

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 22)

EXPLANATORY MEMORANDUM

1. General

Holders of political responsibility must set an example. Their actions and omissions have an effect on the civil service organisation and on society. Relations between the public and government involve a power relationship. For example, citizens cannot approach a different government for a licence. The confidence of the public can only be maintained and strengthened if the legitimacy, due care and decency of the administrators is indisputable; in other words, if the integrity of the administration is assured.

When an administrator not only performs his public duties as an administrator but also holds other positions or represents other interests, the risk of a conflict of interest can arise. This draft aims to promote the integrity of holders of political authority by on the one hand preventing undesirable secondary positions and commercial interests of ministers and by on the other hand laying down additional rules to prevent unjustified enrichment. It is proposed that ministers and their partners should report all secondary positions and certain commercial interests of their own and of their partners and children to the prime minister. The prime minister will then, after receiving advice from the Council of Advice and the General Audit Chamber, assess whether certain positions are undesirable. If this is the case, the minister in question must resign from the relevant position or make provisions in his asset management. If the minister fails to resign from the position or to take appropriate measures, the prime minister will report this to Parliament. Parliament may then propose a motion of no confidence in the minister. The declarations are kept for five years by the clerk of the Common Court. Another measure that will be important to promote the integrity of the administration is the proposed authorisation of the Department of Public Prosecutions, under certain circumstances, to access declarations filed with the clerk of the Common Court of Justice concerning the capital of a (former) minister and his named family members. The reason for this is that the special position of these holders of authority means that they can enrich themselves by means sanctioned in law.

In the Netherlands, ministers and state secretaries must resign all their secondary positions, in order to avoid any appearance of conflicts of interest. Commercial interests must also be disposed of, or an arrangement must be made in that regard. This is laid down in a policy line of the prime minister, which is also used by the 'formateur' (who leads negotiations on the formation of a new government) for candidate ministers.

A policy line for the secondary positions of (candidate) minister also applies in the Netherlands Antilles. The Konfiansa report on administrative improvement and integrity, by the Constitutional Affairs Bureau of the country of the Netherlands Antilles was published in 1999. One of the recommendations of the report was to create a legal regulation for the secondary positions of ministers and state secretaries. This draft is based on a preliminary draft National ordinance promotion of the integrity of holders of political authority dating from 2006, drawn up in response to the Konfiansa report, and on the draft National ordinance containing rules in relation to the criminal procedural aspects of the national ordinance promotion of the integrity of holders of authority of the country of the Netherlands Antilles.

No new sanctions for administrators are included in this draft national ordinance. A minister who breaches the obligation to report may be called to account for this by Parliament and in the worst case, may lose political confidence. Also of importance are the special criminal provisions for ministers regulated in Articles 372*bis*, 372*quinquies* and 372*septies* and the ordinary fraud provisions of the Criminal Code of the Netherlands Antilles, which will be adopted by the country of Sint Maarten.

Although he holds a different job and position from a minister, in the interests of uniformity, the rules on reporting of commercial interests and secondary positions also apply to the minister plenipotentiary (Article 7). The inconsistencies with the role of ministers and ministers plenipotentiary are also regulated uniformly in the draft Constitution.

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According to Article 101 of the draft Constitution of Sint Maarten, rules will be laid down by national ordinance in order to secure the legitimacy and integrity of the administration. This draft serves as a development of that assignment for the legislator.

2. Undesirable secondary positions and interests

Article 34(2) of the draft Constitution explicitly prohibits a number of positions for ministers, such as membership of the Council of Advice or of the General Audit Chamber. According to paragraph 3, it may be laid down by national ordinance with regard to other positions that they cannot be held at the same time as the office of minister. Article 35(2) also provides that a minister may not hold any position associated with any remuneration or benefits charged to the budget of the country. According to Article 35(3), ministers may not participate directly or indirectly in, or serve as a managing director or supervisory director of any business that is registered or active in Sint Maarten. Holding shares in a public limited liability company is not regarded as participation in a business unless the person concerned, together with his relatives by blood or affinity to the second degree, holds at least 25 per cent of the shares. Article 35(4) provides that ministers may not participate directly or indirectly in a concession in the country. Depending on the circumstances of the case, positions other than those explicitly prohibited above may be undesirable. The criterion that applies is whether secondary positions and commercial interests are 'undesirable in the interests of the impartiality and independence of the minister, or of confidence therein'. This criterion is drawn from Article 7(2) of the draft national ordinance General Audit Chamber. It is not possible to further limit this broad standard.

