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National ordinance, containing rules to prevent and combat money laundering and the financing of terrorism based on the recommendations of the Financial Action Task Force (National Ordinance Combatting Money Laundering and the Financing of Terrorism)

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## EXPLANATORY MEMORANDUM

### **General Article**

#### *Introduction*

The purpose of this draft national ordinance is to integrate the National Ordinance Identification when rendering Financial Services and the National Ordinance Disclosure of Unusual Transactions and to bring them into line with the recommendations of the Financial Action Task Force (hereinafter: FATF). Moreover, this draft national ordinance contains supplementary provisions which aim to repair all the remaining lacunas in Sint Maarten's legislation and regulations. The government has set itself the objective of ensuring the legislation and regulations of Sint Maarten entirely comply with all the FATF recommendations, as these read after their most recent amendment in October 2018. There is already a procedure pending for a series of draft national ordinances. The objective of this draft national ordinance is for it to form the final element of the series of draft national ordinances and, as such, offer a solution to any remaining lacunas.

The objective of both the National Ordinance Identification when rendering Financial Services (hereinafter: National Ordinance ID) and the National Ordinance Disclosure of Unusual Transactions (hereinafter: National Ordinance Disclosure) is to combat the laundering of the proceeds from crime and the financing of terrorism. The National Ordinance ID makes it compulsory to identify clients and to carry out customer due diligence, and the National Ordinance Disclosure makes it compulsory to report any unusual transactions, and regulates the Office for the Disclosure of Unusual Transactions (hereinafter: MOT). Together the two national

ordinances form a coordinated series of measures as a protection against making use of the financial system to launder money and finance terrorism. Up until now they have, however, been structured in different ways, the consequence being that there is a lack of transparency in the provisions of both national ordinances. The draft national ordinance under consideration aims to integrate the National Ordinance ID and the National Ordinance Disclosure in order to improve their usefulness, and to update these on the basis of the most recent text of the FATF recommendations. In addition, the provisions relating to the MOT are to be transferred to the draft National Ordinance Office for the Disclosure of Unusual Transactions.

Currently, the Central Bank of Curaçao and Sint Maarten (hereinafter: Central Bank) is charged with the financial supervision of the financial institutions. It has this authority on the basis of various national ordinances relating to the supervision of the financial sector. However, the Central Bank is also charged with supervising that these institutions comply with the National Ordinance ID and the National Ordinance Disclosure.

The MOT is currently charged with supervising the compliance of all other service providers with the National Ordinance ID and the National Ordinance Disclosure. Past years have demonstrated that, in practice, this worked well, partly due to good mutual cooperation between the Bank and the MOT. Under the motto 'never change a winning team', the government, therefore, decided not to make any changes.

A few years ago the MOT was instructed by the Minister of Justice to ensure that - before the year 2022 - all Sint Maarten's legislation and regulations entirely comply with the 40 FATF recommendations. The instruction also required that a minister be made politically responsible for the successful completion of this task. The Minister of Justice has been assigned this responsibility. Therefore, in addition to the political defence of the draft national ordinance ensuing from this instruction, the Minister is also responsible for ensuring that the MOT has access to all the financial and legal resources required for this task to be completed successfully.

#### *The FATF recommendations*

The origin of all legislation enacted as a precaution against money laundering can be found in the 40 FATF recommendations to combat money laundering. The FATF, which was established by the G-7 in 1989, is an inter-governmental body comprising 37 members, including the

Kingdom of the Netherlands, the European Commission and the Co-operation Council for the Arab States of the Gulf. Currently, through regional organisations, more than 180 countries throughout the world are affiliated to the FATF. Sint Maarten is affiliated via a regional organisation, the Caribbean Financial Action Task Force (hereinafter: CFATF).

The objectives of FATF are:

- To set international standards to combat money laundering and the financing of terrorism and to evaluate the implementation of these standards (mutual evaluation process). These standards were formed on the basis of the FATF recommendations. The FATF drew up 40 recommendations and expects countries to implement these through their national legislation and regulations, and to guarantee that this system is effective in the combatting of money laundering and the financing of terrorism. Periodically, the FATF carries out evaluations to assess the extent to which countries are complying with its recommendations. These evaluations are carried out by the CFATF. To this end, a special committee has been instituted comprising representatives from various countries in the Caribbean region. The outcomes of the evaluations are discussed and approved in a plenary session of the CFATF; which explains the use of the word 'mutual'.
- To compile guidelines, best practices and methods which support countries and institutions when implementing the standards and help to identify new risks in the areas of money laundering and the financing of terrorism.
- To identify high-risk or non-cooperative countries (black and grey lists) where there is a higher risk of money laundering and the financing of terrorism. Three times a year, the FATF draws up a list of countries which have failed to implement the FATF recommendations sufficiently<sup>1</sup>, and expects its members to take adequate measures to mitigate the risks related to these countries.

The "40 Recommendations to combat money laundering and the financing of terrorism" - which were established by the FATF in 1990, revised in 2012 and updated in 2015 - are internationally recognised as the standard for combatting money laundering and the financing of terrorism<sup>2</sup>. These

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<sup>1</sup> See: <http://www.fatf-gafi.org/countries/#high-risk>

<sup>2</sup> For the text of these 40 recommendations, and the explanatory notes to a large number of these recommendations, see the annex to this Explanatory Memorandum.

recommendations are regularly examined in detail to assess whether the text of any of the recommendations or their accompanying explanatory notes should be updated. Since the end of 2015, the text of four of the recommendations and the text of five of the explanatory notes have been supplemented or amended. This draft national ordinance has taken account of these supplements and amendments.

The recommendations are, *inter alia*, designed to improve national legal systems in the areas of money laundering, the financing of terrorism and the role of financial institutions, as well as to strengthen international cooperation. In particular, the recommendations which concern the role of the financial institutions relate to tracing and verifying the identity of clients or third parties, paying sufficient attention to unusual or suspicious transactions and high-risk relationships, as well as to the development and implementation of internal procedures and measures to prevent financial institutions becoming involved in money laundering. In addition, a range of demands are placed on the institution of the MOT, as well as on its appointments and independence. Moreover, the recommendations relate to various measures such as freezing assets belonging to terrorists and sending information with electronic transfers.

All the FATF member states are regularly subjected to a FATF evaluation. During the evaluation, a team consisting of a range of experts from other FATF member states assesses the system that the relevant country has established to combat money laundering and the financing of terrorism. These evaluation reports are an important source enabling countries and financial institutions to assess how this system has been structured in a specific country. The reports are published on the FATF website. Sint Maarten is evaluated by the regional organisation CFATF.

In 2013, the FATF published a new methodology for the evaluations. This methodology relates to two facets of the framework for combatting money laundering and the financing of terrorism:

- Technical Compliance: the legal and institutional framework in a country against which the 40 FATF recommendations have to be evaluated.
- Effectiveness: the results expected of an effective framework against which 11 of the 'results' compiled by FATF have to be evaluated.

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This annex also contains a report of the way in which the recommendations are or shall be complied with.

Countries are awarded ratings for both facets. In the coming years, the methodology shall be used by both FATF and the regional organisations when evaluating the FATF standard.

Legal developments in Sint Maarten have always followed the approach in the Netherlands and Europe at a distance, but increasingly they are lagging behind, as has been observed repeatedly in the evaluations and the CFATF's six-monthly follow-up reports. This has led to the government setting up a wide-ranging project, the objective being to align Sint Maarten's legislation and regulations with the 40 recommendations.

