

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN

EXPLANATORY MEMORANDUM Central Bank Charter for Curaçao and Sint Maarten

Objective and purport

The objective of this draft is to introduce a new Central Bank Charter for the common central bank of Curaçao and Sint Maarten.

The points of departure for this draft were the agreements in principle described below, as well as the 1985 Central Bank Charter (PB 1985, No. 183) (CB Charter1985) of the Bank of the Netherlands Antilles (hereinafter referred to as 'BNA'). It was taken into account here that the stability of the value of the currency of Curaçao and Sint Maarten and the health of the financial system must always take priority.

The objectives of the 'Central Bank of Curaçao and Sint Maarten' (hereinafter: the Bank) are explicitly described in Article 3.

Background and motive

In the closing agreement of 2 November 2006, the island territories of Curaçao and Sint Maarten agreed that there shall be a single common central bank for Curaçao and Sint Maarten when these island territories acquire the status of 'Country' 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 monetary supervision, business economic supervision and supervision of integrity 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 legislation. These agreements involved the following, among other things, taking account of the fact that two different countries are involved here:

- 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 ratio to the US dollar;
- the main task is the supervision of the financial sector (i.e. the monetary supervision, the business economic supervision and the supervision of integrity) in both countries; this supervision serves to maintain the external value of the currency and the health of the financial system;
- decision-making by the Countries as shareholders shall take place on the basis of unanimity;
- the distribution of profit shall take place on the basis of the formula of the weighted average of 50% of the GDP (at market prices) and 50% of the population of the year prior to the formation of the Bank, with the distribution being adjusted every five years;
- the Board of Directors shall consist of three members, while the Supervisory Board will have seven members;
- a branch will be set up in Sint Maarten and managed by its own branch director, with the appropriate powers to be able to manage and represent the branch.

In preparation for the introduction of the common central bank, including the preparation of a charter for this institution, the island territories installed a committee, named the Common Central Bank Committee, consisting of representatives of the various island territories and the BNA.

Legal basis

Article 88 of the Constitution of Curaçao and Article 100 of the Constitution of Sint Maarten provide that there shall be a central bank.

Agreements needed to be reached with regard to the organisation, tasks and powers of that common central bank, which were laid down in a mutual arrangement (as referred to in Article 38(1) of the Charter). 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 involved in the arrangement. Legal embedding of the mutual arrangement is necessary for it to be effective. The mutual arrangement concerning the Bank Charter will be legal embedded within the legal system of each of the countries by prescribing in a national ordinance that the Bank will be regulated by a mutual arrangement and that this mutual arrangement can only be realised if it is approved by national ordinance (by each of the countries concerned).

In principle, this realisation procedure of approval by national ordinance is less rigid and time-consuming than a uniform national ordinance in which the regulation is laid down in full. At the same time, the focus of decision-making comes to lie primarily with the parties that negotiate the

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mutual arrangement, in other words the national administrations. The national ordinance granting approval ensures that the national legislators are involved in the adoption of the mutual arrangement.

With a national ordinance granting approval, the relevant mutual arrangement therefore attains the force of law. As a result, it will automatically enter into force within the national legal system of each of the countries. Conversely, the national legal rules will also apply for the Bank.

Other matters relevant for the Bank, i.e. the monetary system, foreign currency transactions and the exchange rate, will also be regulated in the above manner, namely in a mutual arrangement that is approved by national ordinance in both countries. The supervision to be exercised by the Bank, referred to in Article 8, will be regulated by uniform national ordinances.

The Regulation itself also provides that the Countries shall ensure that their national legislation, to the extent that this relates to the objectives of the Bank, and the execution provisions based on this, will be uniform and consistent with this Regulation, and will also contain the same date for their entry into force.

Article 2 of Chapter 1 of the Constitution of Curaçao provides that uniform national ordinances are legal valid regulations in the country of Curaçao.

The realisation of uniform national ordinances is regulated in the Constitution of Sint Maarten in Chapter 6, concerning Legislation and Administration. Specifically, Article 87 provides that the procedure for the realisation of uniform national ordinances may be regulated by mutual arrangements with one or more countries within the Kingdom, with derogation from the provisions of this paragraph being possible. According to this Article, such a mutual arrangement does not enter into force until it has been approved by national ordinance. Parliament may not approve such a draft national ordinance or resolve to propose such a draft without a majority of at least two thirds of the votes cast.