3. The right to privacy

Pursuant to Articles 2 up to and including 6 of this draft, ministers are required to submit a written declaration concerning their commercial interests and other asset elements, secondary positions and secondary activities, and concerning those of their spouses, partners and children, at the start and end of their term of office and during that period.

Article 2 serves a dual purpose. Firstly, information is obtained to prevent undesirable conflicts of interest. On the basis of the said information, the prime minister decides in observance of Article 3 which of the minister's commercial interests, secondary positions and secondary activities are undesirable in his view, in the interests of the proper performance of his office or of the maintenance of his impartiality and independence or of confidence therein. Secondly, Articles 2 up to and including 6, in conjunction with Article 9, also help to prevent unjustified enrichment and to a degree, have a preventive effect on the (former) minister.

It is necessary to consider the question of the extent to which the rights of ministers and of their spouses or partners and children are harmed by the proposals in the draft national ordinance. The right to privacy contains a wide range of elements. These elements can all be classed under one heading: every individual must have scope to live his own life with as little external intervention as possible.

The reporting obligation imposed on a minister in Articles 2 up to and including 6 of this draft national ordinance, as laid down in the said Articles, restricts his right to protection of privacy, as laid down in Article 5 of the draft Constitution and Article 8 of the European Convention on Human Rights and Fundamental Freedoms (Treaty Series 1951, 154) (ECHR), Article 17 of the International Covenant on Civil and Political Rights (Book of Treaties 1969, 99) (ICCPR) and Article 12 of the Universal Declaration of Human Rights (Book of Treaties 1969, 99).

Unlike Article 8 of the ECHR, Article 17 of the ICCPR contains no restriction clause.

Article 17 of the ICCPR provides only that a restriction may not be arbitrary or unlawful. Article 8 of the ECHR therefore appears to provide more protection for individual citizens. Since Article 17 of the ICCPR imposes no further requirements than Article 8 of the ECHR and Article 12 of the Universal Declaration of Human Rights, in contrast to the aforementioned treaty provisions, has no direct effect, testing in terms of Article 8 of the ECHR will suffice.

Pursuant to Article 8(2) of the ECHR, restrictions of the right to privacy are possible only if they are in accordance with the law and are necessary in a democratic society in the interests of one or more of the objective criteria referred to in paragraph 2. Article 31(1) of the draft Constitution imposes similar requirements: a restriction of the traditional constitutional rights is

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necessary and proportional and is described as specifically as possible. In the government's view, these requirements are met. The interpretation of the objective criteria in the jurisprudence of the European Court of Human Rights always takes place in relation to what is deemed to be 'necessary' in a democratic society.

The objective criteria laid down in Article 8(2) of the ECHR are the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

The purpose of this national ordinance is to promote the integrity of public administration.

Without an administration with integrity, the democratic rule of law is not credible. The assurance of integrity is deemed to be a subsequent serious interest justifying restrictions of the right to privacy. The measures proposed in this draft national ordinance are based on two of the aforementioned objective criteria in the ECHR, namely the prevention of disorder and the prevention of crime.

The jurisprudence of the European Court of Human Rights provides an answer to the question of how the objective criterion of 'the prevention of disorder' should be interpreted. In the Engel case, the European Court of Human Rights took the view that the term 'disorder' not only relates to public order, but also the order applying within a particular social group (decision of 8 June 1976, A. 22 (1977), § 98). This draft national ordinance concerns the group of ministers and partners who must tolerate a breach of their privacy on the ground of the restriction clause of Article 8(2) of the ECHR. After all, there is a risk that disorder within the group in which they can be classed will be reflected in the rule of law of Sint Maarten, which could be seriously disrupted as a result.

As mentioned earlier, restriction of the right of privacy is possible in this draft national ordinance because the proposals are necessary in the interests of preventing disorder. The obligation laid down in Article 2 makes undesirable conflicts of interests and positions visible and in observance of the provisions of Article 3, the necessary measures can be taken against this.

