

## **TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 25)**

### **EXPLANATORY MEMORANDUM to the National ordinance substantive civil servants law**

#### **1. General**

As part of the political modernisations last confirmed at the Round Table Conference of 15 December 2008, the country of the Netherlands Antilles will be dissolved and the new countries of Sint Maarten and Curaçao will be formed. The island territories of Bonaire, Saba and Sint Eustatius will be included in the structure of the Kingdom of the Netherlands.

In that regard, it is necessary to set up the institutions for the new Country of Sint Maarten. The Constitution provides that the legal position of civil servants will be regulated by national ordinance. The draft in the appendix to this ordinance serves that purpose. This National ordinance substantive civil servants law is therefore an organic regulation arising directly from the Constitution.

This National ordinance substantive civil servants law (hereinafter: "LMA") concerns the current text in the Netherlands Antilles. All amendments made to the LMA over the years are incorporated in this draft.

As a result of the dissolution of the country of the Netherlands Antilles, the formation of the new countries of Sint Maarten and Curaçao and the inclusion of the island territories of Bonaire, Saba and Sint Eustatius in the structure of the Kingdom of the Netherlands, references to the Country of the Netherlands Antilles and the island territories have been scrapped in this draft wherever possible and desirable.

The principle for the composition of the text was that it should not differ substantively from the old text. Two exceptions have been made to that principle. Firstly, provisions concerning promotion of the integrity of civil servants have been tightened further. Secondly, the possibility of objections against administrative decisions by the competent authorities has been opened in the national ordinance itself.

The expansion of Article 14 with regard to the level of mastery of Dutch and English by civil servants also deserves a mention. As both languages are official languages of Sint Maarten pursuant to the Constitution, it is obvious that civil servants should master both languages, both orally and in writing. Positions for which this requirement does not apply may be designated by national decree, containing general measures. In this way, sufficient flexibility is retained.

The provisions concerning integrity are new; they are included in section 3 (secondary activities) and section 5 (acceptance of gifts) of Chapter VII. Two new sections have also been added to this chapter, i.e. sections 14 (integrity counsellor) and 15 (suspicions of a breach of integrity).

The regulation of a procedure for notices of objection in the LMA will exist alongside the regulation laid down in the Regulation concerning civil servants jurisprudence (hereinafter: "RAR"). The RAR has traditionally regulated the possibility for civil servants to appeal against an administrative decision of the competent authority before the civil service court. In the event of amendments of the LMA and the implementing regulations, in particular the regulation concerning the assessment of performance, a procedure for notices of objection has been created at a lower legislative level, namely that of the national decree, containing general measures. This is not consistent with the principles for the legislation that the award of powers shall take place by or pursuant to national ordinance. The opportunity has been taken to offer civil servants the possibility of filing an objection against an administrative decision taken by the competent authority in the LMA itself. The competent authority may reconsider the order issued. With regard to the government, there will be a more legally robust basis for the processing and assessment of notices of objection against e.g. placements or assessments. The regulation of the procedure takes place by national decree, containing general measures. Perhaps superfluously, it is noted that the possibility of objection to the competent authority in no way prejudices the right of a civil servant to appeal directly to the court in civil service cases. The system is then the same as in the National ordinance administrative justice which citizens may decide to request reconsideration of decisions by the administrative authority that took an administrative decision or address an appeal to the administrative court.

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Finally, Articles have been repealed over the years and other Articles have been added in the old LMA (the LMA of the Netherlands Antilles), often using the previous Article number with the addition of a letter. The opportunity has now been taken to number the Articles in sequence.

As the LMA has existed and been applied for many decades, repeating the Article by Article explanatory notes already presented with earlier amendments has not been done now.

An Article by Article explanation is provided only with the aforementioned new provisions concerning integrity, to the extent necessary.

## **2. The integrity provisions**

### **2.1 Review of amendments**

The following amendments have been made with regard to secondary activities: Articles 54 and 55 of section 3 of the old LMA have been repealed. They have been replaced by Articles 51, 52 and 53 now included.

The regulation concerning the acceptance of gifts has also been included in section 5. Articles 59, 60 and 61 of the old LMA have been replaced by the present Articles 58, 59 and 60.

Finally, two new sections have been added, sections 14 and 15, comprising Articles 82 to 85; the integrity counsellor and the procedure in the event of suspicions of a breach of integrity are regulated here.