With regard to the method of realisation of national ordinances with the same content, it is noted that no 'uniform national decree, containing general measures' exists. However, the Countries can each adopt a national decree with the same content, which in fact achieves the same result.

Finally, the national legislation and the executed provisions based on it must contain the same date of 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.

Contents of the mutual arrangement

The most important aspects of this arrangement are discussed in more detail below.

Objectives

The objectives of the Bank are:

- a. Promotion of the stability of the value of the currency of the Countries.
- b. Promotion of the health of the financial system of the Countries.
- c. Promotion of safe and efficient payments in the Countries.

The objectives were deliberately placed at the start of the Regulation, in order to emphasise their importance; after all, this defines the field of work of the Bank.

Monetary policy and supervision

The Bank has primacy with regard to the monetary policy to be pursued by the Countries. The Bank determines this policy and executes it. One of the conditions for a balanced and effective monetary policy is healthy government finances. This condition is met with the legal embedding of budget standardisation and supervision of this via the Financial Supervision CRW.

Monetary supervision, business-economic supervision and supervision of integrity will be performed on the basis of the different supervisory laws. In doing so, the Countries will ensure that the supervisory national ordinances of the country of the Netherlands Antilles are included in their jurisdictions in uniform national ordinances and that these remain consistent with this Regulation.

Issue of bank notes and coins

In this draft, the Bank is assigned the task of issuing coins with the capacity of legal tender, as well as bank notes. This was previously a task of the country of the Netherlands Antilles; the BNA was only authorised to issue bank notes. As two Countries are now involved, a decision was made to

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transfer the issue of coins to the Bank too. The monetary system of the Countries will be regulated separately by mutual agreement.

Governance structure

In line with the agreements between the Countries, the Board of Directors will consist of three members; a president and two directors. These three must reach consensus regarding decisions to be taken. If they do not succeed in this, the president holds the casting vote. For the appointment of the Board of Directors, the Ministers submit nominations of three persons for each of the three members, based on a recommendation by at least five members of the Supervisory Board. The Board of Directors will be supported by a branch director in respect of its work for the country of Sint Maarten.

The supervision of and advice concerning the actions of the Board of Directors shall be provided by a seven-member Supervisory Board. The chairman is appointed by the two Countries together, on a joint nomination of the Ministers of Finance, based on a recommendation made by the Supervisory Board. For the joint appointment of the members, the Ministers of the Countries each nominate three members for each position, also on the basis of a recommendation made by the Supervisory Board. The intention here is that three different persons should be nominated for each position. The aim of this construction is the parity between the Countries in decision-making concerning the Bank.

The prior approval of the Supervisory Board must be obtained for certain specific actions of the Board of Directors.

Independence

The members of the Board of Directors and the Supervisory Board must comply with certain expertise and integrity criteria, to be determined in advance. Furthermore, members of the Board of Directors and the Supervisory Board must be able to function entirely independently.

Legal exclusion of liability

Pursuant to Chapter III of the mutual arrangement, the Bank performs a number of tasks and exercises a number of powers. The Bank is assigned tasks and powers not only by the Regulation but also by other formal legislation such as the National ordinance concerning foreign currency transactions, the National ordinance concerning the general pension fund of the Netherlands Antilles and the National ordinance concerning general insurance of exceptional medical expenses. In order to ensure an adequate level of supervision, various international organisations have issued principles (recommendations and guidelines). The Basel Committee on Banking Supervision, the International Association of Insurance Supervisors (IAIS) and the International Organization of Securities Commissions (IOSCO) have each established principles for the regulation and supervision of the banking sector, the insurance sector and the sector of investment institutions respectively that Countries or supervisory authorities must follow or comply with and implement. These principles include the exclusion of liability ('legal protection') for the supervisors. This exclusion of liability by the various international organisations reads as follows:

- Principle 1 of the Basel Core Principles:
'... a suitable legal framework for banking supervision is ... necessary, including ... legal protection for supervisors'
- Principle 3 of the IAIS Insurance Core Principles:
'The supervisory authority: has adequate powers, legal protection and financial resources to exercise its functions and powers'.
- Principle 6 of the IOSCO Objectives and Principles of the Securities Regulation: 'The Capacity of the regulator to act responsibly, fairly and effectively will be assisted by: ... adequate legal protection for regulators and their staff acting in the bona fide discharge of their functions and powers'.

