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Netherlands Labour Authority  
*Ministry of Social Affairs and Employment*

# **Enforcement policy Market supervision Commodities Act**

Based on European Regulations,  
the Commodities Act and Commodities  
Act Decrees Applicable during the  
construction phase of new product  
and the usage phase of products.

**Disclaimer:**

The text of the Dutch version is the applicable version.  
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# 1 Introduction: the purpose and the scope of product legislation

The legislator imposes product requirements which protect general interests which secure the safety, the health and the environmental quality for consumers, professional users and the public. The requirements are based on the European legislation and in the Netherlands, these are set out in detail in the Commodities Act. In addition to the general interests referred to above, these European regulations aim to promote the free movement of goods and to safeguard fair trade relations. The legislator has made a manufacturer or an installer (lifts) primarily responsible for the design and the manufacture in conformity with essential safety requirements. As an extra safeguard, a product must in certain instances be approved and certified by experts or government-designated conformity assessment bodies or CABs before it can be placed on the market. The final element of this system is government surveillance: the market surveillance of products. The Netherlands Labour Authority (NLA) has been designated as one of the market surveillance authorities of the Commodities Act and of a number of decrees based on the Commodities Act.

It must be noted for completeness' sake that the Netherlands Labour Authority is also charged with market surveillance of the IMO Containers Directive<sup>1</sup>.

The Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit* or NVWA) is responsible for the market surveillance of consumer products under the Machines (Commodities Act) Decrees and the Personal Protective Equipment (Commodities Act) Decree 2018.

The Commodities Act is, what is referred to as, a legislative framework with respect to goods and technical products. The Commodities Act contains the provisions on the definitions, the scope, the delegation, the granting of powers to the Minister and the supervisory officials, and it includes regulations on sanctioning. In addition, the Commodities Act also contains prohibitions concerned with anyone trading in goods or technical products<sup>2</sup>.

The EU Member States have an internal market which also includes Norway, Liechtenstein and Iceland as signatories to the Agreement on the European Economic Area or EEA. Although Turkey is a party to the Customs Union, it is still considered a third country.

Switzerland does not form part of this market but it has signed an intensive mutual recognition agreement (MRA) and Switzerland tends to align its legislation with that of the European Union. The United Kingdom (UK) has ceased to be a member of the EU since Brexit (31-1-2020). Negotiations on the status of the UK are still ongoing. During the implementation of the enforcement policy, it is important to check the current status of UK operators. Where enforcement activities are concerned, it is essential to establish whether the responsible economic operator is in the EEA or not.

	Commodities Act Decree	Directive / Regulation	Note
1	Machinery	2006/42/EG	Products for professional use
2	Personal Protective Equipment 2018	Regulation 2016/425/EU	Products for professional use
3	Lifts 2016	2014/33/EU	
4	Pressure equipment 2016	2014/68/EU	
5	Simple pressure vessels 2016	2014/29/EU	
6	Explosion-proof equipment 2016	2014/34/EU	
7	Containers	International Convention for Safe Containers (CSC)	Only the Annex to this document is applicable to containers

<sup>1</sup> The Commodities Act Decree on containers has no European origin, but is based on the International Convention for Safe Containers of the International Maritime Organisation of 2 December 1972.

<sup>2</sup> Trading is defined in the Commodities Act as: offering for sale, displaying, selling, delivering, holding or stocking, as well as renting out. It therefore has a wider meaning than 'offering on the market'.

## 2 The parties to which the Commodities Act applies

**A manufacturer, an authorised representative, an importer, a distributor, an installer, a user, a conformity assessment body**

The Commodities Act and Commodities Act Decrees have several parties to which the law applies (*normadressaat*). Such parties are persons or entities subject to the statutory provisions set out in the Commodities Act, as a manufacturer, an authorised representative, an importer, a distributor, an installer, a user and conformity assessment bodies (CABs). The new Market Surveillance Regulation 2019/1020<sup>3</sup> adds one more: a fulfilment service provider. Said definition was added in response to the enormous increase in e-commerce. The Commodities Act has not been amended as yet, which is why this definition is not used in this document.

Each Commodities Act decree stipulates who is responsible for the obligation to make a product or a new product available or placing it on the market. A manufacturer or an authorised representative or an installer has the obligation of a product meeting the essential requirements. Depending on the specific (Commodities Act) decree, a distributor is the party subject to the obligation to check if the required documents accompany the product. The distributor must exercise due care as regards the requirements when offering products on the market.

The requirements apply to new products, and often also apply to used and second-hand products imported from a ‘third’ country<sup>4</sup>, the foregoing in the event that such products are first placed on the EU market. Although many European product safety directives are composed in the same way, it is always important to check the specific requirements set out in each directive and in each Commodities Act decree.

The end-user pursuant to the Commodities Act is the party to which the requirements applies both in the provisions that focus on products being put into service and the provisions which concern the use phase (e.g., obligatory checks).

In conclusion, CABs are parties to which the requirements applies in the Commodities Act. In some instances, the legislator stipulated

that a conformity assessment body (EU-CAB<sup>5</sup>) must be involved in the procedure before a product can be placed on the market. NL CABs have been designated to carry out the statutory inspections of putting products into service at the use stage. The Commodities Act sets the standards for such CABs. If CABs meet these standards, a ministerial order is issued, which provides the authority to carry out conformity assessments required by law and, if applicable, to issue certificates. It is important to identify the product and the conformity assessment for which an EU-CAB has been designated as such a designation is not generic. The requirements set for economic operators and EU CABs are determined at a European level. The requirements for commissioning, usage and NL CABs are determined at national level.

A number of economic operators may be subject to enforcement pursuant to the Commodities Act. Chapter 5 sets out how it is done. Due to the fact that there are specific provisions in each Commodities Act decree, such specific matters are laid down in the Annexes of said Enforcement Policy. The annexes concerned are gradually supplemented and extended. The annexes are given a separate date and a version number making it easy to make supplements.

Enforcement on the user ‘s side in certain cases concerns the putting into service (such as pressure equipment)<sup>6</sup>, the use or the inspection by an NL-CAB. This enforcement is set out in detail in Chapter 6. The enforcement by way of CABs is briefly explained in Chapter 7. However, this enforcement is set out in a separate enforcement policy ‘Enforcement Policy for CAB’s – Netherlands Labour Authority’, to which reference is made. The Netherlands Labour Authority oversees the lawful execution of tasks by the CABs and the effectiveness of statutory certification systems in addition to having powers of enforcement. The CABs are private companies that perform part of their task based on a ministerial designation.

In the supervisory practice of the Netherlands Labour Authority, a user is in many cases also the employer, within the meaning of Section 1 of the Working Conditions Act (*Arbowet*). It means that a user can be the subject of surveillance of product regulations as well as the surveillance of occupational health and safety regulations (see chapter 9).

<sup>3</sup> REGULATION (EU) 2019/1020 of 20 June 2019 on market supervision and product conformity.

<sup>4</sup> A “third country” is a country that does not belong to an EEA (EU countries + Norway, Iceland and Liechtenstein) and with which the European Union has not concluded a customs union.

<sup>5</sup> See NANDO website: <https://ec.europa.eu/growth/tools-databases/nando/>

<sup>6</sup> For certain products, the emergence of European regulations has led to the abolition of the commissioning inspection, such as as under the ATEX directives, SPVD, LD, MD and PPE Regulation.