### **2.2 General explanation of integrity provisions**

It is of vital importance that citizens have confidence in the performance of the government. That confidence of the public can only be won or retained and strengthened if the quality, incorruptibility and care of the government, and, therefore its integrity, are beyond all doubt. Without that confidence, the democratic state under the rule of law will be damaged to its roots. In connection with this, the Administrative Board prepared a draft national ordinance concerning the promotion of integrity among holders of authority for the country of Sint Maarten. The draft contains a reporting obligation for the secondary activities of ministers and commercial interests of their own and of their partners and children. The draft for Sint Maarten is based on the equivalent draft for the Netherlands Antilles, in response to the recommendations of Konfiansa report by the Constitutional Affairs Bureau of the Netherlands Antilles.

Not only the conduct of administrators, but all government actions should be distinguished by incorruptibility, reliability and due care, i.e. by integrity. High-quality government action requires a high-quality civil service machinery. This not only imposes requirements on the organisational structures, but also on the integrity and discipline with which the civil service and its employees bear and meet their responsibilities.

Civil servants must be loyal to the administration and at the same time give high priority to their own responsibilities. This imposes high demands on their capacity to operate with due care and effectively in the performance of their official duties in an environment that continually faces them with changing situations and with new opportunities and threats. This makes the position of civil servants vulnerable. It is necessary to continually guard against civil servants abusing their position, powers and knowledge in order to benefit themselves or others. That notion is also reflected in Article 44(1) of the LMA. This provides that a civil servant 'is required to fulfil the duties arising from his position accurately and conscientiously and to conduct himself as befits a good civil servant'.

Anyone can imagine what is meant by the term 'a good civil servant'. A good civil servant makes efforts for the interests of the community and supports his minister in implementing the chosen policy. Citizens must also be able to rely on the fact that their capacity, their social or financial position will have no consequences for the service they receive in contacts with a civil servant. It can generally be said that it is expected of a good civil servant that the possibility of personal gain, either directly or through the deployment of powers for third parties, has no influence on his performance.

Some aspects of the term 'good civil servant' are developed in more detail in the LMA. Articles 61 and 62 impose a confidentiality obligation on civil servants, for example, and prohibit abuse of the information they obtain during the performance of their official duties.

The LMA also contains provisions concerning the performance of secondary activities and the acceptance of gifts. This draft national ordinance implements a number of changes in those

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provisions. Both the public and civil servants benefit from a clear definition of the official responsibilities concerning the performance of secondary activities and the acceptance of gifts. The prohibitive provisions are sharpened where necessary and the possibilities for control of compliance with those rules of conduct are improved with the introduction of a system of mandatory reporting and registration.

In order to further support civil servants in developing the term 'good civil servant' in their day-to-day work, it is desirable to take organisational measures. To that end, this draft national ordinance introduces the integrity counsellor, who civil servants can consult with questions concerning integrity, including if they obtain knowledge of potential breaches of integrity.

The obligation for civil servants to conduct themselves as good civil servants as such entails that civil servants can be expected to report potential breaches of integrity. To promote such reporting, this draft national ordinance provides clarity with regard to the procedure to be followed for a report. The procedure followed in this way must also provide an assurance that a report will be taken seriously.

### **2.3 Articles 51 up to and including 56: secondary activities**

These Articles contain the regulations concerning the performance of secondary activities.

In the interests of integrity, matters such as entanglement of interests, conflict of interests, damage to the reputation of the office and inadequate availability for the official position are undesirable. The proposed Articles impose a prohibition on the performance of secondary activities that could hamper the performance of the civil servant or that of the relevant service. In order to make this rule of conduct controllable, the introduction of a system is proposed in which civil servants are required to report secondary activities and the head of the service assesses these reports and then records the result of the assessment.

With regard to the aspects of administration and recording of that system, provision is made for further development by ministerial regulation. That further development may also include the use of the data recorded in connection with secondary activities. With a view to the integrity policy to be pursued, there is in any event a need for the national government to have an insight into information on the extent to which civil servants perform secondary activities. It is obvious that protection of the privacy of the civil servant concerned in the records must also be regulated.

Not all activities that civil servants perform in addition their office are covered by the term 'secondary activities'. Article 51 provides that secondary activities only include the work that is (or will be) performed on the basis of employment, in relation to business or trade or to fill an administrative or supervisory position. This does not include political activities and trade union work. For that reason, these activities do not need to be reported.

