the VWA. With respect to the hospitality industry, enforcement activities are markedly more numerous. However, the hospitality industry differs from other industries, such as construction, with respect to compliance rates. Right from the first day, compliance rates were very high and therefore compliance in this sector cannot be explained by the enforcement activities of the VWA either.

Accordingly, not only did the supposed advantages of self-regulation not materialize, but it was also less effective than its counterpart, government regulation. How can this be explained?

A possible explanation of the results could be the moment the legal bans came into effect. Dutch governments were clear that they had delayed legal smoking bans until the moment they expected society had changed sufficiently to accept them. It is clear that at the time the

legal bans were imposed, the norm – do not disturb others with tobacco smoke – had considerable public support. With respect to the smoke-free workplace we know that smoking rates started to decrease before the law came into force and hardly at all thereafter.⁵² The legal ban gives the norm – do not disturb others with tobacco smoke – ‘moral force’ by clarifying its importance.⁵³

Another possible explanation could be the period of self-regulation attributed to the acceptance of smoking policies. In that period not only did non-smokers and smokers gain experience with smoking policies but entrepreneurs and managers did too. Regarding the latter two groups, this experience may have shown that the benefits exceeded the costs – for example fewer absentees, lower cleaning costs – and that employees and customers were positive about it.

Some proof for this explanation is to be found in the problems the ‘wet sector’ has. With respect to smoke-free areas, the KHN omitted this sector from the self-regulation rules. In their opinion smoking bans in this sector were premature because of a lack of support. Furthermore, the KHN never took into account that businesses without employees would also be subject to smoking policies. Therefore, if self-regulation served as a preparation for smoking bans, it is no wonder that the ‘wet sector’ was not ready for smoking bans. Furthermore, it is doubtful whether establishments in this sector, especially small bar owners, can afford even a small temporary fall in income. For them, probably, the outcome of the costs and benefits analysis is negative.⁵⁴

To conclude, the example of self-regulation with respect to smoking policies shows that the supposed advantages of self-regulation may not always materialize in cases of top-down self-regulation. Furthermore, the example puts the difference between regulation by government and self-regulation into perspective – despite the fact that the advantages of self-regulation did not appear, regulation by government did not show the supposed disadvantages. Furthermore, although self-regulation of smoking bans was not very successful, it apparently did a good job in preparing the various sectors for legal smoking bans. Regulation and self-regulation of smoking policies again showed that regulation processes are mixes of different forms of regulation, and the description provided of the example industry demonstrates, again, the complexity of such processes.⁵⁵

52 Nienhuis & Weyers 2005.

53 Kagan & Skolnick 1993.

54 Weyers 2009.

55 Griffiths 2003: 216.

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