# 3 Certification as an extra safeguard

Where certain products are concerned, the legislator has obliged the party responsible to provide an extra safeguard and to arrange for an independent body designated by an EU Member State (EU-CAB) to test the design, the production process or the end-product and to certify such a product.

An overview of the possible conformity assessment modules (A-H) is given in chapter 5.1.7 of the Blue Guide<sup>7</sup>.

A certificate/statement issued by an EU-CAB is valid throughout the European internal market. Each Member State has the surveillance of the EU-CABs designated by that Member State. In the practice of market surveillance for product safety, the Netherlands Labour Authority must therefore also deal with foreign EU-CABs. The Netherlands Labour Authority is the supervisory authority in respect of Dutch EU-CABs and it can take enforcement actions. Foreign EU-CABs can only be formally held to account through the supervisory authority of that other Member State.

In the use phase, users of products such as lifts, pressure equipment and cranes must arrange for the periodical testing of such equipment by an institution (NL CAB) as designated by the Netherlands Labour Authority on behalf of the Minister of Social Affairs and Employment to verify whether their product still meets the statutory requirements. In all the cases referred to, only products with a valid certificate are allowed to be placed on the market or to be put into service.

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<sup>7</sup> <http://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=OJ:C:2016:272:FULL&from=EN>

# 4 The principles of the enforcement of requirements for new products (the new construction phase)

Market surveillance of products consists of many activities/ interventions to ensure that products on the European market meet the standards. The Netherlands Labour Authority uses a mix of instruments, ranging from providing information and having consultations (on a national and international level) to imposing measures and fines.

This chapter sets out the principles of enforcement. The steps for enforcement are set out in chapter 5.

The target is in fact the European market and the enforcement of the Commodities Act must fit within the following:

- The European supervisory policy, implemented by the supervisory authorities in the EU countries. The framework is provided by Regulation (EC) No 765/2008 which has been partially replaced by Regulation (EU) No 2019/1020. Articles 29 to 33 and 36, which deal with coordinated enforcement and cooperation between Member States have been applicable as of 1 January 2021. The other articles have been in force from 16 July 2021 onwards. Decision 768/2008/EC is a framework decision which is the basis for all New European Approach directives. As a result, this Decision is not directly applicable to enforcement;
- The supervision policies and its enforcement on the basis of which the other market surveillance authorities in the Netherlands carry out the surveillance of products (NVWA, ILT, Telecom Agency, IGT);
- The supervision and enforcement policy of the Netherlands Labour Authority, including the penalty policy.

The details of the enforcement policy are based on the guides established by the European Commission:

- The “Blue Guide” gives substance to the product regulations;
- The “Horizontal Guide” and the Guide for Internet Trading give substance to coordinating themes;
- The guides for each directive or regulation give substance to the supervision (the guide for the Machinery Directive, the PED Guides, etc.).

General principles for the use of an enforcement instrument:

- Has there been a violation of the Commodities Act or a Commodities Act decree related thereto?

- Is the instrument to be used proportionate? Is it proportional to the level of risk and the degree of non-compliance? The severity of the enforcement instruments to be used depends on the gravity of the deficiency.
- Is it a matter of being subsidiary? Is it the most appropriate way a supervisory authority can achieve its goal?

The violations may include:

- The essential health and safety requirements;
- The formal obligations - administrative or procedural -, including certification obligations.

The Blue Guide clarifies what the formal obligations are. There is a distinction between formal and substantial non-compliance. It is a matter of formal non-compliance where typically a CE marking has not been affixed, or where an EU declaration of conformity is not present with the product, or where the identification number of the body which was notified is missing on the EU declaration of conformity. Where there is non-compliance with the formal requirements, it is not known whether the product meets the essential safety requirements. In such event, there might be a hazard for which evidence must be submitted. It is a matter of substantial non-compliance where it can be demonstrated that the essential safety requirements have not been met, possibly resulting in a hazard.

The corrective measures to be taken depend on the degree of non-compliance and the risk posed by the violation and the aforesaid must be in accordance with the principle of proportionality. Unless it is urgent, the person responsible must be given the opportunity to be consulted prior to a competent supervisory authority taking action to restrict the free movement of products.

In addition to corrective measures, the Market Surveillance Regulation stipulate that sanctions must be proportionate to the gravity of a violation as well as being a sufficient deterrent against misuse. The penalties may be increased if an economic operator has previously committed a similar violation. Criminal sanctions may also be imposed for serious violations.

Enforcement in the event of violations is in principle instituted in respect of the most senior responsible economic operator (a manufacturer, an authorised representative, an installer or an importer) within the EU. Where machines are concerned, a manufacturer or his authorised representative is in principle responsible (even if a manufacturer is not based in Europe). The Machinery Directive has not been brought in line with the New Legislative Framework as yet.

Section 5.2 sets out the risk assessment of the inspection in respect of essential requirements. The decision on the enforcement instrument and the measures to be imposed depend on the risk assessment. The same section stipulates which enforcement instruments and which measures are used and they are set out for each risk. Section 5.4 concerns the enforcement in respect of products with formal (administrative or procedural) non conformities.

In situations involving forgery or deliberate violations - such as the falsification of certificates by a manufacturer or the marketing of a product that has been rejected by an EU-CAB -, there may be consultations with the Public Prosecutor's Office about possible criminal prosecution.



# 5 Enforcement Market surveillance

This chapter describes which enforcement is applied and when. The risk posed by the violation is considered as far as possible.

## 5.1 No non-conformity established

The conclusion of an inspection or investigation may be that **no non-conformity** has been found. If no non-conformity is found during a product inspection, a settlement letter is sent, which includes:

- the products inspected, and
- the obligations inspected.

This letter clearly explains that no pronouncement is made about the full compliance of the product, as the Netherlands Labour Authority not (be able to) check all product obligations during an inspection. The Netherlands Labour Authority is not an inspection body but a supervisory body. The market surveillance authority does not issue a declaration of compliance, as this could be seen as a product's approval.

## 5.2 Product not in compliance with the essential health and safety requirements

The determination of the enforcement instrument and the measures to be imposed for a product not complying with the essential health and safety requirements depends on the risk resulting from the inspection's risk assessment of the non-conformities of the product inspected or to be inspected. The RAPEX risk assessment method [RAG ECL \(europa.eu\)](https://eur-lex.europa.eu/eli/dec/2019/417/oj) is used for this assessment of the essential health and safety requirements. The system is described in <https://eur-lex.europa.eu/eli/dec/2019/417/oj>.

RAPEX risk assessment methodology distinguishes 4 risk categories:

- Green / Low / R - 1
- Yellow / Medium / R - 2
- Orange / High / R - 3
- Red / Serious / R - 4

The enforcement policy of a formal (procedural or administrative) non-conformity is described separately in section 5.4 and the annexes per Commodities Act decree, for example CE mark is missing or does not conform; address details of the economic operator are missing; or the conformity procedure is not followed.