Article 52 provides that the head of the service must assess the reported secondary activities. Those assessments not only concern the question of whether there is actually an entanglement of interests, a conflict of interests, damage to the reputation of the office or inadequate availability. Secondary activities where there is a risk that the performance of the civil servant or that of the relevant service will be hampered are also important. Examples of secondary activities that could affect the interests of the relevant service include:

- secondary activities obtained (partly) under the influence of the position as a civil servant or of the nature of the official work;
- secondary activities of a nature similar to that of the official duties;
- secondary activities that could lie in the same field as that of the official position;
- secondary activities in which it is possible that information obtained in the official position will be used;
- secondary activities in which the person concerned may deal with natural persons or legal entities that he also deals with in the official position;
- secondary activities that cannot be consistent with the reputation of the office or reputation of the service;
- secondary activities that can lead to poor collegial relationships;
- secondary activities in which the demands on time or the workload could have a negative impact on the availability for performing the official position;
- secondary activities that are performed for a natural person or legal entity who/which probably has a poor reputation.

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The assessment by the head of the service of reported secondary activities may not go so far that every risk is ruled out. For the secondary activities that could affect the interests of the service, the head of the service must consider whether a particular risk can no longer reasonably be accepted. The head of the service can take account of the following elements in that assessment:

- the character of the secondary activities;
- the position of the civil servant and the position in the organisation;
- the area in which the secondary activities are performed;
- potential entanglement with the official position;
- the risk that the reliability and integrity of the civil servant in question will be jeopardised;
- the risk that official information will be abused in the performance of the secondary activities;
- the risk that a personal confrontation will arise in the official position through the secondary activities;
- the reputation of the natural person or legal entity for which the secondary activities are performed;
- the possibility that secondary activities that are acceptable in themselves will have significant negative public effects;
- potential negative effects of the secondary activities on the enforcement possibilities in the official position;
- the demandingness of the secondary activities.

Furthermore, in far from every case in which secondary activities present a certain risk for the integrity of public administration is it necessary to forbid those secondary activities. It is also possible that the threat of negative effects for the official position can be absorbed by the fact that conditions are attached to the performance of secondary activities.

The system of reporting, assessment and recording also benefits legal security. In this way, it becomes clear to the civil servant concerned whether, in the view of the head of the service, the secondary position is admissible or not. The civil servant must be notified of that view within a term of four weeks after the secondary activities have been reported. Objections and appeals may be filed against that notice in the usual manner.

#### **2.4 Articles 58 up to and including 60: acceptance of gifts**

In these provisions, the regulation concerning the acceptance of gifts has been tightened.

Article 58: gifts may be offered in many different forms. Examples of gifts include ballpoint pens, calendars, diaries, a bottle of wine, a dinner, gift coupons, a trip, discounts on articles, tickets for shows, events, symposia or congresses. Gifts may also be given by way of a service, such as the production of an architectural design or the provision of advice. Because of the various forms that gifts can take, these provisions concerning the acceptance of gifts use broad terms: fees, remuneration, gifts or promises in any form whatsoever.

It is clear that the acceptance of gifts can have negative effects for the integrity of public administration. With the acceptance of gifts, a civil servant exposes himself to the possibility of influencing. It is essential that civil servants should retain their independence.

Article 59 develops that rule of conduct further by forbidding civil servants to accept gifts without the consent of the head of the service. For reasons of controllability and transparency, civil servants are required to report all offers of gifts to the head of the service without delay. That obligation also applies if the civil servant does not intend to accept the offer.

The head of service must always be consulted first regarding whether the gift can be accepted. The head of the service decides whether the gift can be accepted and records a number of relevant data concerning the report and the decision. In certain cases, the head of the service may not permit the civil servant to accept a gift. This applies in any event for gifts representing a value in excess of ANG 100. That amount may be further laid down by national decree in response to new situations or on the basis of new insights. Considerations of inflation-proofing may also play a role.

A head of service may also not permit a civil servant to accept a gift if it is clear, or if there are reasonable suspicions that the intention is to win a favour in that manner. Examples of aspects that the head of service can include in the assessment are:

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- the time at which the gift is offered (for example, a gift offered before an order must be placed may have a different assessment from a gift offered after an agreement has been contracted);
- the reason why the gift is offered;
- a performance by the civil servant that could justify the gift;
- the number of times that the same relation has offered gifts to the civil servant;
- the interests of the service served by the acceptance of the gift;
- the private benefits of the civil servant in accepting the gift;
- the unique character of the gift;
- the relationship between the interests of the party offering the gift and the tasks of the civil servant or of the service concerned.

