

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN

EXPLANATORY MEMORANDUM

to the Regulation foreign currency transactions for Curaçao and Sint Maarten

Objective and purport

This regulation serves to regulate foreign currency transactions in the countries.

As a rule, foreign currency regulations are positive, in which all financial transactions are free, or negative, in which all financial transactions with other countries are prohibited unless a licence is granted. A combination of a positive and a negative system is also possible.

This regulation contains a dual system. It is based on a positive system in which designated (current) payments are free unless they are subject to restrictions, and at the same time, it is based on a negative system in which all other payments – in fact, therefore, capital transactions – are prohibited unless a licence is granted. In this system, the different powers serve to support and protect the monetary and economic policy of the Countries.

This draft is based on the National ordinance foreign currency transactions (P.B. 1981, No. 67) and the agreements in principle described in more detail below.

Background and motive

In connection with the entry into force of the new political status for the island territories forming the Netherlands Antilles on 10 October 2010, it is necessary to replace the National ordinance foreign currency transactions by a new regulation.

In the closing agreement of 2 November 2006, the island territories of Curaçao and Sint Maarten agreed that there will be a single common central bank for Curaçao and Sint Maarten when they acquire the status of 'countries' within the Kingdom of the Netherlands. At the same time, it was agreed that there will be a single supervisory authority (i.e. a common central bank) for the monetary supervision, business-economic supervision and integrity supervision, and that uniform central bank and supervisory legislation will apply in the future Countries. Curaçao and Sint Maarten then reached further agreements on a common central bank and the relevant regulations. These agreements, taking account of the fact that two different countries are involved here, included the following:

- a common central bank will be formed as a public legal entity;
- there shall be a single currency area with a common currency, in a fixed exchange rate with the US dollar;
- the main task is the supervision of the financial sector in both countries (i.e. monetary supervision, business economic supervision and supervision of integrity);
- this supervision serves to maintain the external value of the currency and the health of the financial system;
- decision-making by the Countries shall take place on the basis of parity.

In preparation for the introduction of a common central bank and the foreign currency transactions, the island territories formed a committee, known as the Joint Central Bank Committee, consisting of representatives of the respective island territories and the Bank of the Netherlands Antilles (BNA). Among other things, this committee prepared legal regulations for the introduction of the Central Bank of Curaçao and Sint Maarten (hereinafter referred to as: Bank), the common currency, the exchange rate and foreign currency transactions.

Legal basis

Article 88 of the Constitution of Curaçao provides that the monetary system will be regulated by national ordinance. Article 100(1) of the Constitution of Sint Maarten provides that there shall be a central bank, that supervises the monetary system. Other tasks may be assigned to this central bank by national ordinance. Paragraph 2 provides that the monetary system shall be regulated by or pursuant to national ordinance.

The foreign currency transactions, in other words, all foreign payments, are related to the aforementioned central bank and the monetary system. Agreements had to be reached with regard to the organisation of foreign currency transactions, which were recorded in a mutual arrangement (as referred to in Article 38(1) of the Charter for the Kingdom of the

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Netherlands). A mutual arrangement is only effective between the countries that reach the agreements, but is not automatically effective within the legal system of each of the countries that are party to that regulation. For this to have effect, legal embedding of the mutual arrangement is required. The mutual arrangement concerning foreign currency transactions will be embedded in the legal system of each of the countries by providing in a national ordinance that foreign currency transactions shall be regulated by a mutual arrangement and that this mutual arrangement shall be realised only if that regulation is laid down by national ordinance (by each of the countries concerned).

This creation procedure of establishment by national ordinance is in principle less rigid and time-consuming than a uniform national ordinance in which the regulation is laid down in full. The establishment national ordinance ensures that the national legislator is involved in the establishment of the mutual arrangement. With an establishment national ordinance, therefore, the mutual arrangement in question acquires the force of law. As a result, there will be an automatic effect within the national legal system in each of the Countries.

Other matters relevant for foreign currency transactions, i.e. the joint central bank, the monetary system and the exchange rate will also be regulated in the above manner, in a mutual arrangement that is established by a national ordinance in both Countries.

The Central Bank Charter for Curaçao and Sint Maarten (hereinafter referred to as: Charter) also provides that the Countries will ensure that their national legislation is uniform and consistent with the Charter, in relation to the objectives of the Bank and the implementing provisions based on this, and that the date of entry into force is the same. This therefore also applies for the national decrees referred to in this draft. With regard to the realisation method for national decrees with the same content, it is noted that no 'uniform national decree, containing general measures' exists. However, the Countries can each establish a national decree with the same content, which in fact achieves the same result. Finally, the national legislation and the implementing provisions based on it should contain the same date for entry into force. The reason for this is that it is necessary to ensure that the national decrees, in particular, enter into force at the same time, in the event that they are not announced or published at the same time.

Content of the regulation

The main aspects of foreign currency transactions are discussed in more detail below.