### 5.2.1 Non-conformity low risk

If the non-compliance with the essential health and safety requirements of the product is of low risk, a letter of findings is sent. It depends on the legislation to which economic operator this letter should be sent. In general, the highest responsible economic operator for the product that is located within the EU will be addressed (except for machines, where the responsible economic operator may also be located outside the EU). First the economic operator has the opportunity to take responsibility by bringing the non-compliant product into conformity with the legislation (Please note that the physical modification of a product is the manufacturer's sole responsibility) or to stop placing it on the market, including making it available on the market.

The economic operator is given the opportunity to respond within 14 days to the content of the findings (non-conformity, measures to be taken). Perhaps the requirements have been met? Or were they not (sufficiently) informed and will take action soon?

The letter of findings is followed by one of the following steps:

- The response leads to the conclusion that there is no non-conformity after all: the letter of findings is followed by a settlement letter (see 5.1) or;
- In response, it is concluded that the responsible operator uses the possibility to "voluntarily" eliminate the non-conformity and take the necessary measures. The letter of findings is then followed by letter of warning in which the non-conformity and the corrective measures to be taken is confirmed (including deadlines, etc.), or;
- In the light of the response or lack of response, it is concluded that the responsible economic operator will not take the corrective measures voluntarily. The letter of findings is then followed by a non-conformity warning, which confirms the non-conformity and indicates that the violation must be rectified.

**Table 1** Summary of steps to be taken in the case of low risk non-compliance

1. Start enforcement	2. Economic operator response	3. Handling	4. Safeguard	5. Re-inspection
Letter of findings	No non-conformity	Settlement letter	No	None
	"Voluntary" removal of violation	Warning	No	None
	Violation will not be eliminated	Warning	No	None

*Important note: only after a response has been submitted or after the response period has expired a non-conformity warning is sent. This warning will briefly outline the content of the response, if any.*

### Low-risk Safeguard procedure

The non-conformity is recorded in ICSMS even if the non-conformity is "voluntarily" remedied. No Safeguard procedure or notification follows because a warning is no legally binding Measure.

#### Low-risk re-inspection

Given the risk-oriented working method and the not infinite inspection capacity of the Netherlands Labour Authority, low-risk violations do not have priority and are not re-inspected. Of course, exceptions are possible. If the company is re-inspected later on and this non conformity is found again, this is a repeated violation and enforcement follows the steps described in chapter 5.2.2.

### 5.2.2 Non-conformity Medium risk

If the non-conformity of a product with the essential health and safety requirements poses a medium risk, **a letter of findings** is sent to the highest responsible economic operator in Europe (except for machinery, the manufacturer of machinery may also be outside the EU).

The responsible economic operator is given the opportunity to respond within 14 days to the contents of the finding in the letter (non-conformity, measures to be taken, deadlines). Perhaps the requirements have been met? Or were they not (sufficiently) informed and will take action soon?

After the letter with the possibility to react, and the non-compliance is indeed present in the product, a warning letter of non-compliance will follow, stating that the economic operator must remove the non-compliance. Even if he "voluntarily" indicates that he will eliminate the violation. In any case, the violation is clear.

### Safeguard procedure Medium risk

The non-conformity is recorded in ICSMS even if the violation is "voluntarily" eliminated. No Safeguard procedure or notification follows because a warning is no legally binding measure.

If the responsible economic operator is not established in the Netherlands and the non-compliance is not resolved, we pass the baton in ICSMS to the responsible market surveillance authority in Europe. No system is available for operators outside Europe.

#### Re-inspection medium risk

A re-inspection follows after about a year if the responsible operator is located in the Netherlands. If the non-conformity is still there, an administrative penalty report will follow. The use of punitive/sanctioning measures punishes the economic operator. The fine is imposed because the non-conformity of the relevant Commodity Act Decree has not been eliminated.

If the re-inspection shows that the violation has been eliminated, the inspection is concluded with a settlement letter re-inspection.

**Table 2** Summary of steps to be taken in case of medium risk non-compliance

1. Start enforcement	2. Economic operator response	3. Handling	4. Safeguard	5. Re-inspection	6. In order	7. Conclude re-inspection
Letter of findings	No non-conformity	Settlement letter	No	N/A	N/A	N/A
	"Voluntary" removal of violation	Warning	No	After 1 year	Yes	Settlement letter re-inspection
					No	Administrative fine
	Violation will not be eliminated	Warning	No	After 1 year	Yes	Settlement letter re-inspection
No					Administrative fine	

### 5.2.3 Non-conformity high risk

If the non-conformity of a product with essential health and safety requirements poses a high risk and the responsible economic operator for the product safety is established in the Netherlands, a notification pursuant to Article 21 of the Commodities Act will be sent with the opportunity to express an opinion.

The important thing is that the non-conformity in question constitutes a danger. This danger must be described. In some cases, for example, if few products are only marketed in the Netherlands, it may be preferable, for the sake of a prompt response, to use enforcement options as described in Article 30 of the Commodities Act. This is described separately in section 5.3.

#### Foreign economic operator product safety

If the product originates from a foreign economic operator, correspondence is conducted in English. It should be noted that the Commodities Act is not applied. An order may be imposed on foreign economic operators, but it is not enforceable. Therefore, foreign economic operators are addressed using a letter of findings, which contains the findings and the expected corrective measures. At the same time, a copy is sent to the European Market surveillance Authority. If the responsible economic operator within the EEA does not follow up on the measures to be taken, the European Market surveillance Authority will be asked to assist in the enforcement of the measures imposed. For this, we pass the baton in ICSMS to the responsible regulator in Europe. No system is available for operators outside Europe.

After that A notification order article 21 is sent to the distributor in the Netherlands to stop making the product available on the market.

In the notification order article 21 Commodities Act one or more of the following corrective measures are imposed:

- Article 21 (1): the holders must be informed of the danger (users and distributors);
- Article 21 (2) sales ban, or the products that are on the market must be recalled.

Because the legislator has chosen to make non-compliance with an order under Article 21(2) Commodities Act a criminal offence under Article 21(3) and an order under Article 21(1) Commodities Act not, it is legitimate to make a distinction. As a result, the follow-up to the notification order under 21 (2) Commodities Act is different and is described separately.

*Important note! If a product has several non-conformities, of which some represent a low or medium risk, these non-conformities and the corrective measures to be taken are dealt with separately, according to the procedure described in 5.2.1 or 5.2.2. or in the case of a formal non-conformity as described in 5.4. Low and medium risk deficiencies may NOT be included in the notification order! Not even in the annex.*

#### a. Article 21, (1), Commodities Act

A notification pursuant to article 21 (1) of the Commodities Act is sent if the corrective measure is to inform the holders and users.

After sending the notification under 21 (1), one of the following steps are taken:

1. On the basis of the view submitted, the conclusion is that there is no non-conformity after all: the notification under 21(1) is followed by a settlement letter, or;
2. The views expressed do not lead to a change of opinion, and the economic operator undertakes the corrective actions as set out in the Notification Letter. After positive verification of this commitment, a letter waiving the order under 21 (1) is sent, stating the measures taken by the economic operator. If the inspection reveals that the corrective measures have not been implemented, the order will still be imposed, or;
3. The economic operator fails to implement the corrective measures or does not implement them satisfactorily, the order under Article 21(1) of the Commodities Act is imposed. It is stated in the order that an order for incremental penalty payments (hereinafter: Incremental penalty order) can follow. And a fine will be imposed if the order is not followed.