The provisions of Articles 2 up to and including 6 serve partly as a tool to control unjustified enrichment. If there are suspicions that a (former) minister or his spouse or partner has committed a crime, referred to in Article 10 of this draft, the examining judge, in response to a demand of the public prosecutor, may obtain access to or receive copies of his written declarations and other documents filed with the clerk of the Common Court of Justice. To the extent that the declarations are available in digital form, a copy of these will suffice. Documents relating to the spouse or partner may only be requested and used as evidence against the spouse or partner in the detection of crimes in which they were involved in connection with the provision of information.

As already mentioned, pursuant to Article 8(2) of the ECHR, restrictions are possible only if they are in accordance with the law and necessary in a democratic society. As the European Court of Human Rights includes everything that is deemed to be law in accordance with the national constitution in the term 'law', provided that this complies with the requirements of identifiability and predictability, the aforementioned term includes a national ordinance.

In the jurisprudence of the European Court of Human Rights, the following three criteria are used for the requirement 'necessary in a democratic society'. The restriction requires the existence of a 'pressing social need', must be 'proportionate to the legal aim pursued' and the reasons that the state gives for the restriction must be 'relevant and sufficient' in the light of the objective criteria laid down in Article 8(2) of the ECHR. In determining what is 'necessary' in this regard, Parliament is granted a certain 'margin of appreciation'.

The need for the proposals in this draft national ordinance must primarily be seen in the light of the revival of attention to administrative integrity in the Netherlands Antilles and Sint Maarten. Continual attention to the preservation of integrity is necessary for the maintenance of an incorruptible and reliable public administration that exercises due care. Government integrity is not a given, but a necessary condition for the proper function of the democratic rule of law, which must be created. It is important that provisions are made that contribute towards protection against potential threats to the integrity of the public administration. The separation of public and private interests in the actions of officials is a *conditio sine qua non* for a transparent and accountable administration.

The risk of bias in the actual performance of official duties is higher in a small community. The issue of the risk of bias becomes more transparent if it is borne in mind that there is a concentration of offices in the Netherlands Antilles and in Sint Maarten with a limited number of holders of office and the performance of official duties in the direct vicinity of citizens with an

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interest. The small scale of our society entails limited social distance, as a result of which holders of office cannot always avoid social contacts. Emotional, economic and political ties can increase the risk of bias. Emotional relationships play an important role in our society. Family ties are perceived as very close, while the circle of persons with which people perceive family ties is very large. The decision-making and decisions of a holder of political office may not be influenced by personal interests and the appearance of such influence must also be avoided. In the presence of such influence, there may be an undesirable conflict of interests. However, political ties can have a negative influence on the conduct of a politician. Relationships are necessary with voters as well as with fellow party members. As a result of the recognition of such conflicts of interest, various countries have taken measures. A report by the holder of office of his secondary activities and secondary positions, as well as commercial interests and other asset elements is an example of such a measure.

The fact that the spouse or partner of a minister is also taken into consideration arises from the assumption that ties will exist with them that could lead the minister to take account of their interests. Ministers also have such ties with their children.

The risk that interests of the minister will be transferred to his spouse, partner or children would increase if a choice were made to require the minister to submit a written declaration concerning himself alone. Apart from the obvious risk of a conflict of interest between family members and the public interest, the underlying reason for reporting these is to prevent the shift of interests from the minister to his spouse or partner, or to his children. In connection with this, a restriction of their rights of privacy is also necessary in order to attain the envisaged goal.

Because the written declaration will be submitted to only a limited number of persons and institutions (the prime minister, the Council of Advice, the General Audit Chamber and the clerk of the Court of Justice), the restriction of rights of privacy will be kept as limited as possible.

The extent to which the provisions of Articles 2 up to and including 6 of this draft national ordinance should also apply for candidate ministers was also considered. The application of the aforementioned provisions to candidate ministers could reduce the risk that a candidate minister has to resign shortly after his appointment, due to an undesirable conflict of interests. However, the right of privacy of a candidate minister and his spouse or partner and children must be taken into account. As already mentioned, the said right can only be restricted if one of the objective criteria referred to in Article 8(2) of the ECHR applies. This is less defensible for a candidate minister.