Foreign exchange

In this regulation, the term 'foreign currency' is not described in more detail. In the terms 'foreign currency policy' and 'foreign currency transactions' the term foreign currency should be regarded as a catchphrase that covers all foreign currency dealings. This therefore refers to payments in international dealings in cash, bills of exchange, other negotiable instruments, securities, precious metals, gold and precious stones as well as compensation for receivables. It should be noted in that regard that all monetary and economic terms used in this regulation generally match the interpretation of these terms by the International Monetary Fund. Consequently, in the event of doubts regarding the correct interpretation of a particular term, it may be advisable to ask this international institution for advice in that respect.

Principle of freedom

The principle of freedom for current payments may be restricted in this regulation by rules intended to regulate the flow of current payments in order to protect the foreign currency reserves of the Countries. At the same time, the commitment to the overall prohibition on capital transactions in the regulation may be mitigated by liberal application of a licensing system, the aim of which is to avoid the possibility of disruption of the monetary and economic development of the Countries by uncontrolled capital flows. These powers create the possibility of continuing existing policy relating to foreign currency transactions.

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Policy versus implementation

The regulation makes a distinction between responsibility for determining general foreign currency policy and responsibility for implementing the regulation. The principle used for this in the regulation is that responsibility for foreign currency transactions lies with the Countries and the implementing responsibility rests with the Bank. In fact, the determination of the general foreign currency policy is a political matter, to the extent that the determination of policy extends to the determination of the value of the guilder and the issue of general measures regarding payment transactions with a particular country or with regard to particular goods. As well as expert advice, the multiple aspects of the problems that can arise in decision-making on these areas require an insight into the political circumstances. The consequences of decisions in the field of foreign currency policy can impact deeply on the national economy and foreign relations. For these reasons, the responsibility for policy has been placed with the governments of the Countries. The responsibility for the implementation of the regulation on foreign currency transactions has been placed in the hands of the Bank. Pursuant to Article 9 of the Charter, the Bank already has the tasks of managing the available foreign currencies and monitoring its expenditure. The powers to regulate foreign currency transactions form an essential instrument for the Bank in the performance of this task. Naturally, it must bear responsibility for their use.

Foreign payments

Without prejudice to the aforementioned powers of the Bank, this regulation primarily steers foreign payments via the foreign exchange banks. The prohibitions on residents other than foreign exchange banks having accounts with financial institutions or parent companies in other countries on the one hand, while non-residents may not hold funds in Caribbean guilders on the other, are appropriate here. The former prohibition is laid down in Article 13 of this regulation. This Article imposes a collection obligation on residents, the consequence of which is that they will not be able to hold their accounts abroad without dispensation. Article 14 contains the prohibition on non-residents holding Caribbean guilders in the Countries. This latter prohibition is also intended to help to prevent the Caribbean guilder from playing a role as a payment instrument in international payments. The prohibition on holding an account denominated in Caribbean guilders will lead to a preference among non-residents for invoicing residents for transactions in a foreign currency. In order to promote the enforcement of these prohibitions, this regulation also contains provisions that restrict or prohibit imports and exports of payment instruments and other securities that can be regarded as foreign currency.

These prohibition provisions are included in the regulation to enable effective action in the event of a sharp and persistent fall in the foreign currency reserves, for instance in crisis situations. In practice, foreign payments are liberalised to a great extent through various announcements concerning foreign exchange transactions, which are laid down by or pursuant to this regulation.

As a result of its monopolistic task concerning management of the available foreign currency and monitoring of its expenditure pursuant to Article 13 of the aforementioned Charter, the Bank has been assigned powers to issue instructions to the foreign exchange banks with regard to foreign payments.

Licensing fees

Licensing fees are due on payments by residents of the Countries to non-residents (National decree, containing general measures, 1995, no. 187). The licensing fees amount to 1% of the amount of the payment. No licensing fees are due for payments between the Countries; these are free.

Public limited liability companies

In order to promote the efforts of the Countries to build up an internationally recognised financial centre, the regulation includes the possibility of issuing legal foreign currency facilities and guarantees to defined public limited liability companies registered in the Countries. These public limited liability companies must comply with certain technical foreign

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currency features, on the basis of which it can be established that their activities do not influence domestic monetary and economic policy.

The Bank, which must be regarded as the ideal expert with regard to the assessment criteria, has been granted the power to grant legal foreign currency facilities and guarantees to the public limited liability companies referred to above, referred to in this regulation as offshore companies.

Integrity

A current issue is the integrity of the financial institutions under the supervision of the Bank and of their (co-)policymakers and the final beneficiaries. The international accounting scandals in which (co-)policymakers facilitated the fall of multinational institutions have increased the need for assessment of every aspect of integrity. In that regard, this regulation also aims to reinforce the legal basis for integrity assessment.