The 40 FATF recommendations form the basis for the European Community's guidelines in respect of preventing the use of the financial system for money laundering and the financing of terrorism. Within the Kingdom of the Netherlands only the Netherlands is obliged to comply with these guidelines. As part of the Kingdom, Sint Maarten is obliged to comply with the FATF recommendations and any other obligations which ensue from the Kingdom's membership of the FATF. However, Sint Maarten is entirely responsible for the implementation of its own legislation and regulations and any essential amendments to such. Tackling money laundering is vitally important if all forms of serious criminality are to be combatted effectively. Obscuring the criminal origins of the proceeds from crime enables the perpetrators of these crimes to remain beyond the reach of the investigative authorities and to enjoy the acquired assets undisturbed. Furthermore, the accrued assets offer them the opportunity to acquire positions in bona fide enterprises and, in countries where the rule of law is insufficiently developed, to undermine the government's authority. Consequently, it is essential that the channels through which money laundering can be carried out are protected against abuse for criminal purposes. This can be done by creating transparency in the financial system, conducting sound customer due diligence and reporting any unusual transactions.

The huge significance of combatting money laundering has ensured that measures for the prevention of money laundering have now been included in a large number of international treaties which focus on combatting serious forms of criminality. These include, for example, the UN Convention against Transnational Organised Crime (2001 Treaty Series

68), the UN Convention against Corruption (2004 Treaty Series, 11) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism (2006 Treaty Series, 104).

The provisions in this draft national ordinance shall, moreover, implement the obligations in respect of the prevention of money laundering which ensue from these treaties.

Even before the attacks carried out in the United States of America on 11 September 2001, the FATF had begun to focus on combatting the financing of terrorism. Generally, the channels used to finance terrorist activities are the same as those used to launder money. On 9 December 1999, the International Convention for the Suppression of the Financing of Terrorism was effected in New York. In article 2 of this Convention, a crime is deemed to be a criminal offence as described in the nine international treaties which are referred to in the annex to the Convention. For a good definition, reference should be made to this annex.<sup>3</sup>

Since then, as a supplement to the existing recommendations for the prevention of money laundering, the FATF has drawn up nine special recommendations in respect of the financing of terrorism and the proliferation of weapons of mass destruction. During the thorough review of all the recommendations in 2012, these special recommendations were converted and integrated into the 'normal' recommendations.

The knowledge and experience gained since the start of the process of combatting money laundering has enabled the FATF to enhance its recommendations. This involved, inter alia, extending the scope of the measures for the prevention of money laundering when it became apparent that, due to the supervision set up for financial institutions, money launderers were diverting to other sectors of the economy. Moreover, the scope of the recommendations was also extended to include independent professionals, such as accountants, civil-law notaries and lawyers. Due to the key position these professionals hold in both the economy and society, they can become involved in attempts to give the proceeds of crime an apparently legal origin.

In 2017, agreement was reached within the FATF about the clarification of the FATF standards for sharing information about unusual or suspicious

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<sup>3</sup> <http://wetten.overheid.nl/BWBV0001518>

transactions. This clarification is twofold: firstly it was made clear that information about unusual or suspicious transactions could be shared within a financial group, including subsidiaries and branches, if sharing was necessary to control the risks of money laundering and terrorist financing.<sup>4</sup> Secondly, it was made clear that sharing this information within the group for this purpose did not contravene the obligation for institutions to keep reports of unusual or suspicious transactions, or any information about such, confidential (the ban on 'tipping off')<sup>5</sup>. In 2018, the changes mainly related to the protection of privacy in relation to customer due diligence<sup>6</sup>, and the addition of new definitions of virtual assets and the supply of virtual currency.<sup>7</sup>

#### *The national range of instruments*

Due to the international developments described, the national range of instruments used to combat money laundering has similarly been changed a number of times over the last few years, and there are procedures pending for several draft national ordinances. When they entered into force, the National Ordinance ID and the National Ordinance Disclosure primarily provided for service provision through financial institutions. However, through legislative changes, the scope of application of the anti-money laundering legislation has been or shall be extended to casinos, money transfer companies, stock exchanges, dealers in extremely valuable goods, brokers and independent professionals. The amendment to the National Ordinance Duty to Report Cross-Border Cash Transports has been submitted to Parliament. By the middle of 2017, the first amendment to the Sanctions National Ordinance, the new National Ordinance Supervision of Money Transfer Companies and an amendment to all the national ordinances on the supervision of financial institutions by the Central Bank had already been passed by Parliament. Moreover, in accordance with the FATF recommendation 29, a modern regulation relating to the MOT's establishment, powers and appointments has been included in a separate draft national ordinance, the aim being to remove the MOT from the organisation of the Ministry of Justice, and to set it up as an independent administrative authority – as recommended by the Council of Advice. Finally, after the approval of Parliament, the National Ordinance

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<sup>4</sup> An amendment to the explanatory note to Recommendation 18

<sup>5</sup> An amendment to Recommendation 21

<sup>6</sup> An amendment to Recommendation 2

<sup>7</sup> An amendment to Recommendation 15 and the addition of two definitions

Administrative Enforcement was ratified, as a result of which the supervision and enforcement of the national ordinances referred to are better addressed.

This has all had an impact on the substance of the National Ordinance ID and the National Ordinance Disclosure. The provisions in these national ordinances have increased in number. Although this has not affected the varying methodology of the National Ordinance ID and the National Ordinance Disclosure. In practice, this causes problems when institutions quickly need to gain insight into their individual obligations to identify clients and report unusual transactions. To do so, they need to refer to two national ordinances which differ in terms of layout, as well as to the various implementation decrees and implementing regulations. This draft national ordinance aims to integrate the National Ordinance ID and the National Ordinance Disclosure into one national ordinance. This integration offers the opportunity of introducing one uniform regulation giving direction to institutions which have to carry out customer due diligence and are subject to the duty to report; as well as giving direction to how data should be saved and other such provisions. From the perspective of clarity about the obligations imposed on the institutions, it is undesirable to preserve the identification and duty to report in two separate national ordinances. Consequently, it is recommended that these two national ordinances be integrated.

#### *Customer due diligence*

Carrying out customer due diligence contributes to the recognition and management of risks which accompany certain sorts of clients and service provision. Therefore, it forms an important part of the measures to prevent money laundering and the financing of terrorism.

For years, various international bodies have been paying specific attention to the development of customer due diligence. For example, in October 2001, the Basel Committee on Banking Supervision published the report «Customer Due Diligence for banks». The procedures prescribed for customer due diligence by the Basel Committee have a broader scope than this draft national ordinance. They focus on promoting integrity within the financial sector in a general sense. However, this proposal focuses specifically on customer due diligence and the reporting of unusual transactions to prevent money laundering and the financing of terrorism.



Issued in 2005, the third Money Laundering Directive from the European Parliament and the Council of the European Union <sup>8</sup> contained amendments relating to customer due diligence and the possibility of differentiation in this context. Institutions in the Netherlands should, in principle, comply with all the customer due diligence measures as prescribed in this Directive; however, the intensity with which the measures have to be applied can be aligned with the risk posed by certain types of clients, relationships, products or transactions. Due to its affiliation with the FATF, Sint Maarten is accordingly obliged to incorporate these provisions in its legislation and regulations. Furthermore, taking due account of the approach to risk, institutions are obliged to identify the ultimate beneficiaries of transactions or relationships, and to ascertain the structure of the group to which a client belongs. They are also obliged to check the activities of their clients throughout their relationship, to acquire information at the start of a relationship and, in certain cases, to ascertain the origin of monies. Institutions also have to take extra measures if services are provided to so-called "politically exposed persons", (also referred to as: PEPs) and in other cases where there is an increased risk of money laundering or the financing of terrorism. However, when providing services which are less sensitive, the measures can be applied more flexibly. In its entirety, this is referred to as "customer due diligence on the basis of a risk-oriented approach".