It is customary for the Netherlands Antilles Security Service to investigate whether the conduct of a candidate minister or state secretary is impeccable. Other conditions may be imposed for a candidate minister. It is advisable for the political parties to reach agreements on the formation of the government that each party will propose only one candidate minister, who will be investigated to ensure that he has no secondary activities, secondary positions, commercial interests and other asset elements that are undesirable in the interests of proper performance of his official duties as a minister or the preservation of impartiality and independence, or of confidence therein. The current (internal) Regulation concerning the incompatibility of interests and positions for ministers and state secretaries in the Netherlands, dating from 1978 and 1983, can serve as an example.

The minister's reporting obligation, as laid down in Article 4, with regard to the intention to acquire commercial interests or to accept secondary positions or secondary activities, gives the prime minister an opportunity to prevent the occurrence of undesirable conflicts of interest.

4. Financial consequences

In this draft, the assessment of whether there is an undesirable conflict of interests and positions in relation to ministers is placed in the hands of the prime minister, in accordance with the draft national ordinance of the Netherlands Antilles and practice in the Netherlands. Partly in view of the independent position of the Council of Advice and the General Audit Chamber, additional advisory tasks are assigned to these bodies.

No structural costs are associated with the aforementioned tasks for the organisation of the Council of Advice and the General Audit Chamber or for the country (the Department of the Clerk of the Common Court of Justice). To the extent that incidental costs associated with the

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performance of the tasks pursuant to this national ordinance are not already taken into account, incidental cover must be found for these.

5. Article by Article Section

Article 1

Pursuant to Article 1(a), 'secondary position' refers to every position, paid or unpaid, that a person holds in addition to the main occupation (in this case, minister), such as a director of a public limited liability company.

Pursuant to Article 1(b), 'secondary activity' refers to an activity in addition to the main occupation that cannot be classified as an occupation, such as that of treasurer of a sports association.

The term 'commercial interests' is described in Article 1(c) as 'all rights, direct or indirect, that a person holds to the proceeds of undertakings'. The possession of shares is an example of a commercial interest.

The description of 'partner' in Article 1(d) is consistent with the description in Article 2(4) of the 1940 National ordinance profit tax (P.B. 2002, No. 54). The fact that a joint household is maintained can be shown by submission of an extract from the population register or a copy of the cohabitation agreement. A joint household is also deemed to exist if a minister and his life partner who are unmarried and cohabit have purchased a residential property that is available to them as their main residence.

Pursuant to Articles 2 up to and including 6 of this draft national ordinance, the minister is required to submit a written declaration concerning commercial interests and other asset elements, secondary positions and secondary activities, as well as those of his spouse or partner and children, at the start and end of the term of office, as well as during that period. Pursuant to Articles 4 and 5, interim changes in the commercial interests, secondary positions or secondary activities, as shown in the written declaration submitted, must always be notified to the prime minister without delay, by means of a written notification.

Article 2

Ministers are required to submit a written declaration as referred to in Article 2(4) to the prime minister within 30 days of accepting their appointment. The declaration is made to the best of the minister's knowledge. The minister can only guarantee the reliability of the data concerning his spouse or partner and his children to the extent that he was, or should have been aware of these. The said reservation is laid down in Article 2(2). He is deemed to be able to guarantee the reliability of the data concerning himself and those concerning his recognised minor children, born in or out of wedlock, and unrecognised minor children concerning whom he has been ordered by a court to provide for their maintenance, or for whom he has recognised a maintenance obligation by an authentic deed.

Article 2 concerns commercial interests and other asset elements within and beyond Sint Maarten. In view of any conflict of interest, it is not only the commercial interests and other asset elements within the national boundaries that should be known.

In view of the dual character of the purport of this draft national ordinance, the term 'asset elements' is broadly defined. As laid down in Article 2(6), the term 'asset elements' covers immovable property, moveable goods, rights capable of being expressed in money and receivables and debts. 'Moveable goods' as referred to in the preceding sentence, refers to all goods that are not covered by the categories of immovable property, rights capable of being expressed in money, receivables and debts.