In the year 2002, at the request of the government of the Netherlands Antilles, the International Monetary Fund (hereinafter referred to as 'the IMF') conducted an evaluation of the Netherlands Antillean supervisory regime and the regulation of the financial sector of the Netherlands Antilles. The IMF report made recommendations to the Netherlands Antillean authorities to enable compliance with the international criteria for adequate supervision. As far as possible, these recommendations have been incorporated in this regulation. These recommendations often concern matters that are updated and harmonised, such as reinforcement of the legal basis for the integrity assessment of (co-)policymakers and ultimate beneficiaries and the introduction of administrative sanctions such as administrative penalties and *astreinte*. The incorporation of a legal exclusion of liability for the supervisory authority and its employees responsible for supervision of financial institutions is also strongly recommended and is included in this regulation. The main reason for this is to give the Bank the necessary freedom of movement, so that it can perform its work in an independent manner. It is noted that where the term financial institutions is used in this explanatory memorandum, this refers to both natural persons and legal entities that are under the supervision of the Bank pursuant to the supervisory national ordinances.

Astreinte and administrative penalties

Astreinte and administrative penalties are two distinct administrative enforcement instruments. In the case of *astreinte* imposed by the Bank, the Bank issues the party that infringes a particular standard with an order subject to a financial penalty in the event of non-compliance. *Astreinte* serves to reverse the infringement, or to prevent further infringements or a repetition of the infringement. In other words, *astreinte* is a restorative sanction. In contrast to *astreinte*, administrative penalties have the character of a punishment. The nature and purpose of the administrative penalty does not differ from a criminal fine. The distinction between restorative sanctions and punitive sanctions is important because:

- a punitive sanction must be assessed in full by the LAR (National ordinance administrative jurisprudence) court, while with a restorative sanction, the court must take account of the discretionary powers of the administrative authority;
- a punitive sanction is regarded as a 'criminal charge' within the meaning of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR); the assurances laid down in that provision therefore apply to this sanction;
- the general principles of the law of sanctions (legality principle, grounds for exclusion of penalties) apply to the punitive sanctions, while this is not the case for the recovery sanctions.

The effectiveness of the supervisory national ordinances not only requires that there are good substantive rules, but also that infringements of those rules can be addressed directly and effectively. As the supervisory authority, the Bank's responsibilities include supervision of compliance with the legal regulations in force in the Netherlands Antilles for prevention of money laundering and financing of terrorism. The Bank also imposes anti-money laundering rules and rules to combat the financing of terrorism. The violation of these rules may also be penalised with an administrative sanction, such as an administrative penalty. Chapters VII and

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VIII of this regulation are aimed at strengthening the effectiveness of administrative enforcement of the rules laid down in the various supervisory national ordinances and the regulations laid down pursuant to these national ordinances.

Infringement of the provisions of the various supervisory national ordinances is made punishable in the supervisory national ordinances themselves and must be preceded by reporting by the Bank. Often, criminal proceedings will not be as fast or effective. The imposition of an *astreinte* or an administrative penalty can be an effective additional instrument for the enforcement of the rules of the different supervisory national ordinances. Furthermore, effective enforcement of these rules can be further strengthened by creating the possibility of publicising the fines and administrative penalties imposed. Publication can harm the reputation of a financial institution, while a good reputation is precisely of the greatest importance for a financial institution.

Due to the fact that the Bank itself is responsible for imposing *astreinte* or administrative penalties, there is a need to prevent it becoming its own judge and jury. The internal organisation of the Bank is designed to ensure that an officer who observes an infringement does not also decide whether a fine or an administrative penalty should be imposed. This is known as 'segregation of functions'. Consequently, the various supervisory national ordinances provide that the work in connection with imposing *astreinte* or an administrative penalty is performed by persons who were not involved in the determination of the infringement and the investigation preceding this.

Because no-one may be prosecuted or penalised twice for a punishable offence for which they have already been found guilty or not guilty in a final decision, the '*ne bis idem*' principle – the accumulation of an administrative penalty and a criminal sanction must not be possible. This regulation includes a strict anti-cumulation regulation. On the one hand, the power to impose an administrative penalty lapses if prosecution proceedings are opened for the same infringement and inquiries have begun in court. This power also lapses if the Department of Public Prosecutions of each country has reached a settlement with the accused pursuant to Article 76 of the Criminal Code of each country. On the other hand, the right to criminal prosecution lapses if the Bank has already imposed an administrative penalty with regard to that infringement. With this, the right to criminal prosecution does not lapse at the time when the administrative decision to impose an administrative penalty becomes final, but as soon as an administrative penalty is imposed. This rule is in fact a development of the '*una via* principle'. This principle means that once a choice has been made for either the administrative or the criminal route, that choice is binding.

For some provisions, a combination of an administrative penalty and *astreinte* may be the most effective means of enforcement. This could include a situation in which a financial institution systematically fails to comply with its regular reporting obligation. In principle, there are then a number of individual infringements for which just as many administrative penalties can be imposed. In such a case, it may be effective if the Bank not only imposes an administrative penalty, but also an *astreinte* to prevent repetition of the infringement.

Objections and appeals

The National ordinance foreign currency transactions included a separate provision concerning appeals, which was withdrawn when the National ordinance administrative jurisprudence (hereinafter referred to as 'the LAR') took effect. For that reason, the Articles that still referred to this separate appeal provision have not been included in this regulation.