In its report of February 2004 entitled 'Assessment of the Supervision and Regulation of the Financial Sector', the International Monetary Fund (IMF) observed that the Netherlands Antilles has no legal provision containing an explicit exclusion of liability for supervisory authorities, nor a regulation for compensation for any legal expenses arising from legal proceedings that result from the tasks and powers performed and exercised or to be performed and exercised by the supervisory authorities.

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An important reason for the exclusion of liability for supervisory authorities is the influence that the threat of legal proceedings may have on the outcome of the tasks to be performed and the powers to be exercised by supervisory authorities.

The recording of the aforementioned principles of the Basel Committee on Banking Supervision, the IAIS and de IOSCO, as well as the exclusion of liability for the performance of monetary supervision serve to promote proper discharge of the Bank's statutory tasks and powers. To that end, this Regulation includes a provision to exonerate the Bank, being its Supervisory Board, Board of Directors and staff, from damages caused in the normal performance of their tasks and powers to be performed and exercised by or pursuant to this Regulation and other formal legislation, provided that no malicious intent or gross negligence is involved.

The Bank personnel already enjoy protection on the grounds of Article 170 of Book 1 of the Civil Code. However, in connection with the specific recommendations of the IMF and the IAIS, it is considered necessary to also explicitly include this exclusion clause for the Bank personnel in relation to the performance of supervisory tasks and the independence required in that respect. Third parties that perform tasks and exercise powers on behalf of or on the instruction of the Bank, involving assignments from the Supervisory Board, the Board of Directors or the staff of the Bank, can invoke the aforementioned exclusion clause. This could include external experts who perform certain work for the Bank and contracted managers and trustees for institutions to which the emergency regulations apply or who are under the undisclosed custody of the Bank.

Article by Article Section

Ad Article 3(1)

This Article contains three objectives:

- a. Promotion of the stability of the value of the currency of the Countries.
The policy that is aimed primarily at achieving this objective is the monetary policy. According to Article 4 of this Regulation, the Bank determines and executes the monetary policy of the Countries. The monetary policy is aimed at promoting the stability of the value of the currency of the Countries. A key issue here is the maintenance of the fixed exchange rate with the US dollar. Partly in connection with this, the Bank manages and controls the foreign currency reserves of the Countries. The Bank implements the monetary policy on the grounds of various national ordinances (see the general section of these Explanatory Notes). Healthy government finances form an important condition for an effective monetary policy (for this, too, see the general section of these Explanatory Notes).
- b. Promotion of the health of the financial system of the Countries.
This refers to the business-economic supervision and the supervision of the integrity of the financial system that the Bank performs on the basis of various supervisory laws. This supervision should guarantee the health, stability and efficiency of the system, in order to protect the savings of the public. The Countries will ensure in that regard that the supervisory national ordinances of the country of the Netherlands Antilles are included in uniform national ordinances within their jurisdictions and that they remain compatible with this Regulation. The fields of supervision are listed in Article 8.
- c. Promotion of safe and efficient payments in the Countries.
The role of the Bank as a circulation bank is important here, as it is responsible for the circulation of money (see the general section of these Explanatory Notes). The monetary system of the two Countries will be regulated by mutual arrangement. The Bank also regulates foreign payments. The Bank functions as a clearing house and manager of the interbank payments system.

Ad Article 6(3)

The design and print of the coins is included in the mutual arrangement concerning the monetary system. This is in accordance with the Constitution of both Countries.

Ad Article 6(6)

If the Bank suspects a criminal offence on the part of a presenter of bank notes or coins for payment or exchange, the Bank is permitted to claim these bank notes and coins without giving a consideration for these.

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Ad Article 8

The national ordinances relating to the policy fields summed up in this Article are drawn up separately in each Country, it being important that they are uniform in order to promote a "level playing field" and their enforceability. Reference is made to Article 43 as a transitional provision.

Ad Article 9(1) and 9(2)

In relation to the objectives of the Bank, as included in Article 3(1)(a), as well as its tasks, as described in Article 4(1), the Bank is responsible for the management of the official reserves and control of their expenditure. More specific provisions regarding foreign currency transactions are included in the mutual arrangement concerning foreign currency transactions.

Ad Article 9(4) and 9(5)

For reasons of competition, the percentage of licensing fees levied must be the same in both Countries and must therefore be the same in the uniform national ordinances.

Ad Article 9(7)

The licensing fees collected by the Bank are transferred to the Countries by the Bank on a monthly basis. Settlement of the licensing fees, which are transferred monthly by way of an advance, takes place once a year.