A choice was made to limit the term 'moveable goods' by setting a threshold value. In international practice, a threshold value is set on the basis of investigations. On the basis of experience figures, an amount is chosen that is not too low and also not too high. The threshold value of ANG 20.000,-- set in Article 2(5) applies only for moveable asset elements and is not based on experience figures because these are not available. A match has been sought with the threshold value used for cash transactions in accordance with the National ordinance disclosure of unusual transactions (P.B. 1996, No.21).

The description of 'asset elements' used also covers financial and commercial interests. With a view to prevention of undesirable conflicts of interest, taking account of the financial and commercial interests of ministers is an obvious step. Every appearance of a lack of objective

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decision-making in this regard must be avoided. Not only the field of policy for which a minister holds direct responsibility, or the field of policy to which the task assigned to the minister relates are relevant here. After all, as a member of the government, the minister is involved in decision-making on all matters raised in the Council of Ministers. On the basis of the declarations submitted, it is possible to determine whether the minister has control regarding relevant financial or commercial interests that could stand in the way of objective decision-making. Where that is the case, the person concerned must either dispose of such interests completely or must make an arrangement under which he cannot or will not exercise control during his term of office. The risk of a conflict of interests arises if a minister has financial or commercial interests that could influence independent decision-making. This primarily concerns financial interests in businesses that have or could obtain relations with the government service and concerning which the government takes decisions. The debts (negative financial interests), such as debts from mortgage receivables, may also be relevant in connection with a potential conflict of interest.

Furthermore, with regard to the minister's secondary positions and secondary activities, every possible appearance that these could harm objective decision-making must be avoided. Moreover, the office of national administrator is so demanding and important that it requires the full commitment of the person concerned. Pursuant to this draft, a national administrator should therefore resign from secondary positions or discontinue secondary activities that are undesirable in the interests of proper performance of the office of minister or the preservation of impartiality and independence, or of confidence there. At the same time, it is possible to accept secondary positions and secondary activities during the term of office, provided that these do not harm the independence and impartiality referred to above. The draft differs somewhat in that regard from the current (internal) 'Regulation concerning incompatible interests and positions for ministers, state secretaries and ministers plenipotentiary' approved by the Council of Ministers of the Netherlands Antilles. After all, under the current regulation, a minister of the Netherlands Antilles may not accept any secondary positions during his term of office. The government takes the view that the obligation to provide interim notification and to submit an interim written declaration in that regard is sufficiently assured. The risks that the internal regulation referred to above was intended to prevent are adequately covered in this draft national ordinance.

If Article 2(8) is implemented, all information in the form of significant patterns on or in a carrier will be qualified as a written document. The documents that may be requested pursuant to this national ordinance will therefore include these written documents.

Articles 3 and 4

Article 3 concerns the commercial interests, secondary positions and secondary activities that a minister and his spouse or partner and children already hold or perform on acceptance of his office.

Article 4 concerns the commercial interests acquired during the minister's term of office and the intention of the persons concerned to accept secondary positions and secondary activities. The principle is that the minister or his spouse or partner should accept no commercial interests, secondary positions or secondary activities without notifying the prime minister of this in advance. If a minister or his spouse or partner accepts the commercial interests, secondary positions or secondary activities after the notification referred to in paragraph 1 but before the prime minister has been able to issue an opinion on the written declarations, the national administrator hereby also accepts the risk that he can face criminal charges pursuant to Article 4(3), in addition to a parliamentary no confidence motion.

Article 4 also takes account of income sources acquired without any action on the part of the minister. Article 4(4) explicitly refers to income acquired pursuant to inheritance or donations. Another example that can be given is income obtained on the grounds of a life insurance policy and income obtained from gaming and betting.

The prime minister decides which secondary positions and secondary activities are undesirable in the interests of proper performance of the office of minister or the preservation of impartiality and independence, or of confidence therein. The criteria for determining which positions or offices are incompatible with the main occupation are consistent with the criteria laid down in Article 7(2) of the 2002 National ordinance General Audit Chamber of the Netherlands Antilles (P.B. 2002, No. 135) for members, deputy members and the secretary of the General Audit Chamber.