Pursuant to Article 7 of the LAR, natural persons or legal entities whose interests have been directly affected by an administrative decision may appeal against this to the Court. Pursuant to Article 3(1) of the LAR, an administrative decision refers to a written decision of an administrative authority containing a public law legal action that is not of a general purport. Pursuant to Article 2(1) of the LAR, an administrative authority is a person or board to whom or to which any public authority has been assigned. This is clear if the authority is instituted under public law; it is instituted (formed) because this is laid down in a law. If this is not the case, 'public authority' must be defined. This relates to the unilateral decision-making; holding

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authority or power. That power must then relate to the public task, what forms part of the government's tasks or what is financed by the government.

Article by Article section

Ad Article 2

This Article lays down the principle of the relationship between the authorities of the Countries on the one hand and those of the Bank on the other. The responsibility for foreign currency policy rests with the governments of the Countries, while the Bank provides for the technical carrying out execution of that policy. In this structure, it is appropriate that the consequences of the policy, if it is correctly carried out, are borne by the Countries.

In line with the idea that the policy is the responsibility of the Countries, a collective responsibility of the Countries is proposed, further to the National ordinance foreign currency transactions. Considerations that foreign currency policy measures can have far-reaching consequences for, *inter alia*, the national economy and foreign relations led to preference being given to a collective responsibility of the governments of the Countries, rather than a policy responsibility resting primarily with the Ministers of Finance. In accordance with existing practice, responsibility for the execution is assigned to the Bank.

Ad Article 3

As the determination of the value of the guilder is firstly a political policy decision, and secondly a technical monetary matter, the determination of the value of the guilder has been placed in the hands of the Countries. This is laid down by the countries in the Regulation concerning the exchange rate of the Caribbean guilder. Paragraph 2 of this Article ensures that the rates fixed by the Bank are maintained in payments between the institutions referred to in this paragraph and their clients.

Ad Article 4

The purpose of this Article is that the countries can execute their policy concerning payments with certain countries by national decree, to the extent that the circumstances necessitate the defence of or action for the interests referred to in paragraphs 1 and 2 of this Article. This refers firstly to measures that control the negative consequences in relation to payments with a country of restrictions that apply with regard to international payments in that country. This could, on the one hand, include measures that entail an obligation for residents to settle debts to residents of that country through a deposit into a special settlement account at the Bank, and on the other, a right for residents to receive payments from the funds deposited into that settlement account for receivables from residents of that country. Secondly, paragraphs 1 and 2 of this Article concern the possibility for the Countries to take measures to settle international obligations and protect the interests of the international legal system. This includes measures based on international agreements that do not have a legally binding character. Thirdly, paragraphs 1 and 2 of this Article concern measures to be taken by the Countries in connection with the arms trade and other strategically important goods.

In relation to international developments concerning the combating of money laundering and the financing of terrorism, the authority of the Ministers of Finance to impose rules by national decree, containing general measures, with regard to financial transactions is formulated more broadly. Broader powers apply here, because the term 'goods, within the meaning of Article 1 of Book 3 of the Civil Code' is used in this regulation. In Article 1 of Book 3 of the Civil Code of each Country, goods are defined as all goods and all proprietary rights, while goods as referred to in Article 1(11) of this regulation refers to moveable goods, with the exception of gold, precious metals, gems, legal tender, negotiable financial instruments, securities and documents embodying receivables. In addition, broader regulatory powers for the Ministers of Finance now exist with regard to the content of the rules. After all, paragraphs 1 and 2 not only create regulatory powers for the government in relation to financial transactions with countries to be designated in that regard or in relation to goods to be designated, but also in relation to financial transactions with persons, groups of persons or organisations to be designated.

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In the National ordinance foreign currency transactions, the present paragraphs 1 and 2 formed one combined paragraph. In connection with the decision-making process, since two countries are now involved, this has been split. In addition, in contrast to paragraph 1, paragraph 2 has been formulated as mandatory; action is therefore required. In their action, the Ministers of Finance must aim for harmonisation as far as possible here.

In paragraphs 3 and 4, the aforementioned regulatory powers are bounded. Paragraph 3 of this Article is a confirmation of the principle laid down in Article 2 of this regulation, that the technical implementation of the policy rests with the Bank. With regard to the supervision referred to in sub-paragraph b, reference is made to Articles 8 and 43 of the Charter.

Paragraph 5 includes the possibility of granting dispensation, being an exception to compliance with the rules, referred to in paragraph 3, in individual cases, or exemption, being an exception to compliance with the aforementioned rules for a category of cases.

Ad Article 5

In issuing administrative decisions, the Ministers of Finance will aim for uniformity as far as possible. Reference is made in that regard to the statements concerning uniformity in the final paragraph under the heading Legal basis in the general section of this explanatory memorandum.

Ad Article 6

The exemption referred to in this Article applies for the Bank, to the extent that securities that belong to the Countries are concerned, either directly or indirectly.