The details of all of the above can be found in the articles concerning standard customer due diligence, enhanced customer due diligence and simplified customer due diligence.

#### *Reporting unusual transactions*

An important part of the measures to combat money laundering and the financing of terrorism is the duty to report any unusual transactions to the MOT.

Any transaction reported is investigated further by the MOT. If the investigation reveals that the transaction is suspicious, the transaction shall be brought to the attention of the investigative authorities. In this way, the reporting of unusual transactions can result in a criminal investigation into money laundering or the financing of terrorism. The suspicious transactions can also provide insight into financial dealings

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<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:nl:PDF>

which are connected to other crimes and, in so doing, assist the investigation into these crimes. Through the public prosecutor, the investigative authorities also have the possibility of asking the MOT questions within the context of an ongoing criminal investigation into serious crimes.

In addition to the role the duty to report can play in detecting money laundering and the financing of terrorism, the duty to report has an important preventative effect. Any person planning to launder money would be aware that the bank has to report any suspicions of money laundering, after which an investigation shall be initiated to determine whether or not the transaction is in fact suspicious. This knowledge may prevent the person concerned from attempting to launder his/her black money.

The duty to report applies to all institutions described in article 2 of this draft national ordinance. Consequently, financial enterprises such as credit institutions, money transfer companies, life insurers, investment firms, investment institutions and financial service providers are also subject to the duty to report.

The duty to report also applies to a number of non-financial institutions, in particular tax consultants, accountants, casinos, dealers who accept cash for their goods, trust offices, brokers and legal service providers.

So-called indicators give further substantiation to the duty to report.

These indicators were laid down in the Regulation on Indicators of Unusual Transactions issued by the Minister of Justice and revised at the start of 2016.<sup>9</sup> The indicators describe the situations in which a transaction must be deemed unusual. In such cases, the institution should report the transaction. The indicators are divided into objective and subjective indicators. Objective indicators describe situations which should always be reported. While subjective indicators base the duty to report on the institution's own assessment of a specific situation.

#### *Relationship with other regulatory measures*

In addition to this proposal, financial enterprises also have, in practice, to deal with other regulatory measures which concern the integrity of

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<sup>9</sup> See the Regulation on Indicators of Unusual Transactions;  
[http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/historie/Sint%20Maarten/143506/143506\\_1.html](http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/historie/Sint%20Maarten/143506/143506_1.html)

financial and economic dealings. This paragraph briefly explains the differences between these regulatory measures, qua objective and substance, and the draft national ordinance under consideration. The relevant regulatory measures are the Sanctions National Ordinance, the eight national ordinances in respect of the supervision of the financial sector by the Central Bank <sup>10</sup>, and the National Ordinance Duty to Report Cross-Border Cash Transports.

Since October 2018, the financial service providers referred to in recommendation 15 have also included service providers who deal in virtual assets, also known as crypto currencies. Bitcoin and Ethereum are the most well-known examples of these currencies. On the instruction of the Central Bank of Curaçao and Sint Maarten, a draft national ordinance is currently being drawn up to regulate the trade in virtual assets and to make it subject to the supervision of the Central Bank. Likewise and identically, this national ordinance shall, in the same way as the other supervisory national ordinances, have to be adopted in Sint Maarten. This draft national ordinance is expected to be submitted to Parliament halfway through 2020.

#### *The Sanctions National Ordinance*

The Sanctions National Ordinance has an individual position. Its objective is to implement international sanction regimes. Regarding financial institutions, this particularly involves freezing the assets of people or organisations designated by international organisations. The sanctions are political policy instruments of the United Nations and the European Union. They are mandatory, non-military instruments which are used in response to, inter alia, breaches of international law or human rights by regimes which, in an attempt to bring about change, fail to respect constitutional and democratic principles. In addition, these sanctions play a role in the battle against terrorism, particularly with sanctions focussing on individuals and non-state entities.

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<sup>10</sup> These eight are: the National Ordinance Supervision of the Bank and Credit System, the National Ordinance Corporate Pension Funds, the National Ordinance Supervision of the Insurance Industry, the National Ordinance Supervision of Stock Exchanges, the National Ordinance Supervision of Investment Institutions and Administrators, the National Ordinance Supervision of Trusts, the National Ordinance Insurance Broking Business and the National Ordinance Supervision of Money Transfer Companies.

In all cases, any sanctions issued are an objective indicator to report to the MOT that a proposed transaction could be an unusual transaction.<sup>11</sup> Sanctions are frequently based on a resolution from the UN Security Council. However, sanctions can also have an autonomous basis within the European Union.

The most prevalent sanctions are:

- arms embargos and trade restrictions;
- financial sanctions (freezing assets); and,
- travel and visa restrictions.

Sint Maarten is obliged to implement international sanctions on the grounds of article 25 of the Charter of the United Nations and article 3 of the Charter for the Kingdom of the Netherlands. To this end, the Sanctions National Ordinance was adopted in 1997.

The effectiveness of sanctions as an international policy instrument requires that national legislation to implement the sanction should be in place immediately. In the FATF recommendations, this requirement is denoted by the expression 'without delay'.

In the CFATF's follow-up reports, there were several observations stating that the methodology of the Sanctions National Ordinance was insufficient and, in practice, it appeared that the majority of sanctions were not applicable in Sint Maarten.

However, for the time being, this extremely undesirable situation has been brought to an end by the Sanctions Regulation of 23 June 2015<sup>12</sup>. To avoid a potential repetition, a procedure is pending to amend the Sanctions National Ordinance, the intention being that international sanctions can always be enacted 'without delay'<sup>13</sup> by ministerial

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<sup>11</sup> See the Regulation on Indicators of Unusual Transactions;  
[http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/historie/Sint%20Maarten/143506/143506\\_1.html](http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/historie/Sint%20Maarten/143506/143506_1.html)

<sup>12</sup> See [www.sintmaartengov.org](http://www.sintmaartengov.org) under Laws/search engine

<sup>13</sup> In June 2017, the FATF made a statement about the expression 'without delay'. Ideally, the expression 'without delay' means within a couple of hours after a designation from the UN's Security Council or its relevant sanctions committee (for example the 1267 Committee, the 1988 Committee, or the 1718 Sanctions Committee). For the application of Resolution S/RES/1373 (2001) the expression 'without delay' means that there must be reasonable grounds or a reasonable basis to suspect or believe that a person or an entity is a terrorist, or is financing terrorism or a terrorist organisation. In both cases the expression 'without delay' is interpreted in the context of the need to prevent the flight or disappearance of resources or other assets which are connected to terrorists, terrorist organisations, those who finance terrorism, or to the financing of the proliferation of weapons of mass destruction due to the need to take globally coordinated action to prohibit these and to disrupt the placement of these in the short term.

regulation. The draft national ordinance referred to was published in the Official Publication 2017, no. 25, and entered into force on 5 August 2017. At the same time and on the basis of the amended Sanctions National Ordinance, the Minister of Justice effected a completely new National Sanctions Regulation.<sup>14</sup> This entered into force on 8 August 2017.

As a result Sint Maarten is not yet complying with the text of the FATF recommendations 5, 6 and 7 which were readopted in 2015 (and updated in 2017). For example, insufficient account is being taken of the proliferation of weapons of mass destruction, the variations in the different national sanctions, the obligation for service providers who implement a sanction to inform the MOT, the possibility of objecting to and appealing against a sanction and indemnity for service providers who, in good faith, implement a sanction. These supplementary amendments of the Sanctions National Ordinance are included in article 34 of this draft national ordinance.