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It is not possible to provide an exhaustive list of positions and the like that are 'sensitive'. These must be determined in the spirit of this national ordinance and to the best available knowledge. The prime minister shall obtain the advice of the Council of Advice and the General Audit Chamber. The aim of this is to further increase the objectivity. Furthermore, this criterion also applies for the members of the Council of Advice, on the basis of the draft national ordinance Council of Advice.

The advice of the Council of Advice shall be obtained through the intermediary of the Governor with regard to all matters concerning which this is required by general ordinance (in this case, this national ordinance). The prime minister shall consult the minister before deciding whether an undesirable conflict of interest is at issue. The following principles apply for the talks with the minister concerned and in the decision, referred to in Articles 3 and 4:

- a. secondary positions and secondary activities that, in the view of the prime minister, could give rise to an undesirable conflict of interest shall be resigned or discontinued;
- b. commercial interests shall be disposed of, to the extent that these could give rise to an undesirable conflict of interest.

With commercial interests, attention is in any event devoted to priority shares, shares or participating interests that qualify for the provision of services for the country or subsidies charged to the country and the like, and to participating interests in private law legal entities in which the country holds part or all of the package of shares.

If an incompatibility as referred to in Article 3 of this draft national ordinance arises, it is reasonable that the minister should discontinue the secondary activity or resign from the secondary position in question if he wishes to retain his office as minister. However, if the minister is not willing or able to discontinue the secondary activity or resign from the secondary position in question, he is expected to resign his office. The foregoing applies likewise for commercial interests for which the minister does not wish to make the necessary provisions in his asset management.

Pursuant to the draft Constitution, the minister is politically answerable to Parliament, which, in the cases, referred to in Articles 3(5) and 4(3), will take action against the minister as part of its control task, by issuing a no confidence motion. If the Governor finds that a minister no longer has the confidence of Parliament, the minister will be dismissed before the expiration of his term of office by an administrative decision, stating the reasons.

In order to give Parliament an opportunity to avail itself of the aforementioned powers, it must be notified by the prime minister if such a case arises, at the earliest opportunity. Articles 3(5) and 4(3) provide for this. Obviously, the Council shall make efforts to disclose as little privacy-sensitive information as possible here. Articles 3 and 4, which apply to the minister, have been declared inapplicable to Members of Parliament for the following reasons. An important difference exists between the role of a minister and that of a Member of Parliament in the final stages of the decision-making process. The nature of the powers of a Member of Parliament in the aforementioned process is different to that of a minister, in that an individual Member of Parliament has no decision-making powers, but only a right to vote on matters that lie within the competence of Parliament. After all, pursuant to the draft Constitution, Parliament may not consult or take decisions unless more than half the number of members is represented. Furthermore, all decisions are drawn up by an absolute majority of the votes cast. In the interests of securing public confidence in the integrity of parliamentary decisions, the main issue with a Member of Parliament is the question of whether a member should abstain from voting (co-voting) if a matter before Parliament affects his personal interests. In the view of the Administrative Board, this is adequately regulated in Article 53 of the Constitution, which refers to a number of matters on which Members of Parliament should abstain from voting.

Pursuant to Article 3(5) and Article 4(3), the prime minister shall inform Parliament without delay if an incompatibility arises and the minister does not make the necessary provisions in his asset management or does not resign from the relevant secondary position or discontinue the relevant secondary activity.

Article 6

As already mentioned, minister are required pursuant to Articles 2 up to and including 6 of this draft to submit a written declaration concerning their commercial interests and other asset elements, secondary positions and secondary activities, as well as those of their spouse or partner and children, at the start and end of their term of office and during this period.

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Requiring ministers to submit a written declaration after the end of their term of office facilitates the use of the relevant declarations as evidence by the Department of Public Prosecutions if the requirements of Article 10 of this draft are met. The submission term for the minister commences on the day following the date on which the parliamentary term ends or the date on which interim dismissal is granted.

Article 8

In Article 8, the Minister of Justice is designated as the official responsible for the register. The reason for this is that the Department of the Clerk of the Common Court - the manager of the written declarations, notifications and requests of the Department of Public Prosecutions referred to in this national ordinance – as well as the Department of Public Prosecutions fall under his responsibility. The establishment of regulations of the said register should, however, not be the responsibility of the Minister of Justice alone. This should be established by agreement with the Council of Ministers. After all, the Minister of Justice, too, may find himself in a situation in which his interests threaten to conflict with the general interest. In order to prevent the possibility that this minister should act in his own interests in that respect, a choice was made in this national ordinance for shared responsibility with the Council of Ministers.