Ad Article 7

In the structure of this regulation, foreign payment transactions are largely steered via the foreign exchange banks. As the management of the available foreign currency and the monitoring of its expenditure are assigned to the Bank in accordance with Article 9 of the Charter for the Kingdom of the Netherlands, this Article provides that the Bank has the authority to monitor the work of the foreign exchange banks concerning foreign payments. For this reason, the authority of the Bank to issue instructions in that regard has been added. Apart from instructions to the foreign exchange banks, these powers can comprise orders to maintain minimum or maximum balances denominated in one or more foreign currencies, as well as to pay amounts in foreign currencies to the Bank. The last phrase of paragraph 2 of this Article implicitly regulates the sanction for non-compliance with these instructions by the foreign exchange banks. After all, providing that these instructions form part of the conditions under which authorisation is granted to operate as a foreign exchange bank authorises the Bank to regard the authorisation that it has granted as having lapsed if a foreign currency bank does not follow the instructions.

Ad Article 8

The purpose of this Article is to afford persons or institutions who necessarily deal regularly with demand for and the offer of foreign currencies and cheques in the performance of their work the possibility of operating an exchange office. This could involve travel agencies, for example. The Article is also intended to promote greater security in payments by creating the opportunity for exchange rates for foreign currencies to be fixed by the bank to also be used outside the circle of foreign exchange banks. The obligation to that effect is imposed on the exchange offices in Article 3(2) of the regulation.

Although exchange offices can never have the same status as a foreign exchange bank, they will have an opportunity, pursuant to the instructions to be issued to foreign exchange banks by the Bank, to use the interbank rates for foreign currencies in payment transactions with the foreign exchange banks.

Paragraph 2 of this Article assigns the Bank the same powers with regard to exchange offices as it has in relation to the foreign exchange banks.

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Ad Article 9

This Article provides for the possibility that the Bank can gather the information and data necessary for the balance of payments, including from offshore companies.

Paragraph 2 is included in order to make clear that in the preparation of the balance of payments, in derogation from the provisions of Article 1, to the extent that these concern residents and non-residents, transactions between residents or the Countries shall be deemed to be balance of payments transactions of the individual Countries.

In paragraph 3, the Bank is granted the power to issue administrative rules in the field of paragraph 1. This creates the possibility in most cases to arrange for the required information to be provided via the foreign exchange banks, which, on the basis of their business, are often closely involved in the facts to be reported. With regard to the confidential treatment of information gathered by the Bank, reference is made to Article 27.

Ad Article 10

The Countries form a monetary union; consequently, payments between the Countries are free.

This Article contains the principle referred to in the general considerations above of the positive system for current payments. In principle, all payments referred to in the Publication concerning foreign currency transactions (1 May 2009) are free:

1. General goods
2. Oil and oil products
3. Goods for refinement/processing
4. Repairs to goods
5. Dispatch/ refuelling
6. Aviation, passengers
7. Aviation, freight
8. Aviation, other
9. Shipping, passengers
10. Shipping, cargo
11. Shipping, other
12. Tourism
13. Telecommunication
14. Construction
15. Financial services
16. Computer and information services
17. Royalties and licences
18. Other commercial services
19. Private, cultural and recreational services
20. Government services (not classified elsewhere)
21. Income from employment
22. Profit distributions
23. Interest on loans
24. Dividends
25. Interest on securities
26. Income from other financial assets
27. Receipt of offshore taxes
28. Other government income transfers
29. Income transfers, foreign employees
30. Non-life insurance premiums
31. Non-life insurance benefits
32. Other income transfers

This freedom may be restricted only by measures imposed by or pursuant to this regulation.

The purpose of the provisions of paragraph 3 of this Article is to assign authority the Bank, for the protection of the foreign currency reserve position of the Countries, to mitigate excesses

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arising in current payments. A prohibition in the rules to be issued by the Bank on payments as referred to in this Article taking place without a licence must firstly be regarded as a technical instrument to be able to realise the mitigation referred to above. The provisions of paragraph 2 of this Article ensure that a prohibition imposed by the Bank pursuant to paragraph 3 of this Article can never prevent a current payment, but may only regulate the times at which, and the volumes in which the payment is made. Moreover, it is not the case that the Bank can determine when a payment takes place; pursuant to paragraph 3, the Bank may prohibit certain payments for a particular period.

Ad Article 11

This Article enforces the negative system for other payments, as was regulated in the National ordinance foreign currency transactions. In particular, this Article is intended to bind foreign capital transactions to a licensing system. In order to rule out the possibility that a payment cannot be regarded as either a capital transaction or a transaction forming part of current payments, referred to in Article 10, with the result that doubts arise over whether or not a licence is required, this Article prohibits all foreign payments with the exception of the current payments, referred to in Article 10. The considerations that led to such an extensive prohibition include the fact that uncontrolled capital flows can have a detrimental impact on the healthy monetary and economic development of the Countries.

To avoid the possibility that the refusal to grant a licence to make payments concerning a capital transaction leads to undesirable consequences for the preceding activities, such as the contracting of certain agreements, paragraph 2 of this Article also makes the preparatory actions from which capital transactions arise subject to prior licensing.