#### Follow-up of order imposed Article 21(1):

Given the risk, follow-up in the case of high risk should not be too long. A reasonable period depends on the time connected with the measures to be taken by the economic operator. If the inspection reveals that the non-conformity has not been eliminated and the promised measures have not been taken, more serious enforcement instruments will be used:

- If the inspection shows that the order has been followed, a letter will follow to confirm this, and the file will be closed;
- If, after imposing the order, it turns out that the order has not been carried out, the inspector will announce a penalty order. Subsequently, an incremental penalty order report is drawn up under the Working Instruction on Execution of an incremental penalty. An administrative penalty report also follows at the same time. If the economic operator continues to refuse, the incremental penalty order is imposed. If the offender still does not comply after all the periodic penalty payments have been forfeited, i.e. the incremental penalty order has not been met, a new incremental penalty order will follow but with higher penalty payments. An administrative penalty order (LOB) may also be considered if appropriate and possible.

## b. Article 21, (2), Commodities Act

A notification order of Article 21, (2) of the Commodities Act is sent if the corrective measure imposed is the sales ban or the recall of the product.

After sending the notification under 21 (2), one of the following steps are taken:

1. On the basis of the view submitted, the conclusion is that there is no non-conformity after all: the notification under 21(2) is followed by a settlement letter, or;
2. The opinion, if any, does not lead to a change of opinion and the economic operator says it will implement the corrective measure as stated in the notification. After positive verification of this commitment, a letter waiving the imposition of order under 21 (2) is sent, stating the measures taken by the economic operator. If the inspection reveals that the corrective measures have not been implemented, the order will still be imposed, or;
3. If the economic operator fails to implement the corrective measures set out in Article 21(2) or does so inadequately, an Article 21(2) order is imposed. The order states that failure to comply with the order is a criminal offence.

### Follow-up order Article 21 (2):

Given the risk, the follow-up by the inspector should not be too long in the case of high risk. A reasonable period depends on the time connected with the measures to be taken by the economic operator. If the inspection reveals that the non-conformity has not been eliminated and the promised measures have not been taken, more serious enforcement instruments will be used:

- If the economic operator decides to implement the corrective measures described in the order described in 21 (2), a letter will follow, after verification, stating that the order has been complied with, or
- If the non-conformity persists after the order under 21 (2) and the corrective measures are not or not sufficiently carried out, contact is made with the Prosecutor of the National Public Prosecutor's Office to ascertain whether this case should be continued under administrative law with an incremental penalty order and BR or whether the public prosecutor should take over the case by imposing provisional measures based on a report drawn up by a special enforcement officer.

If an incremental penalty order is to be drawn up, a verbal announcement of the incremental penalty order is made. And an incremental penalty order report will be drawn up according to the Working Instruction Last Under Penalty. The incremental penalty order notification is skipped if one of the conditions of Article 4:11 of the General Administrative Law Act (Awb) is fulfilled. The incremental penalty order shall state after which period which penalty payment is forfeited.

*NB An incremental penalty order is a decision. Pursuant to Article 4:8 of the Awb, the Netherlands Labour Authority must give the interested party (who, after all, has not applied for the decision and is expected to have reservations about it) the opportunity to express his views. However, pursuant to Section 4:11 of the Awb, the Labour Authority may refrain from applying Section 4:8 of the Awb insofar as:*

- a. *The required urgency prevents this;*
- b. *The interested party has already been given the opportunity to express its views and no new facts or circumstances have arisen since then.*

**Table 3** Summary of steps to be taken in the case of high-risk non-conformities (NB: for low- and medium-risk findings, see green and yellow procedures)

1. Start enforcement	2. Economic operator response	3. Handling	4. Safeguard	5. Follow-up	6. In order	7. Conclude
Notification letter 21 (1)	No non-conformity	Settlement letter	No	None	N/A	N/A
	"Voluntary" removal of violation	Control measure taken	No	Reasonable period	Yes	Letter of waiver 21 (1)
	Violation will not be eliminated	Order under 21 (1)	Yes	Reasonable period	Yes No	Order letter fulfilled Procedure incremental penalty order + BR
Notification letter 21 (2)	No non-conformity	Settlement letter	No	None	N/A	N/A
	"Voluntary" removal of violation	Control measure taken	No	Reasonable period	Yes	Letter of waiver 21 (2)
	Violation will not be eliminated	Order under 21 (2)	Yes	Reasonable period	Yes No	Order letter fulfilled Coordination public prosecutor

### High-risk Safeguard procedure

The non-conformity is recorded in ICSMS, even if the violation is “voluntarily” eliminated. If an order under Article 21 of the Commodities Act, an official report or an incremental penalty order is used, this is an intervention in the European market. An safeguard procedure must be submitted if the products are also marketed outside the Netherlands (see Chapter 8).

#### 5.2.4 Non-conformity serious risk

If the risk assessment reveals a serious risk, immediate action is required. In this case, the opinion is limited to a verbal hearing, possibly afterwards due to the urgent nature, and the deployment of one or heavier enforcement instruments is proportionate.

If the non-compliance with essential health and safety requirements found in a product poses a serious risk, and the economic operator responsible for the product safety is established in the Netherlands, an order under Article 21 of the Commodities Act (paragraph 1 or 2 or both, depending on the situation), stating the corrective measures to be taken by the economic operator. The order indicates that failure to comply with the order will result in an incremental penalty order or an official report.

At the same time, a penalty report is drawn up for an administrative fine.

*Important note! Article 32a, third paragraph, of the Commodities Act states that, in some cases, a violation cannot be settled with a fine. For example, if a higher fine can be imposed for the violation based on the Economic Offences Act and the deliberate or reckless violation results in an immediate danger to human health or safety; or the administrative fine specified in the Annex is substantially exceeded by the economic benefit gained from the violation. In these cases, it is possible to immediately draw up an official report or impose provisional measures (seizure, shutdown). If a switch to criminal law is considered, it is discussed with the Public Prosecutor in advance.*

In some cases, for example, if a few products have only been marketed in the Netherlands, or if there is a suspicion that the user does not follow the manufacturer’s instructions, use can be made of enforcement options as described in Article 30 of the Commodities Act (taking the products out of use and sealing them at the user’s premises as proof of this<sup>8</sup>). This is described separately in section 5.3.

### Foreign economic operator product safety

If the highest economic operator is established abroad, correspondence is conducted in English. It should be noted that the Commodities Act is not applied. Foreign operators are addressed through a letter of findings, containing the findings and the expected corrective action. At the same time, a copy is sent to the European Market surveillance Authority. The product is entered into ICSMS, and a RAPEX notification is sent.

If the responsible economic operator within the EEA does not follow up on the measures, the European supervisor will be asked to assist in enforcing the measures imposed. For this, the baton is passed in ICSMS (request for mutual assistance).

At the same time, if a foreign economic operator is concerned, an Article 21(2) order will be sent to the distributor in the Netherlands to stop making the product available on the market or to recall the product.

#### Serious risk monitoring

Control of measures will have to take place quickly after detection because this is a product with a serious risk.