#### *The national ordinances on supervision*

The most important difference between the national ordinances on supervision and this draft national ordinance lies in the objectives and scope of application. The national ordinances on supervision deal with regulatory measures to promote the integrity of service providers, and focus on parts of the financial sector and the activities of financial institutions. Whereby attention is paid to the organisation of the institutions, to the products they offer and the way in which they provide their services. In comparison to the eight national ordinances on supervision, this proposal has a more specific objective, being the prevention of money laundering and the financing of terrorism. The measures included in the national ordinances referred to are to concentrate on this. Furthermore, not only do they apply to financial institutions, but also to designated non-financial institutions.

The objective of the eight national ordinances on supervision is to protect the integrity of the financial system. On 2 August 2017, a draft national ordinance was approved by Parliament; the objective was to harmonise and update these national ordinances, hereinafter to be referred to as: The National Ordinance Harmonisation. The draft was aligned as closely as

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<sup>14</sup>[http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/Historie/Sint%20Maarten/475646/475646\\_1.html](http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/Historie/Sint%20Maarten/475646/475646_1.html)

possible to the national ordinance accepted by the Parliament of Curaçao in November 2015. Close alignment is compulsory given that, when applying article 8, article two, of the Central Bank Charter for Curaçao and Sint Maarten (hereinafter: Central Bank Charter), the national ordinances on supervision must be uniform.

In the relevant national ordinances strict requirements are placed on the business operations and administrative organisation of the financial and non-financial institutions involved. In addition, there are rules governing the assessment of the reliability of the directors and those who determine the day-to-day policy.

Of vital importance are the provisions in the area of integrity. These relate to measures which should ensure both the enterprise and its employees always act with integrity: tackling conflicts of interest, avoiding any involvement in criminal offences or any other involvement in actions which conflict with what is generally accepted according to unwritten law. This can be denoted as the concept «internal integrity of the institution».

Moreover, the provisions which relate to conducting business operations honourably focus on avoiding entering into relationships with any persons who could damage the trust in the institution or the financial markets.

In conclusion, the National Ordinance Harmonisation aims to harmonise the provisions on supervision and enforcement in the national ordinances on supervision.

The National Ordinance Harmonisation was approved by Parliament on 2 August 2017 and ratified on 29 December 2017.<sup>15</sup> On 28 March 2018, the National Ordinance Harmonisation and the National Ordinance Supervision of Money Transfer Companies both came into force.<sup>16</sup> Furthermore, at the start of 2019, the government intends to submit the draft National Ordinance Supervision of Securities Brokers and Asset Managers to the Council of Advice for its advice. The more or less identical text of this national ordinance was already in force in Curaçao in 2017.<sup>17</sup>

Above it has already been explained that, on the instruction of the Central Bank of Curaçao and Sint Maarten, a draft national ordinance is currently being drawn up to regulate the trade in virtual assets and to make it subject to the supervision of the Central Bank. Likewise and identically, this national ordinance shall, in the same way as the other national ordinances on

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<sup>15</sup> AB 2018, no. 5

<sup>16</sup> AB 2018, no. 12

<sup>17</sup> PB 2016, no. 79

supervision, have to be adopted in Sint Maarten. This draft national ordinance is expected to be submitted to Parliament halfway through 2020.

At this stage, it is important that attention be drawn to the fact that this draft national ordinance does not intend to make any changes to the mutual division of the supervisory responsibilities; the Central Bank shall continue supervising the financial service providers and the MOT shall still supervise the other service providers. This division of responsibilities shall likewise be applicable to the supervision and enforcement of the draft national ordinance under consideration; to this end see article 31.

At the same time, the National Ordinance Supervision of Money Transfer Companies was also approved by Parliament on 2 August 2017. It had become apparent that there was no such national ordinance in Sint Maarten although, in accordance with article 8 of the Central Bank Charter, it was compulsory. As stated above, on 28 March 2018, the national ordinance referred to and the National Ordinance Harmonisation both came into force.

#### *The National Ordinance Reporting Cross-Border Cash Transports*

This national ordinance is also directly connected to the FATF recommendations. The national ordinance makes it compulsory for a traveller to complete a declaration if he/she wishes to bring more than ANG 20,000 into the country or take the same amount out of the country. The declaration is handed to a customs officer who electronically informs the MOT of the declaration. If a traveller fails to complete a declaration, customs can act as an enforcement body and confiscate the money. If an official report is drawn up in this context, customs must also report this to the MOT.

At the end of 2018, an amendment to this national ordinance was submitted to Parliament, in order to amend various defects discovered by the CFATF. Furthermore, the maximum amount was raised to USD or euro 15,000, in accordance with the 2012 revisions to the text of the FATF recommendations. In the draft national ordinance that amount was set at ANG 25,000.

#### *The Criminal Code*

**Commented [RM1]:** Deze ruimere taak hebben we geschrapd in de Lvo MOT. Of zou je die overlap met de bevoegdheden van de Centrale Bank willen ghandhaven?

Several of the FATF recommendations use the criminal code as an important enforcement instrument. The Criminal Code has been revised accordingly and the new Criminal Code took effect on 1 June 2015. Article 1:4, 1:5 and 1:6 state that the criminal statutes of Sint Maarten were also applicable to anyone who outside Sint Maarten was guilty of an action that is described in one of the many treaties which aim to prevent money laundering and the financing of terrorism. Article 1:202 defines what is understood by crimes of terrorism. Article 1:203 defines what is understood by terrorist intentions. And article 1:204 defines what is understood by crimes of preparing and facilitating crimes of terrorism. Article 1:127 lays down that criminal offences can be committed by natural persons and legal entities. In articles 2:404, 2:405 and 2:406 various forms of money laundering are made a criminal offence. The articles 2:31, 2:32, 2:39, 2:40, 2:49, 2:50, 2:126, 2:127, 2:163, 2:184, 2:278, 2:289, 2:295, 2:300, 2:305 and 2:343 impose a heavier penalty for certain crimes of terrorism or other crimes if the action is committed with terrorist intentions. Article 2:54 makes it a crime to help commit a criminal offence or, as the case may be, to prepare or facilitate crimes of terrorism. Article 2:55 makes it a criminal offence to finance terrorism. Article 2:57 imposes a penalty on anyone who, having knowledge of a criminal conspiracy to commit a crime or of the intention to commit a crime of terrorism at a time when the crime could still have been prevented, deliberately fails to give timely information to judicial officers or police officers, or to the person threatened. Article 2:80 makes participation in an organisation which intends to commit crimes of terrorism a criminal offence, while the founders, leaders or directors of such an organisation are under threat of life imprisonment. Article 2:143 imposes a penalty on anyone who hides evidence to help a person suspected of a crime of terrorism to escape or hide. Article 2:251 makes it a criminal offence for someone to deliberately and unlawfully deprive another person of their freedom and keep them imprisoned with terrorist intentions, while any conspiracy to undertake such a crime is made an offence in article 2:252. Finally, article 2:255 makes threatening a crime of terrorism a criminal offence.



Due to having to implement a number of urgent international obligations, the draft of the National Ordinance Amending the Criminal Code was submitted to the Council of Advice on 8 August 2017. The objective of this draft was to repair all the defects in the Criminal Code which had been highlighted by the CFATF.

It related to the following subjects:

1. a better definition and a more severe penalty for the financing of terrorism;
2. a better definition and a more severe penalty for dealing in weapons of mass destruction;
3. a more severe penalty for the underlying criminal offence of human trafficking; and
4. the introduction of higher fines as part of the penalty for money laundering and the financing of terrorism.