As shown by the text of paragraph 2, the prohibition covers not only all legal actions but also all facts, actions and dealings from which a capital transaction can result. For the sake of completeness, this paragraph explicitly mentions the provision of security in order to ultimately realise a capital transaction.

Ad Article 12

This Article regulates the method of payment to foreign countries. A resident must first buy the requested currency before issuing a payment order for the benefit of a non-resident. The purport of this Article is to prevent the Caribbean guilder from acting as a payment instrument in international transactions. The prohibition on non-residents holding accounts denominated in Caribbean guilders, as contained in Article 14 of this regulation, is closely related to this. In practice, these two provisions will mean that non-residents will give preference to invoicing residents in foreign currencies in relation to transactions.

Ad Article 13

This Article imposes a collection obligation on residents and regulates the way in which the collection should take place. The purpose of these provisions is to prevent residents from holding accounts denominated in foreign currencies in other countries. Holding an account in a foreign country is permitted for residents only pursuant to a licence for that purpose issued by the Bank.

It is noted that normal credits in trading are not affected by these provisions. Apart from explicit agreements concerning supplier credit and the use of bills of exchange etc., deferred trade payments are often based on custom in the relevant sector. It is therefore difficult to refer to receivables that are payable on demand in these cases. However, for the sake of completeness, it is added that, to the extent that excesses occur in the trading facilities referred to here, which could seriously disrupt monetary and economic policy, this Article provides for possibilities to take action against this.

It follows from paragraph 2 of this Article that these provisions do not apply for foreign exchange banks, since residents can arrange to deposit their receivables in an account of a foreign currency bank in another country. Pursuant to paragraph 3 of this Article, residents can hold the amounts they collect without a licence in a foreign currency in an account at foreign exchange bank.

The dispensation, referred to in paragraph 4, is granted by the Bank pursuant to Article 17.

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For the situation in practice, reference is made to the section headed Foreign payments in the general section of this explanatory memorandum.

Ad Article 14

The purpose of this Article is to prevent non-residents from holding accounts denominated in Caribbean guilders in the Countries. As already explained in relation to Article 12 of this regulation, this helps to ensure that the Caribbean guilder does not play a role as a payment instrument in international payments.

The last sentence of the Article leaves open the possibility that residents will keep a receivable denominated in Caribbean guilders in their books, for example in relation to deliveries of goods. The normal supplier credit is therefore not affected by this Article.

The Bank can, on request, permit non-residents who can show that they have an interest in the Countries on the basis of which they need to make payments in Caribbean guilders to hold an account in Caribbean guilders at a foreign currency bank.

For the situation in practice, reference is made to the section headed Foreign payments in the general section of this explanatory memorandum.

Ad Article 15

The purpose of this Article is to prevent foreign payments taking place outside the Bank and the foreign exchange banks by means of exports of, in particular, foreign bank notes. It should be noted that the Article does not primarily aim to affect payments to foreign countries, but more the manner in which these payments take place.

In the National ordinance foreign currency transactions, this Article had a second paragraph that required residents to exchange foreign payment instruments within a set term, unless they had dispensation. Although this was intended to promote use of the national currency and was considered important for the compilation of the balance of payments, this was a provision that was not enforceable in practice. For that reason, the second paragraph has not been included in this regulation.

Ad Article 16

The purpose of this Article is to ensure that the foreign currency transactions comprising the securities, referred to in paragraph 1, do not take place out of sight of the Bank either. The contracting of agreements concerning the securities referred to here is already subject to licensing pursuant to the provisions of Article 11 of this regulation. It could perhaps be concluded on those grounds that these provisions in fact constitute a duplication of the forms of prohibition in Article 11. However, independently of this, in a system in which unlicensed capital transactions are prohibited, a provision such as this cannot be missed without harming the effectiveness of the system. The prohibition of imports and exports in paragraph 1 and the obligation to deposit foreign securities in safe custody in paragraph 2 supplement each other in that regard.

It should be added, however, that these provisions are in no way intended to prevent institutions such as the existing trust offices from performing their work in relation to the custody of foreign securities for their clients. To the extent necessary, the aforementioned institutions can obtain a general licence to import and export securities and a general dispensation from the safe custody obligation, even if this concerns securities that may legally be the property of the aforementioned institutions, but in economic terms are the property of non-residents.

It goes without saying that the Bank must attach the necessary conditions to the latter general licences and dispensations to prevent the relevant securities from falling into the hands of residents.

Ad Article 18

Paragraph 1 creates the legal basis for the integrity test to be conducted by the Bank for a licence as referred to in Article 17. In the interests of financial transactions, the licence-holder or the person granted dispensation must continue to comply with the requirements laid down by or pursuant to this regulation for acquiring the licence or dispensation, as well as the conditions laid down by and the obligations associated with the licence or dispensation, and not only until the time when the licence is granted.

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The publication of the rules shall take place through publication on the Bank's website and in a letter to the relevant institution.