If the entrepreneur decides to implement the corrective measures described in the order under 21 (1), a letter will follow, after verification, stating that the order has been met; or

- Order under 21 (1) has been imposed:  
If the non-conformity persists after the imposition of the order and the corrective measures are not or not sufficiently implemented, an incremental penalty order follows. If the offender still does not comply after all the periodic penalty payments have been forfeited, i.e. the incremental penalty order has not been met, a new incremental penalty order will follow but with higher periodic penalty payments. An incremental penalty order may also be considered if possible and appropriate.
- Order under 21 (2) has been imposed:  
If the non-conformity persists after the order has been issued and the corrective measures are not or not sufficiently implemented, contact is made with the National Public Prosecutor’s Office to determine whether this case should be continued under administrative law with an incremental penalty order and BR, or whether the Public Prosecutor should take over the case by imposing provisional measures based on a report drawn up by a Public Prosecutor.

<sup>8</sup> See article 30, first paragraph Commodities Act.

**Table 4** Summary of steps to be taken for serious risk non-compliance

1. Start	2. Response	3. Notifying safeguard	4. Control Measures	5. In order	6. Enforcement instrument
BR and order under 21 (1)	Oral hearing	Yes rapex and safeguard	Control after set deadlines	Yes	Settlement letter order
				No	incremental penalty order
BR and order under 21 (2)	Oral hearing	Yes rapex and safeguard	Control after set deadlines	Yes	Settlement letter order
				No	Coordination public prosecutor

If an incremental penalty order is to be drawn up, a verbal announcement of the incremental penalty order is made. And an incremental penalty order report will be drawn up according to the Working Instruction Last Under Penalty. Due to the urgent nature (art 4:11 Awb), the incremental penalty order notification will be omitted.

#### Notification and safeguard procedure serious risk

The non-conformity is recorded in ICSMS. Member States ensure that products presenting a serious risk that are also on the market in other Member States are immediately notified to the Commission according to Article 19 of Regulation (EC) No 2019/1020.

The product information should be sent as completely and quickly as possible according to the RAPEX/Safety gate procedure. The safeguard procedure is also followed.

### 5.3 Decisions Article 27 and 30 Commodities Act

In some cases, for example if a manufacturer produced only a few items causing a danger that have been marketed exclusively in the Netherlands, it is easier to make use of enforcement options as described in Article 30 of the Commodities Act (taking the products out of use and, as proof of this, sealing them<sup>9</sup> at the users' premises).

Pursuant to **Article 30** of the Commodities Act, the Minister is authorised to take technical products out of service in the event of danger or if the inspection or assessment requirements have not been complied with. If products are taken out of service, a decision on the use of seals is sent to the employer/user. This states that it must be taken out of service because of the danger or non-compliance with the inspection or assessment requirements. As proof that the product has been taken out of service, the inspector seals the product.

A product is sealed on site. This means that something must be done so that the product can no longer be used. This can be done, for example, by blocking an essential component, such as a drive or a (main) switch. The authority to take products out of service is necessary because, in the event of imminent acute danger, it is the only physical means of warning others than those directly involved and preventing them from exposing themselves to serious danger unknowingly.

Once the danger posed by using that product has been eliminated, or the prescribed inspection or assessment procedures have been complied with and the required documents are present, the inspector checks whether this has been done correctly. If this is the case, the taking out of service is formally lifted and the user receives a decision cancelling the seal' (lifting the taking out of service).

The taking out of service is lifted as soon as the reason for it has ceased to exist or has become unfounded.

If it is necessary to break the seal in the meantime for the manufacturer to make the product compliant, the inspector or his fellow inspector can then come and break it himself.

**Article 27** of the Commodities Act gives the inspectors of the Netherlands Labour Authority to test, examine, have tested or have examined technical products. If the examination shows that the product does not comply with the legislation, there is the possibility of applying a rejection mark. It may also order repair or treatment of the technical product in writing within a period to be specified. For the time being, the application of a rejection mark is not described in this enforcement policy.

The decisions described in this section are subject to objection and appeal under the General Administrative Law Act (Awb).

<sup>9</sup> See article 30, first paragraph Commodities Act.

## 5.4 Enforcement for formal non-conformities

If there is only a formal non-conformity and no immediate danger can be demonstrated, Article 21 of the Commodities Act cannot generally be invoked.

A formal non-conformity is, for example, the application of the CE marking in violation of the provisions, an incorrect EU declaration of conformity, an incomplete technical file.

In the case of purely formal non-compliance, the manufacturer or authorised representative must be required to bring the product he intends to place on the market or, where appropriate, has already done so, into compliance within a reasonable period.

We will send a formal non-conformity warning to the manufacturer or authorised representative (depending on the legislation to the importer) stating that the non-conformity must be ended. If, after a re-inspection, it turns out that the violation has not been eliminated, a penalty report will follow. The annexes describe how enforcement will take place for each formal non-conformity.

An exception to the above procedure is made where the legislator has stipulated that the manufacturer must involve an external conformity assessment body (EU-CAB) in the procedure, and this has not been done. The severity of the conformity procedure is often linked to the risk that the product may pose due to its nature and intended use.

### 5.4.1 Formal non-conformity: EU-CAB not involved in the conformity assessment procedure

In some situations, the legislator has stipulated that the procedure must involve an external conformity assessment body (EU-CAB). The EU-CAB carries out inspections and assessments and issues a certificate of EU type examination, EU unit verification or a quality system approval certificate. The conformity assessment procedure and also the role of the EU-CAB can cover a small to large part of the production process (from just the design phase to the testing of finished products), depending on the level of risk of the product (how high are the risks to be controlled). The conformity procedures are elaborated in the various product directives or Commodities Act decrees.

In European regulations, the severity of the conformity procedure is often linked to the risk that the product may pose due to its nature and intended use. Enforcement on the responsible economic operator (manufacturer, authorised representative or installer) regarding conformity procedures is carried out as follows.

*a. A product subject to certification does not have a valid EU-CAB certificate*

No valid EU-CAB certificate” means: a product subject to certification that is placed on the market without the mandatory certificate<sup>10</sup> of approval having been issued by a competent EU CAB for this specific product; the procedure for approval of a product subject to certification has not been completed or has been concluded with rejection. It was a conscious choice of the legislator to require the intervention of an EU-CAB for high-risk products. If this mandatory certification does not take place, it is unclear whether the product presents a hazard and whether the manufacturer has adequately reduced it. The Netherlands Labour Authority considers such a product to be a product with a potentially high risk. In the first instance, a letter of formal non-compliance is sent stating that the manufacturer/authorised representative (importer) must remove the non-compliance, cease trading (including for products in the distribution channel) or withdraw products from the market until a valid certificate can be presented. A penalty report is also drawn up. After all, for the potentially dangerous products, the mandatory assurance by a third party was (deliberately) not carried out, whereby a financial benefit was also obtained.

If the manufacturer/authorised representative (or in certain cases the importer) does not voluntarily undertake the corrective actions, these corrective actions are imposed by means of a (notification) order for periodic penalty payments. An incremental penalty order report is drawn up in accordance with the Working Instruction for incremental penalty orders.

If the product is also traded within the EEA, an safeguard clause (see Section 8) must be initiated when the fine is imposed.