It is highly preferable that civil servants never allow other persons to pay for matters such as outings, trips and dinners. However, this does not apply for meals forming part of a meeting. However, for business lunches, caution is called for. There should be a demonstrable interest of the service that benefits from the acceptance of the gift. That interest does not exist, for example, if the benefits of a 'frequent flyer programme' for business trips are used.

With regard to the aspects of administration and recording associated with the applicable system of reporting, assessment and recording concerning the acceptance of gifts, Article 59(7) provides for further development by ministerial regulation. Once again, there is a relationship with the integrity policy to be pursued. In developing and adjusting that policy, there is a need for insight into the information concerning the extent to which civil servants are offered gifts.

Gifts such as pens, diaries and calendars are often offered routinely in business relationships. This concerns items that represent a limited value and that provide little or no private benefit for the civil servant. Furthermore, the objective of acquiring a favour is lacking. Article 60 provides that the consent of the head of service is not required for the acceptance of such standard business gifts and that these also need not be reported to the head of the service.

## **2.5 Articles 82 and 83: integrity counsellor**

With the aid of training and awareness-raising for all concerned, the resilience of the government organisation to damage to integrity can be increased. An essential addition to this is that the possibility is created for civil servants to raise problems arising in day-to-day work in relation to integrity on a confidential basis. In view of the local culture, it is preferable that this possibility should be offered in an accessible manner, i.e. close by within the civil servant's own government organisation. To that end, Articles 82 and 83 of the national ordinance introduce the integrity counsellor.

For the government, the point of departure is that in principle, ministers are responsible for their own integrity. A personal integrity counsellor must be appointed for each ministry. As a rule, no more than one integrity counsellor will be appointed for each ministry. The Minister of General Affairs is deemed to hold primary responsibility for the integrity policy. In connection with this, the task of appointing an integrity counsellor for each ministry is assigned to the Minister of General Affairs. If there is a need for this, a service unit may be assigned its own integrity counsellor. This could be a service unit with a high number of staff and working conditions all of its own, for example. It is also possible that an integrity counsellor is appointed to jointly serve several service units. It is not the intention that more than one integrity counsellor position should be created for the same civil servants at the same time.

The position of the integrity counsellor is aimed primarily at offering assistance to individual civil servants. Civil servants can contact the integrity counsellor for confidential consultation and to receive advice. It follows from Article 83(1) that the integrity counsellor is required to respond to a request for advice.

The integrity counsellor is the person who can support a civil servant on a confidential basis in a concrete case with regard to integrity issues in various fields. For example, a civil servant can contact the integrity counsellor with the question of whether a particular incidence should or should not be reported. In such cases, the integrity counsellor will also have to devote attention in his advice to the question of how to deal with potential detrimental side-effects of reporting breaches of integrity. These side-effects could include matters such as (the promotion of) discretion concerning the identity of the civil servant who made the report, tensions on the work floor and publicity.

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The information and advice that the integrity counsellor provides to the civil servant concerned is confidential and strictly personal. The confidential character of the service of the integrity counsellor is assured partly by the fact that the integrity counsellor operates outside and alongside the hierarchical and functional organisation. In this way, the integrity counsellor can function independently: no orders may be given to him and he also need not account to the management of the service for the way in which he operates as an integrity counsellor. That independent position is not prejudiced by the fact that the integrity counsellor is appointed as a civil servant at the relevant ministry. The civil servant appointed as an integrity counsellor may not suffer any adverse effects as a result of performing the tasks of an integrity counsellor.

The confidential character means that the integrity counsellor does not inform third parties of the requests for advice addressed to him by civil servants, or of potential breaches of integrity of which he becomes aware in that regard. The confidentiality also applies in respect of the direct supervisors, heads of service and ministers concerned.

Due to the confidential nature of the advice by the integrity counsellor, the government does not wish Article 200 of the Code of Criminal Procedure to apply to the counsellor, at least to the extent that the information concerned was obtained in that capacity. The allocation of roles between the civil servant who contacts the integrity counsellor and the integrity counsellor himself means that the integrity counsellor acts as an advisor and leaves the initiative to the civil servant in that regard.

The activities of the integrity counsellor are not fully shielded from the government organisation. Twice a year, the integrity counsellor issues an anonymised report to the minister under whom he works, or to the Administrative Board. That report states the number of times that the integrity counsellor has been consulted, the matters on which advice was provided and of which forms of breaches of integrity knowledge was acquired, if applicable. This takes place with a view to the integrity policy to be pursued.