The Council of Advice issued its advice on 20 March 2018. The advice was positive but it asked that extra attention be paid to the concordance principle as laid down in article 39, paragraph two, of the Charter of the Kingdom of the Netherlands. This article lays down that the criminal code in all the countries forming the Kingdom should be regulated as concordantly as possible. This advice caused the draft national ordinance to be reconsidered. Eventually, the draft national ordinance was revised and updated. The government intends to submit this new draft national ordinance (the National Ordinance Enhanced Measures to Combat Terrorism and other Essential Revisions) to the Council of Advice at the start of 2019.

The draft of the National Ordinance Adopting a new Criminal Procedures Code , was submitted to the Council of Advice on 12 July 2017, as well as to the Councils of Advice in Aruba and Curaçao. The objective of this draft is to modernise the Code and to repair all the remaining defects in the Code as highlighted by the CFATF.

This includes, inter alia, the following subjects:

1. greater opportunities for confiscation and seizure;
2. greater opportunities for international cooperation;
3. a better scheme for international legal assistance;
4. simpler procedures regarding extradition; and,
5. a scheme for shared detection, which is particularly important in the context of cooperation with the Collectivité de Saint-Martin.

Based on the advice from the Councils of Advice in Aruba, Curaçao and Sint Maarten, a revised version of this draft national ordinance was compiled. This

draft national ordinance was submitted to the Council of Advice in December 2018.

Finally, the draft National Ordinance Revising Book 2 of the Civil Code was submitted to the Council of Advice on 18 April 2017. The Council of Advice has now issued its advice to the government. The national ordinance intends to readopt Book 2 of the Civil Code and to scrap bearer shares. Scrapping the possibility of bearer shares is particularly important in this context. By doing so, not only would the FATF recommendations on transparency in legal ownership be complied with but, for some time, the Organization for Economic Cooperation and Development has also been urging bearer shares be scrapped on the grounds of their (lack of) 'traceability'.

For more detailed information about the national ordinances described in this article, reference should be made to the annex to this Explanatory Memorandum.

#### *Amendments to other national ordinances*

The draft national ordinance under consideration also forms the final element of the large project, under the MOT's leadership, to assess the extent to which all Sint Maarten's legislation and regulations conform to the FATF recommendations and, if necessary, to amend these; and do so in accordance with all the comments made by the CFATF in the six-monthly follow-up reports. For these reasons, at the end of the draft national ordinance, it is proposed that amendments be made to a number of other national ordinances. Reference should also be made to the annex to this Explanatory Memorandum.

However a few amendments deserve separate attention in this article of the Explanatory Memorandum.

#### *Amendments to Book 2 of the Civil Code*

The amendment to Book 2 of the Civil Code proposed in article 36 requires a more detailed explanation.

In June 2016, the text of the explanatory notes to recommendation 8, non-profit organisations, was substantially amended so that this no longer had to apply to all NPOs, but only to the NPOs which appeared vulnerable to abuse for the financing of terrorism. The decision as to which NPOs were involved was left to the governments of the affiliated countries. Regarding the situation

in Sint Maarten, the government chose to draw the limit at foundations or associations which have balance sheet or statement of income and expenditure totals in excess of ANG 100,000.

Another option was to have the MOT proactively assess which foundations and associations were vulnerable to potential abuse. However, that encountered the problem that the Commercial Register would first have to be reviewed. Currently, too many of the legal entities registered in the Commercial Register are no longer active. In addition, such an analysis would impose too great an administrative burden on the foundation or association concerned, as well as on the MOT.

However, article 36 of the draft national ordinance does provide for a suitable administrative sanction if, in a subsequent assessment, the MOT discovers that a legal entity has committed a suspicious transaction. In this context "Suspicious" means a transaction which pursuant to the Sanctions National Ordinance is subject to a restriction, or a transaction which involves a resident of – or a legal entity based in – a country or jurisdiction which appears on the FATF list of high-risk and non-cooperative countries and jurisdictions.

The aforementioned article 36, paragraph A, includes an extra amendment to Book 2 of the Civil Code. In the draft National Ordinance Revising Book 2 of the Civil Code, article 25 of Book 2 has been amended and stipulates that the Chamber of Commerce can dissolve a legal entity which is no longer active and delete that legal entity's registration. To which, due to the proposed article 36 of the draft national ordinance, can be added that the Chamber of Commerce can do the same to a legal entity if the MOT has notified the Chamber that the legal entity concerned has been carrying out suspicious transactions.

Given the legal consequences of such a notification from the MOT to the Chamber, it is plausible that an administrative appeal is available to the legal entity concerned. The legal entity concerned must be informed of this, given Article 25 of Book 2 of the Civil Code prescribes that the Chamber must issue a 'warning' to any legal entity which the Chamber is proposing to dissolve. In the second place, the aforementioned article 36, paragraph B, includes a new article 59, obliging legal entities, which until now have been exempt, to prepare an annual report and financial statements and to publish these on the internet. Moreover, a copy must be sent to the Chamber of Commerce and the MOT.

Both amendments are considered in more detail below.

*Article 25*

Article 25 of the National Ordinance Revising Book 2 of the Civil Code relates to the obligation of the Chamber of Commerce and Industry to close down an inactive legal entity. Article 25 of the National Ordinance Revising Book 2 of the Civil Code provides that a public limited liability company, private limited liability company, cooperative, mutual insurance company or provident society, association, foundation or private fund foundation listed in the Commercial Register shall be dissolved by an administrative decision of the Chamber of Commerce and Industry if the Chamber finds that at least one of the following circumstances has occurred:

- a. no directors of the legal entity are recorded in the register for at least one year, while no submission for registration is made or, if directors are registered, one of the following circumstances occurs:
  - 1°. all the directors have died;
  - 2°. all the directors have proved to be unavailable at the address of the legal entity shown in the register;
- b. according to the records of the Chamber, the legal entity has failed to comply with its obligation to pay the amount due for listing in the Commercial Register for at least one year.

Article 36 of this draft national ordinance proposes to extend this authority. The Chamber of Commerce shall also be authorised to close down a legal entity if the MOT has notified the Chamber that the legal entity has conducted suspicious unusual transactions. Moreover, the Chamber of Commerce and Industry shall have the authority to close down a legal entity if this entity does not satisfy the new requirements to prepare and publish an annual report and financial statements, in compliance with the requirements of the FATF recommendation 8.

*Article 59*

The new article 59 imposes an obligation on legal entities, which until now have been exempt, to prepare an annual report and financial statements and to publish these on the internet. Moreover, a copy must be sent to the Chamber of Commerce and the MOT.

Although this prescription can prove a burden for some foundations, private fund foundations and associations, the government believes that it is inevitable in the light of the FATF recommendation 8. Reference should be made to the article in the annex to this Explanatory Memorandum which deals with this recommendation. In order to at least partially

address the potential objections to the increased burden and the publication of annual reports and annual financial statements of legal entities which were previously exempt, article 36, under B, paragraph 7 (of article 59) in combination with article 36, under C, it is proposed that an exception be made for foundations and associations with balance sheet and income and expenditure totals of less than ANG 100,000.

*Amendments to the Commercial Registers Decree*

Finally, the amendments to the Commercial Registers Decree, proposed in article 35, are worthy of mention. It is unusual for a national decree, containing general measures, to be amended by means of a national ordinance, but it is not constitutionally impossible. The government has chosen this method for reasons of efficiency and the close connection with other parts of the draft national ordinance under discussion.