### Foreign economic operator product safety

If the product originates from a foreign economic operator, correspondence is conducted in English. It should be noted that the Commodities Act cannot be applied. Therefore, no orders, etc. can be imposed on foreign operators. Foreign operators are addressed through a letter of findings, containing the findings and the expected corrective action. At the same time, a copy is sent to the foreign supervisor. If the responsible economic operator within the EEA does not follow up on the measures, the European supervisor will be asked to assist in enforcing the measures imposed. For this, the baton is passed in ICSMS (request for mutual assistance).

<sup>10</sup> Not every conformity assessment leads to the issue of a certificate. In some procedures, the CAB does not issue a certificate but a declaration, or a document with yet another name. Where this paragraph refers to a certificate, it also refers to these statements or other documents mentioned in the procedures in which the CAB gives its opinion.

### 5.4.2 EU-CAB withdraws or suspends certificate

If an EU-CAB revokes a certificate, the certificate has, in principle, lost its validity retrospectively (unless the CAB attaches a date to it). If a certificate is suspended, the certification loses its validity from the date of suspension. The product may no longer be placed on the market after this date. The reason for the suspension or withdrawal determines the corrective measures. Enforcement takes place if the suspension or withdrawal is due to non-compliance with the essential requirements as described in 5.2. If the certificate is suspended based on a formal non-conformity, enforcement takes place according to 5.4.

Important note: in practice, the terms suspension and withdrawal may be used interchangeably.

If the validity of an EC type-examination certificate expires and is not renewed, the manufacturer must stop marketing the product in question. If the non-renewal is due to deficiencies identified by the EU-CAB, enforcement takes place as described in 5.2 or 5.4.

### 5.4.3 A technical non-conformity has been established in a product with a valid certificate

A valid certificate from an EU-CAB does not guarantee compliance with product regulations. Therefore, even a certified product can be inspected for compliance by the Netherlands Labour Authority. If a non-conformity is found, enforcement by the Netherlands Labour Authority focuses primarily on the responsible economic operator. The manufacturer is and remains responsible for fulfilling the obligations imposed on a product by the product directive. Enforcement takes place as described in 5.2.

If a certified product does not conform to the essential safety requirements it is subject to, the EU-CAB is informed during the investigation and asked to respond.

If the response of the EU-CAB to this request is not adequate, an internal report is made to the supervisors of the CABs working within the Certification Department of the Netherlands Labour Authority. The Netherlands Labour Authority is, after all, also supervisor of the EU-CABs designated by the Minister of SZW and can, on behalf of the Minister of SZW, impose measures on the EU-CAB if it does not carry out its tasks in the statutory certification system lawfully (see Chapter 7.). The Netherlands Labour Authority cannot enforce against an EU-CAB designated by another EU member state but will inform the national accreditation body, the notifying authority and the possible public supervisor of the member state concerned about the found or suspected non-conformity in the conduct of the EU-CAB.

## 5.5 Falsification of documents or intentional acts

In situations involving forgery or deliberate violation by the operator (for example, falsification of certificates), the Penal Code article 225, (1), is applicable, and there will be consultation with the Public Prosecutor's Office regarding possible criminal prosecution.

## 5.6 Repeated violation and enhanced supervision

This topic is still under development. Until then, all violations are dealt with as described in Chapter 5.



# 6 Enforcement in the use phase

## 6.1 Principles of enforcement of the Commodities Act in the usage phase

The requirements connected with putting a technical product into service or having it in service must be complied with in the use phase. Under Articles 4 and 7 of the Commodities Act and the articles based on these in the Commodities Act decrees (e.g. Article 2 of the Commodities Act Decree for Lifts 2016), it is forbidden to use technical products that do not comply with the stipulated regulations, including the periodic inspections. The Netherlands Labour Authority has the authority to take technical products out of use if they are dangerous. The Netherlands Labour Authority can also impose a fine under the [Commodities Act Decree on administrative fines](#). This decision specifies the fine that can be given for a certain violation. The starting point of the Netherlands Labour Authority is that, in deviation from this, in the event of a violation a written warning is in principle first issued, unless the situations described in the following paragraph occur. For enforcement purposes, a technical product must be in use when the violation is established.

For technical products not covered by a Commodities Act decree, the provisions of chapter 7 of the Working Conditions Decree on work equipment, with the accompanying enforcement, apply concerning the performance of inspections. This enforcement policy deals exclusively with the obligations under the Commodities Act.

Below are the relevant Commodities Act decrees with a brief indication of the most important obligations (not exhaustive) in the usage phase. A conformity assessment body carries out inspections (hereinafter referred to as CAB, but the Dutch use the name CBI), or user inspectorate (KVG), unless stated otherwise. The target group for each decree is also indicated, which may vary. It would be going too far to list all the obligations here, but this provides an indication.

[Commodities Act Decree on containers](#), chapter 4; traffic and use regulations.

- The container is examined for its safe condition after a maximum of five years from the date of completion and subsequently after a maximum of two and a half year periods (not required by CAB).
- If transported, traded or used, the container must be clearly marked with the month and year when it is to be examined.
- Target group: the owner.

[Commodities Act Decree on Pressure Equipment 2016](#), chapters 3 and 4; circulation, use and inspection.

- Operating instructions available.
- Being accessible and reachable for the use and performance of maintenance, examination, inspection, repair and testing.
- In good condition.
- Used as intended.
- Inspection before first entry into service by CAB.
- Periodic inspection by CAB.
- Entry inspection by CAB.
- Availability of certificates of entry into service, periodic inspection and entry into service.
- Availability of other documents such as inspection reports and the record sheet.
- Target group: the user. This also includes the lessor who maintains and looks after the pressure equipment in its entirety. The user is not always the owner.

[Commodities Act Decree on simple pressure vessels 2016](#), article 16; user manual.

- A pressure vessel is accompanied by the manual prepared by the manufacturer.
- The person commissioning or using a pressure vessel ensures that it is in a good state of repair.
- A pressure vessel is correctly put into service and must not be used for anything other than its intended purpose.
- Target group: the party using the pressure vessel. This is usually the owner or employer.

[Commodities Act Decree for lifts 2016](#), chapter 3; obligations in the use phase.

- Periodic inspection by CAB, twelve months after first use and then every eighteen months.
- In the construction phase: by CAB inspection before first use and then every three months.
- Instructions and lift booklet at the lift.
- Be able to show certificate of approval.
- Use as intended.
- In good condition.
- Do not use engine rooms, disc rooms and shaft pits as storage areas for objects that do not belong to the lift.
- Target group: the person who is in charge of the lift. This is usually the owner but can also be the leasing company or an owners' association.

[Commodities Act decree machines](#), cranes, chapter traffic and usage (Commodities Act Decree for machinery, cranes).

- Periodic inspection, every two years by CAB, in the meantime by expert.
- Certificate of approval in the vicinity of the crane.
- Crane book in vicinity of crane.
- Target group: the decree states that the crane may not be used if it does not meet the requirements and refers to the applicant for the inspection. In most cases it will be the owner (sometimes the lessor).

[Commodities Act decree machinery](#), hoist lifting machines for professional passenger transport, chapter 4; traffic and usage.

- Inspection by CAB after each assembly at a new workplace and subsequently every maximum period of six months.
- Certificate of approval in the vicinity of hoisting and lifting equipment.
- Hoisting and lifting equipment booklet.
- Target group: the decree states that this machine may not be used if it does not comply with the requirements and refers to the applicant for the inspection. In most cases, it will be the owner (often the lessor).