Ad Article 21
[Roselle]

Ad Article 22

The provisions of paragraph 2 are contained in Article 9(3) of the 1994 National ordinance supervision of the banking and financial sector, in its form before the National ordinance updating and harmonisation of supervisory national ordinances regarding the Bank of the Netherlands Antilles entered into force.

In relation to the updating and harmonisation of the supervisory national ordinance, and taking account of the general principles of good administrative practice, this regulation provides that the decision to withdraw a licence and the refusal to withdraw a licence must be notified to the person concerned.

In relation to the updating and harmonisation of the supervisory national ordinances, this Article also provides that the Bank may defer the notice to a date that it fixes, if the notice could cause serious harm to the interests of the interested parties.

Pursuant to the supervisory national ordinances, the Bank may take a number of measures regarding the financial institutions under its supervision. The Bank may, for instance, impose restrictions or attach rules or conditions to the licence of the licence-holders and may monitor compliance with the rules laid down in the supervisory national ordinance or in Bank rules issued on the basis of the supervisory national ordinance, by means of reports, notices and both regular and special investigations.

In the event of the infringement of the rules, the Bank has a number of instruments at its disposal for taking action against the infringement. The Bank may thus issue instructions to the offender to follow a particular line of conduct or, in the most extreme case, the licence-holder's licence may even be withdrawn.

Ad Article 27

The enforcement of integrity in general and the combating of (organised) crime in particular necessitate this Article concerning the confidentiality obligation.

The confidentiality obligation concerns only the data or information obtained pursuant to the supervisory national ordinances, making use of the relevant supervisory national ordinance or of certain supervisory powers. The confidentiality obligation also applies with regard to the data and information obtained from the Department of Public Prosecutions of a Country, the reporting centres, referred to in the national ordinances concerning the reporting of unusual transactions and/or a foreign supervisory authority. The confidentiality obligation cannot be invoked with regard to other data or information.

There are a number of exceptions to the obligation to preserve the confidentiality of certain data or information; see paragraphs 3, 4 and 5. The authorisation of the Bank to notify the Unusual Transactions Reporting Centres if it discovers facts in the performance of its tasks and the execution of its powers that give rise to suspicions of money laundering practices or of financing of terrorism, arises partly from a recommendation in the IMF report, the need to enforce integrity in the financial sector and the combating of (organised) crime and the need to implement other regulations and rules concerning money laundering and financing of terrorism.

Ad Articles 28, 29 and 30

International developments mean that financial institutions have or will have increasing points of contact with each other, necessitating the exchange of data between the supervisory authorities of the different sectors. Partly in view of the need to enforce the integrity of the sectors, as well as to protect the interests of those concerned which the supervisory national ordinances aim to protect, this regulation expands the number of authorities or institutions with which the Bank can exchange data or information.

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It is noted that the international organisations such as the IMF and the World Bank are not included in the government agencies, referred to in Article 28(1). The clause in the first sentence of paragraph 1 'which are responsible for supervision of the financial markets or of legal entities, partnerships or natural persons operating in those markets' concerns all government agencies, referred to in the first sentence.

Ad Article 31

This Article contains a standardised provision for charging on of the costs in all supervisory national ordinances. With the implementation of these provisions, the Bank will now be able to recover the supervisory costs it incurs, to some extent.

In contrast to the other supervisory national ordinances, this regulation, in view of the nature and purport of the licences or dispensation to be granted, does not provide that the application for a licence or dispensation will not be processed until the due amount, referred to in paragraph 1, has been paid.

The following is noted with regard to the last paragraph. The letter from the Bank in which a payment obligation is imposed, as provided for in paragraph 4, is an administrative decision. The financial institution may object to such a decision of the Bank to the Bank itself as well as appeal against this at the Court. With regard to the writ of execution, referred to in paragraph 7, through which the collection takes place, the financial institution may only appeal against the enforcement of the writ. An appeal is possible, for example, if the amount shown in the writ is not consistent with that in the Bank's administrative decision imposing the payment obligation. For that reason, the provision concerning the legal instrument of appeal against the enforcement of a writ of execution, as provided for in the chapter or paragraph concerning financial debts, is declared to be likewise applicable, as the appeal is not provided for in the Code of Civil Procedure of each Country.

Finally, it is noted that the interest at the statutory rate referred to in paragraph 5 can vary from one country to another, as this is fixed by the relevant Minister of Justice.

Ad Article 33

In order to protect the interests of those concerned which the different supervisory national ordinances aim to protect, the Bank is granted the power to open talks with the organisations that are designated as representative organisations by the Ministers of Finance pursuant to the supervisory national ordinances. However, the Bank must notify the financial institutions concerned before entering into talks with the relevant representative organisations. The Bank holds these powers if the financial institutions fail to comply with the instructions of the Bank, fail to do so within the term set by the Bank or fail to do so adequately, or if exceptional events jeopardise adequate functioning of the financial institutions concerned.

Ad Article 34 up to and including Article 52

For an explanation of these Articles, reference is made to the section headed 'Astreinte and administrative penalties' in the general section of this explanatory memorandum.