Article 9

Although this concerns the custody of privacy-sensitive information, in order to avoid technical evidence problems, a custody term of five years following the end of the term of office should be chosen. The term is always longer than five years if, on the date on which the first five-year term expires, the minister to which the documents relate still holds the office of minister. The term then commences on the date on which the term of office expires. Rules must be laid down for the custody and destruction of documents, including provisions for proper storage of data and provisions that designate the group of persons with access to the data.

Article 10

As already mentioned in the general section of these Explanatory Notes, the provisions of Articles 2 up to and including 6 also serve as an instrument to combat unjustified enrichment. The proposed Article 10 contains a criminal law regulation in that regard, which is drawn from the draft national ordinance containing rules in relation to criminal procedural law aspects of the national ordinance promotion of the integrity of holders of authority of the country of the Netherlands Antilles.

Obviously, partly taking account of the value attached to the protection of privacy and the purpose of this draft, only when there are suspicions that certain sanctioned violations of standards, defined in more detail in criminal law, which can be related to property offences, have occurred, can the Department of Public Prosecutions gain access to information saved on the basis of this draft.

It is necessary to prevent abuse of the powers created in this regulation in the gathering of evidence by the Department of Public Prosecutions. The Department of Public Prosecutions will only be able to gain access to the documents of the (former) minister or minister plenipotentiary, referred to in Article 8(1) in the case of investigation of the following categories of crimes of which the (former) minister or minister plenipotentiary is suspected:

- a. forgery of coinage, coin notes and banknotes;
- b. forgery of seals and trademarks;
- c. forgery of documents;
- d. theft;
- e. blackmail and extortion;
- f. embezzlement;
- g. deception (fraud);
- h. defrauding creditors and holders of rights;
- i. serious offences by civil servants (relating to property crimes);
- j. obstruction of justice;
- k. the crimes described in Articles 1, 2 and 3 of the National ordinance criminalisation of money laundering (P.B. 1993, No. 52).

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Pursuant to Article 10(3), the request to the examining judge contains the name, the date of birth and the identity number of the person concerning whom the Department of Public Prosecutions requires information. The form of the information required must also be reported. Simple viewing of the documents may suffice, but the applicant may also need a copy of the relevant documents once he has been granted access to them. Both forms are possible pursuant to paragraphs 1 and 2 of the latter Article.

A suspect has the right to view the case documents relating to his case on request. A request to that effect can be made three weeks prior to the date on which the custody term referred to in Article 9(1) expires. The clerk shall decide on such a request within two weeks of its receipt. The proposed term of three weeks for the submission of the request means that the clerk, following the term of two weeks for his decision, has at least one week's time to grant the applicant access.

The access right of the suspect is not unlimited. During the preparatory criminal investigation the suspect's access right may be withheld in the interests of the investigation and to the extent that the suspect's interest in access is outweighed by the interests of the investigation.

Following the preliminary court investigation or, if this did not take place, as soon as the summons to appear in the Court of First Instance has been served, this right can no longer be restricted on the grounds of the foregoing. In order to avoid the suspect from discovering during the preparatory investigation, via this national ordinance, which documents the Department of Public Prosecutions has requested as evidence in criminal proceedings against him, an exception is included in Article 10(9) of this draft.

Finally, it is important that, pursuant to Article 123 of the draft Constitution, further prosecution of a minister for a crime can take place only after the Common Court has issued an order in response to a petition from the Attorney-General. This regulation is related to the far-reaching legal consequences that Articles 36 and 50 of the Constitution attach to certain prosecution actions by a minister in office. With that order, the Attorney-General himself, or another member of the Department of Public Prosecutions designated by him, may prosecute the minister.

Article 12

In order to prevent that interests also influence decision-making Article 12(1) contains a provision serving to exclude the minister from decision-making in the Council of Ministers on the matters referred to in paragraph 1.