## 6.2 Enforcement policy in the usage phase

The policy of the Netherlands Labour Authority is that in case of non-compliance with the regulations in the usage phase, a warning is given the first time, but in case of non-compliance or repetition, a fine is issued. In the following situations, however, no warning is given the first time, but a fine is imposed immediately:

- In case of a legally required periodical inspection by a CAB or KVG:
  - If an inspection period is three months or less: if this period is exceeded by one week.
  - If an inspection period is six months or less, but more than three months: if that period is exceeded by two weeks.
  - If an inspection period is more than six months: if that time limit is exceeded by four weeks, with the exception of pressure equipment. For pressure equipment, an extension of up to six months is provided on request to the CAB; if the extension is not requested or is not counted from the new final inspection date, a delay of one week applies.
- A technical product is not used for its intended purpose and a dangerous situation exists. The prohibition of non-use must be provided for in the relevant regulations.
- The owner/user/employer, despite knowing that the product was dangerous, put the product into use<sup>11</sup>.

In situations b and c, in addition to the penalty notice, a dangerous technical product is taken out of service and sealed<sup>12</sup>.

In addition, the following applies:

- A prohibition in the individual Commodities Act acts that the relevant technical products may not be used if they do not comply with the provisions of those acts does not mean that they must be taken out of service immediately. The owner/user remains responsible at all times. If the product creates hazardous situations, the product must always be taken out of service. The inspection body can determine whether a technical product is dangerous, which must also take dangerous lifts out of operation, for example. The inspector of the Netherlands Labour Authority may also consider a technical product to be dangerous and take it out of operation (or have it taken out of operation) and seal it.
- Where the regulations state that a technical product must be “inspected”, this means “approved”.
- The standard recovery period given in a warning is two months. The Inspectorate may deviate from this in special cases.
- In the event that a hazardous situation does not exist, an escalation ladder applies for re-inspections: warning>penalty notice>incremental penalty. If a dangerous situation does exist, the product must be taken out of service and sealed. Breaking a seal is a criminal offence and a police report is made.
- Several technical products may be found during one inspection, with the same violation at that time. If this is a violation that leads to a warning, the various technical products and violations can be included in one warning letter, stating the year of manufacture, type and other registration details. If a violation leads to a penalty notice, each technical product that causes a fine-worthy violation leads to a separate penalty notice. These can also be included in one penalty notice, provided they are addressed to the same target group of the standard. Violations that occur more than once will be included in the penalty notice up to 10 times.
- In determining whether similar violations are repeated, independently operating branches of legal persons is treated as separate undertakings. See Article 3, paragraph 4 of the Commodities Act Decree on Administrative Fines for the intended increase for similar violations.

<sup>11</sup> If, for example, the Authority has put a lift out of operation and sealed it, and it turns out that the lift has been put back into operation, this is a violation under Section 30(1), (3) and (4) of the Commodities Act and a police report will be drawn up under Section 1(3) of the Act (WED).

<sup>12</sup> It is also possible that, on the basis of occupational health and safety legislation, dangerous work equipment is taken out of use (shut down). In this case, no decommissioning is required under the Commodities Act.

# 7 Enforcement at EU and NL Conformity Assessment Bodies (CABs)

Many products may only be placed on the market after the intervention of a CAB (inspection/issue of certificate of approval/conformity assessment as referred to in the European product directives).

The Inspectorate also supervises the functioning of the CABs. Officials carry out supervision and enforcement at CABs other than those who supervise the products. It is based on Article 7a(3) of the Commodities Act, further elaborated in the various Commodities Act decrees. For how enforcement is carried out, reference is made to the enforcement policy of the Netherlands Labour Authority for CABs. enforcement policy for CABs - Netherlands Labour Authority'.

# 8 Safeguard Procedure and Safety Gate (formerly RAPEX)

The safeguard procedure and the procedure for the Rapid Exchange of Information System (Safety Gate formerly known as Rapex) are not the same: they have different notification criteria and application methods.

## 8.1 Safeguard procedure

Under the Safeguard clause, which is based on Article 114(10) TFEU and which is included in most sectoral Union harmonisation legislation, Member States may take restrictive measures with regard to products posing a risk to health and safety or other aspects of public interest and are obliged to inform the Commission and the other Member States of such measures.

Where a Member State ascertains that a product is not in conformity or that it is in conformity but presents a risk for human health or safety or for other issues of public interest protection, it requires the relevant economic operator to take all appropriate measures to ensure that the product concerned, when made available on the market, no longer presents that risk, to withdraw the product from the market or to recall it within a reasonable period, commensurate with the nature of the risk.

The non-conformity found must apply to all products of a production series, regardless of their size. Also, the risk must be attributable to the product itself and not be caused by misuse, i.e. when the product is used for purposes other than those intended or in circumstances that could not have been reasonably foreseen, or when the product is not installed and maintained as intended. In the case of a one-off error limited to the territory of the Member State that discovered the non-compliance, the indemnification clause procedure does not have to be applied, as there is no need to take action at EU level.

If the manufacturer or authorised representative voluntarily takes the necessary measures, or if the product is modified or voluntarily withdrawn from the market, this does not lead to a safeguard clause procedure. However, the safeguard procedure applies if the economic operator does not take adequate corrective action within the period set by the market regulation authorities.

In our case, the safeguard procedure starts with using an order under section 21 of the Commodities Act or the imposition of a fine. In such cases, the safeguard clause procedure must be followed if the products are marketed in one or more EEA countries other than the Netherlands.

As soon as a competent national authority restricts or prohibits the free movement of a product in such a way as to trigger the safeguard clause procedure, the Member State must immediately notify the Commission. This notification must be sent via ICSMS. If the legislation does not contain a safeguard clause, the information is sent to the relevant ADCO (Blue Guide section 7.5.1. (2016/C 272/01)).

## 8.2 Safety Gate (Rapex)

The safeguard clause procedure must be applied in parallel to the Rapex procedure when a Member State decides, based on a hazard or other serious risk associated with a harmonised product, to prohibit or restrict the free movement of that product permanently.

If there is a serious risk (R - 4), the case is reported in the European Rapid Alert System Safety Gate (formerly RAPEX). See COMMISSION IMPLEMENTING DECISION (EU) 2019/417 of 8 November 2018, Regulation (EC) No 765/2008 and Regulation 2019/1020 Article 20. This notification is sent via the RAPEX contact point of the Netherlands (NVWA: [vwa.dtalert@vwa.nl](mailto:vwa.dtalert@vwa.nl)).

# 9 Concurrence between product and occupational health and safety regulations at the user's premises

## **Occupational Health and Safety Decree, article 7.2, first paragraph**

“Work equipment made available to the employee by the employer complies with the Commodities Act decrees applicable to that work equipment.”

In principle, manufacturers and importers only place products/work equipment on the market that comply with the applicable Commodities Act decrees. However, it is also considered important to oblige employers (professional users) to make sure that the work equipment does indeed comply with the applicable commodities legislation, and thus (in accordance with that legislation):

- is provided with a CE marking, and
- is accompanied by a declaration of conformity<sup>13</sup>.