Ad Article 69 up to and including Article 77

This chapter provides for the power of the Bank to publicise two facts, i.e. the Bank's refusal to grant a requested licence if such a refusal has become final, and unlicensed operations. This chapter also provides for the power of the Bank to publicise the fact for which an astreinte or administrative penalty was imposed, the rule infringed, as well as the name and address of the party on which the astreinte or the administrative penalty was imposed. It is noted that publication of an infringement is an effective enforcement instrument, as publication can harm the reputation of a financial institution, while a good reputation is precisely of the greatest importance for a financial institution. For that reason, the fact is expressed here that publication involves an enforcement instrument that is applied only in the case of an infringement of the supervisory national ordinance.

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In view of the sanctioning character of these powers, a number of provisions have been included to protect those whose actions or omissions are made public. However, it will not always be possible to provide the offender with sufficient assurances. This could involve an offender of no known address, or who conceals his identity, for example. In such cases, the Bank cannot reasonably be required to nevertheless provide the offender with all assurances before taking the necessary enforcement measures.

The 'publication' of infringements, as described above, will take place in a manner to be determined by the Bank, such as through publication in the journals in which the countries record official notices, or in one or more daily newspapers, at the discretion of the Bank.

Finally, the fact that publication of infringements concerns cases in which the Bank makes use of information obtained on the grounds of the relevant supervisory national ordinance merits attention. If an infringement of a supervisory national ordinance is known to the public or this concerns public information in other respects, such as publications that have already appeared in daily newspapers or on the internet, etc., the Bank is naturally free to issue warnings on the basis of that public information. The Bank would then be wise to verify the information.

Due to the fact that the Bank itself is responsible for the publication of an infringement, it is necessary, in order to avoid it becoming its own judge and jury, that the internal organisation of the Bank is structured in such a way that an official who observes an infringement does not also determine whether an infringement will be made public (segregation of functions). Consequently, the supervisory national ordinances must provide that the work in connection with the publication of an infringement is performed by persons who were not involved in the establishment of the infringement and the investigation that preceded this.

Ad Article 78

Since the Code of Criminal Procedure (P.B. 1996, No. 164) came into force, a standard supervisory provision has been used in the Netherlands Antilles, regulating in a structured and uniform manner who is authorised to perform supervision, the powers that may be exercised in that regard and the rules to which the exercise of such powers is subject. Article 78 is based on this standard supervisory provision. Consideration was given here to which powers are necessary in relation to the supervision of compliance.

The following is noted with regard to paragraph 1, which provides that the persons designated for that purpose by national decree are responsible for supervision of compliance with the provisions of or pursuant to any national ordinance. Principle 1 of the 'Basel Core Principles', principle 3 of the 'Insurance Core Principles and Methodology' and principle 6.1 of the 'Objectives and Principles of Securities Regulation' provide, *inter alia*, that the supervisory authority must be operationally independent in order to be able to bear its responsibility in the performance of its tasks and the exercise of its powers. For that reason, this paragraph provides that the supervisors shall be appointed by the President of the Bank.

Finally, it is noted with regard to the appointment of supervisors that, in view of the nature and purport of this regulation, customs officials will also be designated to supervise compliance with the provisions of or pursuant to this regulation, in addition to the officials of the Bank.

The following is noted with regard to the powers of the supervisory authorities as laid down in paragraph 2 of this Article. Paragraph 2 provides an exhaustive list of the powers of the supervisory authorities. The increasing modernity of the technologies that the financial institutions use to perform their work or their activities means that it may be necessary, for the adequate performance of supervision by the Bank, to enter locations, to inspect vessels, stationary vehicles and their cargoes and to enter residential properties without the explicit consent of the occupant. This could involve, for example, the performance of the work of a credit institution from a vessel without a licence, or the activities of Bank officials in relation to the combating of money laundering and the financing of terrorism, which may call for far-

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reaching intervention. For that reason, sub-paragraphs (d) and (e) were added to paragraph 2 in relation to the provision in the National ordinance foreign exchange transactions.

Through the inclusion of the power for the supervisory persons to enter residential properties and parts of vessels intended for accommodation without the explicit consent of the occupant, the text of paragraph 3, referring to rules relating to the entry of residential properties pertaining to criminal procedure, is necessary. Thus pursuant to Article 155(1) of the Code of Criminal Procedure, which applies on the grounds of Article 78(3) of this regulation, special written authorisation is required for entry to a residential property without the explicit consent of the occupant. Pursuant to paragraph 3, this authorisation is granted by the Chief Prosecutor. Because it is important to maintain the unity of procedures concerning entry, only a few provisions that, due to their specific criminal-law character do not lend themselves for equivalent application, have been exempted.

Apart from the question of whether authorisation is necessary for entry, it is possible, pursuant to paragraph 4, to request the assistance of the police or the judiciary in providing access to the locations referred to in paragraph 2(d) and 2(e).

Ad Article 83

As already stated in the general section of this explanatory memorandum, the entry into force of this regulation will be regulated by an establishment national ordinance. This establishment national ordinance will also regulate the publication of the regulation.

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