Unlike members of the government, the ministers do not form part of a collegiate administrative body. With the exception of the cases referred to in the Rules of Order of the Council of Ministers, ministers take decisions independently on matters that fall under the ministry for which they are responsible. In connection with this, Article 12(2) of this draft national ordinance includes a provision requiring that matters that are not to be discussed in the Council of Ministers according to the aforementioned rules of order and that affect his interests or that of his spouse or partner or his relatives by blood or affinity to the third degree must be discussed in the Council of Ministers.

Pursuant to Article 41(6) of the draft Constitution, the minister plenipotentiary is given an opportunity to attend the discussions of the Council of Ministers regarding matters that concern him. The proposed Article 11(3) contains a provision requiring that the minister plenipotentiary must refrain from casting an advisory vote on matters that affect his interests or those of his spouse or partner or his relatives by blood or affinity to the third degree. This is consistent with Article 54(1) of the Island Regulation of the Netherlands Antilles. The latter paragraph also applies for advice to be issued by the minister plenipotentiary. The provisions of Article 5(1) of the Instructions of the minister plenipotentiary (P.B. 1993, No. 99) Concerning Commentary by the minister plenipotentiary on documents relating to Kingdom affairs can serve as an example.

Article 12(3) also applies to the deputy minister plenipotentiary.

No provision applying for Members of Parliament, to the effect that they must refrain from voting in the event of an undesirable conflict of interests, is included in this draft national ordinance, because this matter is adequately regulated in Article 53 of the Constitution.

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Articles 14 and 15

Pursuant to Article 372bis(3°) of the Criminal Code, a minister may face criminal prosecution if he takes actions knowing that these violate the provisions of any legal regulation in the country. The provisions of the aforementioned paragraph mean that it is not necessary to include any special criminal provision in this national ordinance for the following cases:

- The minister who does not comply with the obligation laid down pursuant to Articles 2(1), 3(3), 3(4) 4, 5(1), 5(2) and 6 within the set term, or within a reasonable term;
- The minister who deliberately acts in contravention of Article 12(1) and 12(2).

The proposed Article 14 therefore provides only for a criminal provision for the minister plenipotentiary and his deputy if they act in contravention of Article 12(3).

No criminal provision is needed in this draft national ordinance for deliberate inaccurate or incomplete entries in the written declaration by a minister or minister plenipotentiary either, because such actions are deemed to be forgery of documents. Forgery is already sanctioned in Articles 230 *et seq.* of the Criminal Code.

In Article 2(3), a choice was made to impose the obligation on the spouse or partner of a minister to provide assistance for the completion of the declaration and, to the extent that such assistance is provided, to provide accurate information to the minister. Action in contravention of the aforementioned obligation is criminalised in Article 14. The maximum penalties included in the latter Article are consistent with those included in Article 52 of the National ordinance general insurance of exceptional medical expenses (P.B. 1996, No. 211) for a similar criminal offence.

Article 16

The maximum penalties included in Article 16 are consistent with the provisions of Article 372bis(3°) of the Criminal Code.

Article 17

The government also considered criminalisation of culpable leaking of information. However, as in the Netherlands, this was considered too drastic a measure. After all, this would mean that in principle, unintentional disclosure of confidential information could also provide grounds for criminal prosecution. Certainly in the small-scale society of Sint Maarten, civil servants and other holders of confidential information must be able to do their work without fear that certain expressions are qualified as careless breaches of confidentiality after the event. Culpable violation of the confidentiality obligation can be sanctioned adequately outside criminal law.

In conjunction with Article 17, Article 13 makes it possible that, if someone deliberately leaks confidential information, establishing that the suspect should have been aware of the confidential nature of the information already suffices as proof of the offence. For civil servants, this criterion soon applies, because civil servants know that they must treat information that they receive in the performance of their work prudently.

The government also takes the view that excessive derogation from the general penal provisions of the Criminal Code must be avoided. After all, Article 285 of that Code also makes intentional leaking of information a criminal offence. The reason for the choice of a separate criminal provision, in addition to the aforementioned Article 285, must be sought in the desirability of defining the extent to which the perpetrator was aware that the information was confidential. Furthermore, the government regards a more severe sanction than that referred to in Article 285 to be more appropriate in connection with the nature of the information that this national ordinance concerns.

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