The amendments to the Commercial Registers Decree serve to implement the FATF recommendations 24 and 25, which prescribe that the personal details of the ultimate beneficiaries of the legal entity must be known. These details can be made known by inclusion in the commercial register, or – if a company is involved - by inclusion in the shareholders' register which pursuant to article 109 of Book 2 of the Civil Code is compulsory.

An ultimate beneficiary is a natural person who:

- 1<sup>o</sup>. has an interest of more than 25% of the capital in a legal entity, or can exercise more than 25% of the voting rights at that legal entity's shareholders' meeting, or in some other way can exercise effective control in or on behalf of the legal entity;
- 2<sup>o</sup>. is the beneficiary of 25% or more of the capital in a legal construction, including a foundation or a trust, or can exercise effective control in the legal construction; or
- 3<sup>o</sup>. has control over 25% or more of the capital of a legal entity.

Persons referred to under 1<sup>o</sup> are generally the most important shareholders.

Persons referred to under 2<sup>o</sup> are generally the beneficiaries of a trust or foundation.

Persons referred to under 3<sup>o</sup> are generally the executive and supervisory directors.

For the sake of the readability of the draft national ordinance and the accompanying documents, it has been decided that only the concept "ultimate beneficiary" should be used.

For more detailed information reference should be made to the annex to this Explanatory Memorandum, in particular to recommendations 24 and 25.

*Financial paragraph*

The draft national ordinance shall have no impact on the national treasury. The advantages for the business world of integrating statutory provisions which relate to reporting and customer due diligence are unquantifiable, just as the disadvantages for foundations and associations of being obliged to prepare annual reports and annual financial statements are unquantifiable.

**Explanatory notes on individual articles**

*Articles 1, under ee, 3 to 7, 9 to 12, 17 and 25*

For an explanation of the provisions relating to an ultimate beneficiary, reference should be made to the article above entitled '*Amendments to the Commercial Registers Decree*' and to the annex to this Explanatory Memorandum, in particular to recommendation 24. Transparency and Economic Ownership of Legal Entities.

*Article 2*

Two amendments in respect of the current National Ordinance Disclosure of Unusual Transactions require a more detailed explanation.

Firstly, the definition of a service provider who offers games of chance is no longer to be categorised under financial service providers but under non-financial service providers (see article 2, paragraph 1, under b, part 5<sup>o</sup>). On reflection, casinos did not seem to fit into the category of financial service providers very well. Advantage has also been taken of this opportunity to define lotteries, as referred to in the Lottery Ordinance. It cannot be ruled out that a prize worth more than the threshold amount of ANG 25,000 is paid out. In such cases, the organiser of the lottery should conduct customer due diligence, as referred to in Chapter II of the draft national ordinance, before the prize is paid out. In practice there is little difference between winning a large sum of money in a lottery or in a casino; therefore, there is no good reason to retain the exception afforded to lotteries. There is no question of this placing an unreasonable burden

on the lotteries, given customer due diligence is neither complicated nor laborious.

Secondly, it is proposed that a pawnshop should also be categorised under the definition of a non-financial service provider (see article 2, paragraph 1, under b, part 4<sup>o</sup>). It is not unusual for jewellery to be offered as security in a pawnshop. If the pledge loan is not repaid, the operator of the pawnshop is in fact acting as a jeweller, and there is insufficient reason to make a distinction with a 'normal' jeweller. If the operator of a pawnshop sells jewellery for a price which exceeds the threshold amount, then this operator should comply with the requirements applicable to jewellers.

Because pawnshops and pledge loans are not (as yet) regulated by the Civil Code, it has been proposed that the definitions of such be included in paragraphs 3 and 4 of this article. Whereby, use shall be made of the definitions in Dutch legislation. The fact that pawnshops and pledge loans are not (as yet) regulated in the Civil Code does not provide a reason to exempt such businesses from the statutory provisions to prevent and combat money laundering and the financing of terrorism.

For more detailed information about article 2, paragraph 1, under b, part 5<sup>o</sup>, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 22. Designated non-financial enterprises and professions: customer due diligence, 23. Designated non-financial enterprises and professions: other measures and 28. Regulation and supervision of designated non-financial enterprises and professions.

#### *Articles 3 to 14*

For more detailed information about the provisions in these articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 10. Customer due diligence, and 22. Designated non-financial enterprises and professions: customer due diligence.

For more detailed information about the provisions in article 3, paragraph 2, under c, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 25. Transparency and economic ownership of legal constructions.

Article 4, paragraph 2 lists a number of exceptions to the obligation to carry out customer due diligence. These exceptions, which ensue from the

FATF recommendations, are primarily prompted by considerations of efficiency in the dealings between service providers and their clients, and in an attempt to ensure that bona fide clients do not become the victim of an unnecessarily strict enforcement of the statutory provisions.

In accordance with recommendation 10, article 5, paragraph 1, prohibits the use of anonymous accounts or accounts under unmistakably false names.

For more detailed information about the provisions of article 5, paragraphs 2 and 3, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 16. Electronic transfers and 22. Designated non-financial enterprises and professions: customer due diligence.

For more detailed information about the provisions in article 10, paragraph 2, under l, and article 22, paragraph 1, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 16. Electronic transfers. This prescribes, *inter alia*, that, for each electronic transfer, the financial service provider must keep accurate records detailing the client and the beneficiary.

*Articles 10, paragraphs 2, under h, 12, paragraph 1, under a, and paragraph 2, 14 and 19 paragraphs 2 and 3.*

In these articles a scheme is worked out so that special attention and enhanced due diligence is given to clients from countries which pose a higher risk. For more detailed information about the provisions in these articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 19. Countries posing a higher risk.

*Article 10, paragraph 2, under k*

For more detailed information about this provision reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 19. Countries posing a higher risk<sup>18</sup>.

*Article 10, paragraph 4*

The fourth paragraph proposes to detail the data required for enhanced customer due diligence. How the prescribed (supplementary) information is to be acquired is determined by the specific case. It is left to the service

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<sup>18</sup> These countries can be found at: [http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc\(fatf\\_releasedate\)](http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate))



provider to decide how the (supplementary) information is actually acquired, provided the service provider complies with the 'know your customer principle'.

*Article 11, and article 10, paragraph 2, under i*

Politically exposed persons require special attention. For more detailed information about the provisions in these articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 12. Politically exposed persons.

*Article 14*

This article provides further rules to determine whether a country appears on a list of higher-risk countries. For more detailed information about paragraph 2 reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 19. Countries posing a higher risk.

*Articles 15 and 16*

These articles provide rules about correspondent banks. For more detailed information about the provisions in these articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 13. Cooperation between banks.

*Article 17*

For information about the provision in paragraph 6, detailing which documents should be copied, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 24. Transparency and Economic Ownership of Legal Entities.

*Article 18*

The first paragraph stipulates that the Minister of Justice shall adopt a national policy which serves to promote transparency, integrity and public trust in the governance and management of all non-profit organisations, as well as a national policy to prevent or curtail money laundering and the financing of terrorism which is based on the risks identified. Naturally the national policies referred to already exist, but they now have to be collated in a comprehensive policy document and adopted. This is expected to happen within a year of the entry into force of the draft national ordinance.

For more detailed information about the provisions in paragraphs 1 and 2 reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 1. The assessment of risks and the application of a risk-based approach, 2. National cooperation and coordination, 8. Non-profit organisations, and 24. Transparency and Economic Ownership of Legal Entities.

*Articles 19, 20 and 21*

These articles focus on internal procedures, such the assessment of risk and vulnerability or the appointment of a compliance officer, and cooperation within an individual institution. For more detailed information about the provisions in these articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 18. Internal audits and foreign branches or subsidiaries.