Further rules must be laid down with regard to the recording and use of the information contained in the half-yearly reports of the integrity counsellor. With a view to the development and adjustment of the integrity policy, there is a need for an insight into such information.

## **2.6 Article 84: Suspicions of a breach of integrity**

The function of the integrity counsellor is aimed at providing civil servants with support in integrity issues, on a confidential basis. By contrast, the interest that the government organisation has in such issues is primarily that investigations can be conducted into potential breaches of integrity and that if necessary, adequate measures can be taken. It is necessary for this that a suspected breach of integrity has actually been raised.

It is important to note that Article 84 does not create any new obligations. The obligation of a civil servant to conduct himself as a good civil servant as such entails that the civil servant can be expected to report suspected breaches of integrity. This is reaffirmed by Article 84. This takes place in particular with the aim of promoting reporting by creating clarity with regard to the procedure to be followed for a report. The procedure followed in this way also serves as an assurance that reports will be taken seriously.

The term 'breach of integrity' must be broadly interpreted. It refers to serious offences, gross breaches of regulations or policy rules, misleading the judiciary and matters that create a major risk to public health, safety or the environment. In addition to such abuses, it also refers to less serious matters such as leaking of confidential information, improper use of business equipment or the abuse of special leave.

As in the case of the integrity counsellor, the reporting procedure has been kept accessible, which means that reporting takes place close by, within the civil servant's own government organisation.

A civil servant who suspects a breach of integrity reports this to the head of the service in which that civil servant is employed, unless reporting to the head is undesirable. Obviously, the report must then be made to another head of service. Preferably, in that case the report will then be made to the

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head of service most closely concerned. This also applies for the case in which a civil servant who is also a head of service wishes to report a suspected breach of integrity.

The head of the service to whom the report is made shall conduct talks at that time with the civil servant who made the report, in order to inform the civil servant of the procedure to be followed, the time path and what may still be expected. The head of the service will also provisionally assess the information received for the possibility that an unjustified report is involved. Suspicions of a breach of integrity must be based on reasonable grounds.

The relevant head of the service draws up a report on each notification and sends this report to a minister or the Administrative Board. At the national level, the notification can be reported to a minister who is officially involved in the reported matter in any way. As a rule, that will be the minister of the ministry at which the reported matter took place.

The responsibility for the settlement of a report of a suspected breach of integrity lies with the minister to whom the report was sent in response to the report of a breach. Obviously, the relevant minister may enlist the assistance of other persons.

At the most within eight weeks of a report, a substantive position will be taken regarding the reported suspicions of a breach of integrity. The civil servant who reported the matter will be notified of this in writing within the same term.

If a breach of integrity actually proves to have occurred, the necessary measures must be taken. Depending on the concrete case, these may be disciplinary sanctions or a report to the Department of Public Prosecutions pursuant to Article 200 of the Code of Civil Procedure. Other measures, for instance in relation to the organisation, may also be necessary in order to prevent any recurrence. In the national government, the minister to whom a suspected breach of integrity is reported will not always be able to take such measures himself. In that case, the minister is required to refer the matter on.

Further rules must be laid down with regard to the recording and use of the data recorded in the substantive position taken in response to a reported suspicion of a breach of integrity. With a view to the development and adjustment of the integrity policy, there is a need for insight into such data.

Article 85 provides for the legal protection of a civil servant who has reported suspicions of a breach of integrity in observance of the provisions laid down by or pursuant to this national ordinance. That civil servant must not suffer any disadvantage in his position as a result of reporting those suspicions. This also means that, in view of the potential effect of a report and the subsequent investigation on the working atmosphere and the performance of the relevant service, the identity of the person making the report should remain unknown outside the smallest possible circle for as long as possible and that the investigation must be conducted as discreetly as possible.

In practice, offering legal protection by means of a statutory regulation may be inadequate. In particular, a good working atmosphere and good collegial relations cannot be forced. Account must therefore be taken of the fact that a civil servant who has reported a suspected breach of integrity and regardless of whether the investigation shows that the report was based on the truth, may no longer be able to function within his service.

Taking account of the possibility that a report could be made on improper grounds, a reservation has been made that the party who makes a report must act in good faith and may enjoy no personal gain from the breach of integrity or the reporting of this.

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