Ad Article 9(8)

Because of the importance of the stability of the currency, a decision has been made to fix the exchange rate in relation to the US dollar by mutual arrangement. Movements in the rate are therefore possible only with the consent of the parliaments of both Countries. The mutual arrangement concerning the monetary system regulates that the currency of the Countries is the Caribbean guilder.

Ad Article 10(3)(f)

This Article concerns the situation in which the bank, as the "lender of last resort", must have the possibility of exerting an influence on the long capital market.

Ad Article 10(6)

This Article concerns the situations in which the Bank acts as the "lender of last resort". For example, the Bank may see a need to issue a guarantee for small savers for a credit institution that has run into difficulties.

Ad Article 10(7)

This provision is broader than was the case in the Charter of the BNA. It will now become possible for the Bank to invest its foreign currency in securities guaranteed by foreign governments and issued or guaranteed by international organisations.

Ad Article 11(1)

In contrast to the provisions of the Charter of the BNA, it will now be possible to provide this service only for payment based on the cost price, as fixed by the Bank. After all, if one of the Countries opts for an institution other than the central bank as its home bank, provision of this service to the other Country free of charge will be at the expense of the profits of the providing country. More in general, if a service is provided at the discretion of a Country, this provision takes place for payment.

Ad Article 12

This Article has been made temporarily ineffective by Article 42(2), until the Kingdom Act concerning Financial Supervision of Curaçao and Sint Maarten has lapsed for each Country. At present, the Kingdom Act provides that if the Countries may temporarily borrow from the Netherlands in the event of insufficient liquid assets. If that Kingdom Act lapses, Article 12 provides for the possibility that the Bank provides advances to the Countries, for which the Countries must pay interest at a rate equal to the lending rate.

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Ad Article 13(1)

In combination with Article 10 and Article 12, this Article excludes the possibility of providing credit for other parties, such as government institutions.

Ad Article 13(2)

Property is mortgaged as security for a loan. If this security is executed due to failure to repay the loan, the property is auctioned. The Bank may then buy this property itself (acquisition), as the sale value will be very low at that time, and resell the property later, when the property market recovers. This avoids a loss.

Ad Article 14

This Article covers an exoneration from all liability under civil law, administrative law and criminal law for the Supervisory Board, the Board of Directors and the staff of the Bank for damages caused in the normal performance of their tasks and powers to be performed and exercised by or pursuant to this Regulation and other formal legislation, provided that this is not attributable to malicious intent or gross negligence. Reference is made to the general section of these Explanatory Notes for a further explanation. Finally, it is noted that the terms 'Supervisory Board' and 'Board of Directors' also refer to the members of these bodies.

Ad Article 15

This Article is included in order to avoid the bodies and persons, referred to in Article 14, from being improperly burdened with the costs and expenditure of legal proceeding for the tasks they have performed or will perform and the powers they have exercised or will exercise in accordance with this Regulation and other formal legislation. If the legal proceedings establish malicious intent or gross negligence on the part of the relevant body or person, the Bank shall not refund the costs and expenditure arising from the legal proceedings. For the purposes of this Article, the term 'persons' refers to both natural persons and legal entities and the term 'bodies' also refers to the members of the bodies, referred to in Article 14 of the Regulation.

Ad Article 16(4)

The members of the Board of Directors, the members of the Supervisory Board and the personnel of the Bank who must perform work in the Countries are exempted from the obligations referred to in Article 3(1)(f) of the National ordinance concerning admission and deportation.

Ad Article 18

The importance of the independence of the Board of Directors and the Supervisory Board is assured partly through the use of job profiles based on expertise and experience.

Ad Article 20

An appointment, suspension or dismissal takes place by national decree. Although no 'uniform national decree' exists, such a decree, in observance of the provisions of Article 3(2), must be uniformly established by both Countries. The appointment, suspension or dismissal commences from the date laid down in the uniform national decrees.

Ad Article 21(3)

In addition to the head office, there is a branch in Sint Maarten, headed by a branch director who has the appropriate authorities to be able to manage and represent the branch of the Bank. The branch is equipped and staffed in such a way that it can also perform policy-preparation and implementing tasks in the fields of investigation and supervision, in addition to operational activities such as cash and clearing activities.