## **Occupational Health and Safety Decree article 7.2, second paragraph**

If, in addition to the CE marking and the EC declaration of conformity (or EU declaration of conformity), the work equipment is also used in accordance with the instructions for use, then this work equipment is presumed to comply with the provisions of the Working Conditions Decree referred to in this article, as shown by article 7.2, second paragraph.

The said regulations concern:

- moving parts (7.7),
- alarm signals (7.10),
- operating system (7.13),
- putting work equipment into operation (7.14),
- stopping work equipment (7.15),
- emergency stop device (7.16), and
- equipment for mobile work equipment, whether self-propelled or not (7.17a and b). The employer may therefore assume that the work equipment complies with the requirements of the articles above.

## **General duty of care and investigation**

However, this legal presumption has been upheld by Netherlands Labour Authority. The presence of the CE marking and EC declaration of conformity does not relieve the employer of the obligation to verify whether a given machine is sufficiently safe when used in the actual work situation.

<sup>13</sup> In some cases, e.g. in article 7.2 of the Working Conditions Decree, another term is used in this context, such as EC declaration of conformity or EU declaration of conformity. However, this means exactly the same thing.

The Netherlands Labour Authority must demonstrate in Article 7.2 (2) that the use of the work equipment is in fact unsafe. If the work equipment does not comply with the requirements of the Commodities Act Decree, there is a violation of the WB.

## **Pronunciation “Storteboom”**

In this context, the judgment in the Storteboom case<sup>14</sup> may be cited. In this ruling, the Council of State confirms that enforcement via the Commodities Act (Machines Decree) and via Chapter 7 of the Health and Safety Decree are coextensive. Pursuant to article 7.2, second paragraph, of the Working Conditions Decree, a machine marked CE in accordance with the Commodities Act Decree on Machinery is, in principle, deemed to be safe. However, the Council of State confirms that paragraph 1 is a legal presumption. This means that the Netherlands Labour Authority can prove that a machine is not safe in practice. Furthermore, the ruling indicates that the presence of a CE marking and an EC declaration of conformity does not relieve the employer of its general duty of care and examination in respect of the machine. If this obligation is not met, the employer can still be fined for violating the Working Conditions Decree. This does not exclude the possibility of enforcement against the manufacturer/importer and vice versa.

## **Enforcement at employer and manufacturer**

If it is established that the work equipment (product in the meaning of the Commodities Act) is intrinsically unsafe<sup>15</sup> due to a defect in the original design, and poses a serious risk to persons, the work equipment found at an employer's/user's premises will be shut down. Reference is made in this connection to the Working Conditions Act Enforcement Policy. In addition, action will have to be taken against the responsible operator based on the Commodities Act.

<sup>14</sup> Council of State: Judgment 200409513/1, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBARN:2004:AR5145> and ruling of the Administrative Jurisdiction Division of the Council of State, 7 September 2005, ECLI:NL:RVS:2005:AU2140.

<sup>15</sup> This means that the product does not comply with the essential health and safety requirements. This may be the case, for example, when certain moving parts of a machine are not guarded. <http://wetten.overheid.nl/BWBR0011841/2017-10-01>

# 10 Commodities Act Decree on Administrative Fines

On 1 February 2020, the Commodities Act Decree on Administrative Fines for SZW Commodities Acts was amended. For the latest version, please visit [www.overheid.nl](http://www.overheid.nl). For the violations that have been committed, the current Commodities Act Decree on Administrative Fines can be used to find out which violation number(s) belong(s) to it. In the various Commodities Act decrees, a list of violations is described in the appendices, and it is explicitly stated which administrative fine can be imposed for which violation number.

# Annex 1

## Further interpretation of Commodities Act Decree on Machinery v1 d.d. 1-1-2022

Machines / new construction phase:

- only machines for intended professional use. A “consumer machine” that is used professionally remains under the supervision of the NVWA in terms of product legislation; however, occupational health and safety supervision of the work equipment may apply.

The Commodities Act Decree on Machinery and the Directive only recognise economic operators: manufacturer and authorised representative. This will change when the new Regulation comes into force.

The most responsible person may therefore also be located outside the EU. Requests for information and any enforcement letters should be addressed to the manufacturer/authorised representative.

Decisions referred to in sections 21(1) and (2) and 30 of the Act that relate to machinery shall immediately be announced by Our Minister in the Government Gazette or in any other appropriate manner. Appropriate way is that if an order is imposed Commodities Act article 21 for a machine, this is published on the website of the Netherlands Labour Authority.

Economic operator	Non-conformity	Formal non-conformity
Manufacturer/Authorised Representative	The compulsory (type) inspection of an Annex IV machine by an EU-CAB has not been carried out. Non-compliance with EC conformity procedures, wrongful CE marking.	5.4.1
Manufacturer/ Authorised Representative	An Annex IV machine that is not manufactured according to the harmonised standard has not been assessed by an EU-CAB. Non-compliance with EC conformity procedures, wrongful CE marking.	5.4.1
Manufacturer/ Authorised Representative	Type certificate suspended or revoked.	5.4.2
Manufacturer/ Authorised Representative	One or more of the following: risk assessment, EC declaration of conformity, test reports, missing or incomplete technical file. As a result, the EC conformity procedures have not been complied with, wrongly affixing the CE marking.	5.4
Manufacturer/ Authorised Representative	CE marking not compliant.	5.4
Manufacturer/ Authorised Representative	CE marking not affixed.	5.4

## Annex 2

# Further implementation Commodities Act decree on personal protective equipment 2018 v1 dated 1-1-2022

The Commodities Act Decree on Personal Protective Equipment and the Directive defines the economic operators, manufacturer, authorised representative, importer, distributor.

It is important to identify the responsibilities of the various economic operators. An importer, for example, is responsible for ensuring that the manufacturer has followed the correct assessment procedure. It is up to the manufacturer to carry out the relevant conformity assessment procedure or have it carried out.

The Netherlands Labour Authority supervises products for professional use. The NVWA on personal protective equipment for use by consumers. Because the dividing line is not always clear, coordination is necessary in some cases.

The annex of the other Commodities Act acts will be completed in due course.

Economic operator	Non-conformity	Formal non-conformity
Manufacturer/Authorised Representative	Product Cat II and Cat III has no valid type certificate or no valid production phase certificate. Non-compliance with EC conformity procedures, wrongful CE marking.	5.4.1
Importer	Product Cat II and Cat III has no valid type certificate or no valid production phase certificate. The importer has not ensured that the manufacturer has followed the correct conformity assessment procedure.	5.4.1
Manufacturer/Authorised Representative	Certificate is suspended or revoked.	5.4.2
Manufacturer/Authorised Representative	CE marking not in conformity/not affixed.	5.4
Importer/distributor	The importer/distributor did not ensure that the CE marking was affixed.	5.4
Manufacturer Authorised Representative	One or more of the following: risk assessment, EC declaration of conformity, test reports, missing or incomplete technical file. As a result, the EC conformity procedures have not been complied with, wrongly affixing the CE marking.	5.4
Importer	The importer has not ensured that the product is accompanied by the Internet address where the EU declaration of conformity can be found or has not accompanied the product in accordance with section 1.4 of Annex II.	5.4
Manufacturer/Authorised representative/ importer	Name address of manufacturer/importer not available.	5.4





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