Article 19, paragraph 4 relates to countries with more stringent legislation as far as the protection of privacy is concerned.

For more detailed information about the provisions in article 20, paragraph 1, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 1. Assessing risks and applying a risk-based approach, and 26. The regulation and supervision of financial institutions.

For more detailed information about article 20, paragraph 2, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 1. Assessing risks and applying a risk-based approach, notes 10.

For more detailed information about the provisions in article 20, paragraph 3, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 15. New Technologies.

*Articles 22 and 23*

These articles provide rules about how service providers should store data and information acquired pursuant to this national ordinance.

For more detailed information about the provisions in these articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 11. Data management, and 24. Transparency and Economic Ownership of Legal Entities.

For more detailed information about the provisions of article 22, paragraph 1, reference should be made to the annex to this Explanatory

Memorandum, in particular to recommendation 16. Electronic transfers, and 25. Transparency and economic ownership of legal constructions. These proposed articles stipulate, inter alia, the retention periods during which data may be used as evidence in the detection and prosecution of money laundering and the financing of terrorism. Recommendation 11 refers to a retention period of 'at least five years'. However, the government is proposing a retention period of at least ten years. The duration of this period shall be motivated by the investigation. Frequently, when a financial crime is involved, it is necessary to prove the criminal offence was committed over a longer period. In practice, when investigations into criminal offences are conducted in Sint Maarten, it is not unusual for a suspicion to take a number of years to become sufficiently 'hard' to justify starting a formal criminal investigation. This is usually due to a lack of sufficiently qualified personnel and prioritisation. In a complicated case, the criminal investigation can take several years. Both terms taken together can exceed the term of five years stipulated in the FATF recommendation 11. Precisely in a complicated case, it would be unfair if the prosecution had to be abandoned simply because the service provider had destroyed the data after five years.

*Articles 24, 25 and 26*

These articles elaborate on the duty to report unusual transactions. For more detailed information about the duty to report reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 22. Designated non-financial enterprises and professions: customer due diligence, and 23. Designated non-financial enterprises and professions: other measures.

Through the aforementioned Regulation on Indicators, article 24 has already been implemented on the basis of currently applicable legislation. In respect of article 25 reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 10. Customer due diligence, 20. Reporting of suspicious transactions, and 29. Financial Intelligence Units. In paragraph 1, a specific period is proposed. The current legislative text states 'without delay'. Various professional bodies have, however, requested a more precise definition.

The proposed paragraph 2 of article 26 lays down that the director of the Financial Intelligence Unit determines the way in which disclosures are reported. The government deems such a conferral of powers suitable in the light of the draft National Ordinance Office for the Disclosure of

Unusual Transactions. In this draft national ordinance the MOT is being removed from the Ministry of Justice, and transformed into an independent administrative authority with regulatory power.

*Article 27*

For more detailed information about this article which prescribes rules in respect of confidentiality, reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 10. Customer due diligence, 21. Sharing of Information and Confidentiality and 23. Designated non-financial enterprises and professions: other measures.

*Article 28*

The proposed article lays down that the privacy regulations of financial institutions may not inhibit the implementation of the national ordinances reporting unusual transactions. For more detailed information reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 9. Secrecy laws of financial institutions. The text of this article is literally the same as the text of the recommendation.

*Articles 29 and 30*

These articles provide regulations governing indemnity for service providers who execute the statutory provisions correctly. For more detailed information reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 21. Sharing of information and confidentiality. The text of article 29, paragraph 1, is literally the same as the recommendation.

The proposed article 30 serves to ensure the service provider is not unnecessarily confronted by a dilemma if it feared that a report would harm the interests of those whose behaviour it is reporting.

*Article 31*

In this proposed article, the director of the Financial Intelligence Unit is given the authority to provide guidelines to service providers. Hereby thought should be given to a user's guide about how to find your way around the MOT's website, rather than substantive statutory provisions. In this context, the government deems such a conferral of powers suitable, all the more so as, in so many words, recommendation 34 requires that the Financial Intelligence Unit must be able to issue guidelines with a view

to promoting compliance with legislation combatting money laundering and the financing of terrorism.

The background as to why paragraph 3 proposes to set the maximum administrative penalty at ANG 4 million is explained in the explanatory notes to article 33.

#### *Article 32*

In this article, the 'usual' investigating officers are charged with the investigation, as well as supervisors working at the Office for Disclosure, who have been appointed by national decree. This includes supervisors who, to this end, have followed a particular training to become special police officers. The proposed paragraph 2 stipulates that a report, as referred to in article 25, and information, in whatsoever form, provided by a financial intelligence unit in another country, cannot serve as independent evidence for a criminal conviction.

The person reporting should remain free from any involvement in the subsequent criminal investigation and court hearing. The potential involvement in such an investigation could negatively influence a person's readiness to report an unusual or suspicious transaction.

To participate in the Egmont Group such exemption is even essential. If a foreign financial intelligence unit provides information, the institution receiving the information should ask permission before it makes use of the information. If this permission is granted, this is always on the basis of 'police-use only'. This means that if it is used independently, for example in a criminal investigation or in criminal proceedings, the recipient institution should first have the information formalised by submitting a request for legal assistance to the other country. Subsequently, the result of the request for legal assistance can, if necessary, serve both a criminal investigation and criminal proceedings. Paragraph 3 contains an exception to the duty of confidentiality in article 27 for reports in specific cases.

#### *Article 33*

Article 33 contains the penal provisions. For an explanation of this article reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 35. Sanctions.

For more information about the higher penalties for 'tipping off' reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 10. Customer due diligence, and 21. Sharing of information and confidentiality.

A separate explanation is necessary to explain why the sixth category is being proposed for the maximum penalty, both for deliberate criminal offences as well as for infringements which were unintentional. This is unusual in criminal law. The most important reason is that an action which contravenes this national ordinance can involve huge sums of money, certainly if the action has been carried out repeatedly. Even actions which are unintentional can be repeated several times; however, by definition, the infringer is not aware that he/she/it is committing an infringement. Because the criminal-law penalty has to have a deterrent effect, the sixth category is also the most desirable penalty for the infringement. The fine has to be greater than any gain that can be made, and that gain could be considerable. The integrity of Sint Maarten's financial system is deemed to be of such great importance that any breaches of it must be countered with sufficiently dissuasive prison sentences or fines. Through an infringement banks, investment institutions and other service providers can potentially acquire huge amounts of money. As asserted above, the fines must be considerably higher than any gains if they are to act as adequate deterrents. If the maximum level of the fine should appear too low in an exceptional but specific case where there is a gain of over ANG 1 million, the possibility of confiscating the illegally acquired gains could offer a satisfactory solution. This latter situation is regulated in the (new) Criminal Procedures Code .

In a situation where the offence is going to be dealt with in administrative proceedings rather than criminal proceedings then, for the same reason, the proposed article 31 stipulates a maximum administrative fine of ANG 4 million.

#### *Article 34*

This article consists of a number of amendments to the Sanctions National Ordinance. Reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 6. Targeted financial sanctions for terrorism and the financing of terrorism, 7. Targeted financial sanctions related to proliferation, 16. Electronic transfers. Several of the parts in these proposed articles have been taken literally from the recommendations referred to. Naturally, the sanctions committees referred to here can be found on the internet.