Ad Article 24(1)

On the basis of Article 32, at least one meeting of those entitled to the assets takes place each year, in any event the annual meeting. At this meeting of those entitled to the assets, matters as referred to in Article 32(3) are raised. On the basis of Article 24, the Ministers will conduct talks on other matters at least once every six months. This will often concern matters that must be regulated by uniform national ordinance or executed provisions based on this, such as the appointment, suspension and dismissal of members of the Board of Directors and the Supervisory Board, the supervisory tasks and the rules for the calculation of the licensing fees.

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Ad Article 24(3)

Article 24(3) is directed at the 'annual report' that the Bank issues each year.

Ad Article 27(2)(a)

The investment of its capital takes place on the basis of a pre-determined investment policy, under which only investment in the securities shown here is permitted.

Ad Article 30(3)

To the extent that this does not conflict with this Regulation, the Bank shall follow the Corporate Governance Code of Curaçao and the Corporate Governance Ordinance of Sint Maarten.

'Relations by blood or affinity to the second degree' as referred to in paragraph 3 refers to the following. Blood relations are relationships between two persons with a common ancestor.

Relations by affinity are relations between a spouse or registered partner and the blood relations of their spouse or registered partner.

Blood relations in the first degree: parents, children

Blood relations in the second degree: grandparents, grandchildren, brothers/sisters

Relations by affinity in the first degree: partner's parents, partner's children

Relations by affinity in the second degree: partner's grandparents, partner's children, partner's brothers/sisters.

Ad Article 32

For a brief explanation, reference is made to the notes to Article 24(1) of this Regulation.

Ad Article 33

The formula for the calculation of the new share of each Country in the capital is as follows: $A_{i,t} = \frac{(EV_{t-5} * A_{i,t-5}) + (\Delta EV * V_{i,t})}{EV_t}$

Where:

A = new share (not in the year of formation)

i = of one country

t = year

EV = capital

V = apportionment key

In the year of the Bank's formation, the relative apportionment of the capital to the Countries is equal to the apportionment key. After the formation of the Bank, the apportionment key is recalculated and applied every five years. If, following calculation, the apportionment key indeed proves to require adjustment, this application in principle means that the share of each Country in the capital changes. Only if the capital have remained unchanged in a five-year period will an adjusted apportionment key have no effect on the apportionment of the capital to the Countries. An alteration in the capital, known as a movement, may be positive or negative. In both cases, together with an altered apportionment key, this leads to a redistribution of the capital between the Countries.

The formula aims to express the fact that the new apportionment key is only applied to the movement in the capital arising during each five-year period. After all, the differences between the Countries in GDP and/or population growth rates only relate to the latest five-year period and did not affect the development of the capital as contributed by both Countries on the formation of the Bank.

The foregoing means that the first change in the apportionment key will take place as of 1 January 2016.

Ad Article 33 in conjunction with Article 45

The principle for the capital contribution is that the capital of the BNA will be transferred to the new common central bank. This means that Curaçao and Sint Maarten will use their share of the partition of the capital of the BNA for this.

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Ad Article 36(2)

The results, referred to in paragraph 2, concern both realised and unrealised results.

Ad Article 38 (1)

The external expert referred to in paragraph 1 refers to a chartered accountant, within the meaning of Dutch legislation, an accountant-administrative consultant, within the meaning of Article 2:393(1) of the Dutch Civil Code, a certified public accountant within the meaning of the regulations of the United States of America, and a person admitted as an expert under a licence, which may be withdrawn, issued by the minister responsible for Economic Affairs on the basis of evidence that the person concerned complies with competency requirements. These requirements must lie at a level equivalent to those for a chartered accountant, accountant-administrative consultant as referred to above or a certified public accountant as referred to above. The minister may attach conditions to the licence.

Ad Article 38(4)

If the meeting of those entitled to the assets fails to adopt the annual statement of accounts and/or the financial annual report, this means that the Supervisory Board on behalf of the Bank cannot be discharged. The Supervisory Board can contest the failure to adopt the statements and/or report before the Common Court of Justice of Aruba, Curaçao, Sint Maarten, and of Bonaire, Sint Eustatius and Saba.

Ad Article 42

The entry into force of this Regulation is regulated in the accompanying approval national ordinances of both Countries, as described in the general section of this Explanatory Memorandum, under the heading 'Legal basis'. These approval national ordinances shall also regulate how changes in this Regulation shall attain the force of law in the Countries.

Ad Article 45(1)

The provisions of paragraph 1 apply solely for the president and the other managing directors of the BNA according to its Articles of Association and not, therefore, for the Supervisory Board. When this Regulation enters into force, new supervisory directors will be appointed.

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