For reasons of efficiency, the proposed article 8 of the Sanctions National Ordinance has built in the same automatism as is included in article 2, paragraph 2, of the National Sanctions Regulation. That article includes a so-called dynamic reference. This means that if a UN Sanctions Committee amends or scraps a sanction, Sint Maarten's sanction regulations shall

simultaneously and automatically be amended, in the sense that the designated sanction shall either be amended or scrapped. On the grounds of article 2, paragraph 2, of the National Sanction Regulation this does not need to be published in the Official Publication if the sanction (and also the amendment to such) has already been published in the official journal of the European Union or the United Nations Security Council. The consolidated text of the Sanctions Regulation, which cites the prevailing text of all the sanctions applicable in Sint Maarten, is published on the MOT website; this is stipulated in (article 34, paragraph C of) the proposed article 9, paragraph 2, of the Sanctions National Ordinance. A decree as referred to in the proposed article 9 of the Sanctions National Ordinance is a decree as referred to in the National Ordinance Administrative Justice.

If any damage/loss is incurred as a consequence of the provisions in the proposed article 10 of the Sanctions National Ordinance, the country responsible can be held to account if that country has failed to act correctly.

#### *Article 35*

This article proposes a number of amendments to the Commercial Register Decree in order to respond to the comments from the CFATF concerning the way in which Sint Maarten's legislation has dealt with the FATF recommendations. Reference should also be made to the General Article of this Explanatory Memorandum, under *Amendments to the Commercial Registers Decree*.

#### *Article 36*

This article, which contains a number of amendments to Book 2 of the Civil Code, has already been dealt with in the General Article of this Explanatory Memorandum. For more detailed information about the provisions in this article reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 8. Non-profit organisations, and 24. Transparency and Economic Ownership of Legal Entities.

#### *Article 37*

Article 37 contains an amendment to the National Ordinance Personal Data Protection. Recommendation 9. The secrecy laws of financial institutions issued by FATF prescribe that "Countries should ensure that a financial

institution's secrecy laws do not inhibit implementation of the FATF Recommendations".

Recommendation 2. In February 2018, national cooperation and coordination was supplemented by: "This<sup>19</sup> should include cooperation and coordination between relevant competent authorities to ensure the compatibility of AML/CFT requirements with Data Protection and Privacy rules and other similar provisions (e.g. data security/localisation)."

Sint Maarten's National Ordinance Personal Data Protection includes the statutory provisions required to implement article 5, paragraph 2, of the Constitution. That article lays down that derogations are only permitted on the basis of a legitimate principle provided for in a national ordinance. Strict implementation of the provisions in the National Ordinance Personal Data Protection could conflict with the proper implementation of the National Ordinance Combatting Money Laundering and the Financing of Terrorism, the Sanctions National Ordinance, the draft National Ordinance Office for the Disclosure of Unusual Transactions or the National Ordinance Reporting Cross-Border Cash Transports. In particular, thought should be given to articles 25, 26 and 27, which concern the right for every person to be informed if his/her personal data are being processed. The proper implementation of the aforementioned national ordinances could be harmed if a client has the right to be informed when a report about him/her/it is submitted to the MOT. Currently article 35 of the National Ordinance Personal Data Protection contains an exception in this respect, but it is doubtful whether this provision is 100% watertight. To the extent this is important - this article reads: "The responsible person can decide not to apply articles 9, paragraph 1, 25, 26 and 27 to the extent this is necessary in the interests of:

- a. the security of the country or state;
- b. the prevention, detection and prosecution of criminal offences;..."

There can be doubts as to whether the processing and storing of data acquired during (enhanced) customer due diligence or a disclosure to the MOT are sufficiently covered by the provisions under b.

To date, such a conflict has not become apparent, but the FATF would like recommendations 2 and 9 to be implemented in a statutory provision. The recommendations referred to are of a general nature, and consequently have to be implemented as a general exception. Article 5, paragraph 2, of the

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<sup>19</sup> "This" refers to the need for good mutual coordination and information exchange between all the national authorities involved. Reference should be made to the annex to this Explanatory Memorandum, under recommendation 2.



Constitution prescribes that this must be a statutory provision with the equivalence of a national ordinance.

Even if the government does not expect the proposed statutory provision to bring about any substantive changes, a new provision in the National Ordinance Personal Data Protection is essential if recommendation 2. National cooperation and coordination and recommendation 9. FATF's secrecy laws for financial institutions are to be implemented.

In the proposed paragraph, the National Ordinance Personal Data Protection is left intact, but a derogation is permissible if and to the extent necessary for the proper implementation of the National Ordinance Combatting Money Laundering and the Financing of Terrorism, the Sanctions National Ordinance, the (draft) National Ordinance Office for the Disclosure of Unusual Transactions or the National Ordinance Reporting Cross-Border Cash Transports.

The proposed statutory provision does not only focus on the competent authorities, but also on the (financial) service providers. Several national ordinances already contain statutory provisions concerning the confidentiality practised by professionals, and confidentiality clauses are included in the draft national ordinance under discussion. The government therefore deems the proposed article 37 to be legitimate, suitable and necessary in the balance between the objective of the National Ordinance Personal Data Protection and the need to fully implement the FATF recommendations 2 and 9 in Sint Maarten's legislation.

#### *Articles 38 and 39*

These proposed articles amend the National Ordinance Substantive Civil Servants Law and the National Ordinance Structure and Organisation of National Government in order to enshrine the integrity of the statutory apparatus of the state. The amendments ensue from the FATF recommendation 36. In this recommendation countries are instructed to take immediate measures in order to participate in and fully implement, inter alia, the 2003 United Nations Convention against Corruption. The application extends to Sint Maarten, but some of the necessary implementing legislation in respect of this Convention is still lacking. As far as criminal law is concerned, the Convention is already being implemented by means of the new Criminal Code. And in respect of prosecution, the new Criminal Procedures Code shall ensure the requirements of the Convention are fully complied with. Then any

implementing legislation that is still lacking shall be included in the draft national ordinance under discussion.

This relates to a new article 83a in the National Ordinance Substantive Civil Servants Law. The proposed article makes the Minister of General Affairs responsible for an integrity policy, for ensuring that this integrity policy forms part of the personnel policy, for ensuring a code of conduct for correct official conduct, and for determining the way in which each official is to account for their observance of the integrity policy and compliance with the code of conduct.

The same obligation is proposed for the public bodies referred to in articles 35 of the National Ordinance Primary Education, 40a of the National Ordinance Secondary Education and 44 of the National Ordinance Secondary Adult and Vocational Education if the civil servant is, as such, already in the service of - or shall be appointed to - this legal entity.

The code of conduct for civil servants has recently been adopted, and the Personnel and Organisation department of the Ministry of General Affairs is aware that it is responsible for the government's integrity policy. In the proposed article 39, the National Ordinance Structure and Organisation of National Government is supplemented by the provision that the integrity policy forms part of the personnel policy for which the Personnel and Organisation department is responsible.

Apart from the annual accountability, the proposed articles have not, in practice, imposed an increased burden or caused the responsibility to be transferred from one body to another. In practice, the new articles mainly reinforce the existing situation, however, it is essential these are incorporated in articles of a law to prove to the CFATF that the UN Convention against Corruption has been implemented in Sint Maarten. For more detailed information about the provisions in both articles reference should be made to the annex to this Explanatory Memorandum, in particular to recommendation 36. International conventions.

#### *Articles 40 to 43*

These articles are logically necessary to repeal the currently existing national ordinances and to give existing implementing regulations another basis.

#### *Article 44*

It is proposed that it be made possible to have parts of this draft national ordinance enter into force at a later date. The most important reason being

that it is conceivable that the draft National Ordinance Office for the Disclosure of Unusual Transactions shall not have become effective by the time the draft under discussion is ready to enter into force. In which case, the entry into force of the articles which refer to that draft national ordinance shall have to be delayed.

The Minister of Justice