



Council of Advice
Raad van Advies

Strengthening our
Democracy

ANNUAL REPORT 2016



COUNCIL OF ADVICE

RAAD VAN ADVIES



STRENGTHENING OUR DEMOCRACY

MISSION

The Council of Advice will guard the democracy and constitutional state of Sint Maarten by providing Independent, Qualitative, Accurate, Sound, Just and Fair advice to the Government and Parliament.

VISION

The Council of Advice is a professional advisory body functioning in a representative setting that provides Independent, Effective, Academic and Just advice to the Government and Parliament with the aim to stimulate them to enact qualitative legislation in the benefit of a good functioning democratic society for the people and the Sint Maarten community as a whole.

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FOREWORD



Figure 1 – Mrs. drs. M.C.C. Brooks-Salmon, LL.M. vicechair

The Council of Advice (hereinafter: ‘Council’) is pleased to present you the 2016 Annual Report.

In this report you will not only be informed about the work and the advices issued by the Council, but you will also by means of a theme gain a better insight into the role that the Council has during the constitutional legislative process.

This year’s theme is: “The Constitutional Court regarding the amendment regulation and the publication of the advices of the Council”.

Worth mentioning is the fact that because of a verdict of the Constitutional Court, jurisprudence was created pertaining to two aspects of the role of the Council within the legislative process. This refers to requesting a second advice from the Council when amendments with far-reaching consequences have been made to the initial advice and the publication of the advices of the Council”.

This year the Council received 23 advice requests and rendered 21 advices.

The Council visited different high schools to acquaint the students with the role, the tasks and activities of the Council. The Council also organized a lecture for the general public entitled “Stable Government: an exploration of different Electoral systems”.

Moreover the Council dedicated itself to deepen and enhance the knowledge of its members and staff by hosting and attending different courses and upgrading activities. However the course of events regarding staffing remains a challenge. It is my hope that stability will reign in that respect.

In closing, I would like to thank the secretariat under the leadership of Mr. A. Baly LL.M. for their undeniable support and the members for their valuable dedication and contribution.

Sincerely

Mrs. Mavis Brooks-Salmon LL.M., MA
Vice-chair of the Council of Advice Sint Maarten

1. Legal basis of the Council of Advice

The Council of Advice is a High Council of State, meaning that its independent position has constitutional foundation. Articles 69 to 73 in the fifth chapter of the Constitution of Sint Maarten regulates the constitutional embedding of the Council.

Based on article 69, second paragraph of the Constitution, the Council is required to give advice to the Government:

- a. on all proposals of national ordinances and national decrees, containing general measures;
- b. on proposals as referred to in the Charter of the Kingdom of the Netherlands regarding approval and termination of treaties which concern Sint Maarten;
- c. on proposals of Kingdom laws and administrative orders of the Kingdom;
- d. in extraordinary cases and in all other cases deemed necessary by the Government.

The Council is required to give advice to Parliament on proposals for initiative laws, the so called draft initiative ordinances.

The Council is also authorized to provide Government with unsolicited advice whenever the Council deems it necessary.

1.1 The assessment framework

The Council examines draft legislation on the basis of an assessment framework similar to the assessment framework of the Council of State in the Netherlands. This framework consists of a policy analysis, legal analysis and a technical legal analysis. The assessment framework is the Council's tool to ensure a high standard of quality, accuracy and fairness of the advices. The Council's assessment framework is included in annex 1.

1.2 Advisory time

The Council strives to complete an advice within three months given the complexity of an advice request and the amount of pending (urgent) advices. The Council further tries to adopt its deadline.

The Council aims to hold an advisory period of up to three months depending on the complexity of an advisory request. The Council further tries to implement its advisory period as much as possible, however factors such as the capacity of the Council, the secretariat and the amount of (urgent) advisory requests are taken into consideration.

In addition to the complexity of the advisory request, the fact that the Council can seek third party consultation in order to render its advice, also plays a part in the advising period. Ultimately, the Council prefers not to bind itself to deadlines in order to ensure high-quality advice.

1.3 Dictums of the Council of Advice on draft ordinances and draft decrees containing general measures

At the end of an advice, the Council provides a final formal statement (dictum) concerning the proposed draft legislation. This dictum is based on considerations regarding the facts that are mentioned in the advice.

Depending on the observations made by the Council in its advice, the Council can advise one of the following dictums to government, concerning draft ordinances and draft decrees containing general measures.

Types of dictums for an advice request regarding a draft ordinance:

- To send the draft ordinance to Parliament (the Council does not have any material remarks, the so called blank advice);
- To send the draft ordinance to Parliament after attention has been given to the observations of the Council;
- To send the draft ordinance to Parliament after the observations of the Council have been considered;
- Not to send the draft ordinance to Parliament, until the observations of the Council have been considered;
- Not to send the draft ordinance to Parliament (harsh conclusion).

Types of dictums for an advice request regarding a decree, containing general measures:

- To adopt the draft decree, containing general measures (the Council does not have any material observations on the content, the so called blank advice);
- To adopt the draft decree, containing general measures after attention has been given to the observations of the Council;
- To adopt the draft decree, containing general measures after the observations of the Council have been considered;

- Not to adopt the draft decree, containing general measures, until the observations of the Council have been considered;
- Not to adopt the draft decree, containing general measures (harshest conclusion).

1.4 Draft Initiative ordinances

Advices on draft initiative ordinances do not have dictums. In this case the Council gives a brief summarizing conclusion.

2. Operational Management of the Council of Advice

2.1 Composition of the Council of Advice in 2016

His Excellency, the Governor of Sint Maarten, drs. Eugene Holiday is the constitutional chair of the Council of Advice. The Governor can exercise the chairman's function in the meeting of the Council as often as he deems it necessary; on those occasions he has an advisory voice.

Article 1 of the Council of Advice ordinance states that the Council consists of five members, including a vice-chair and, at most, five extraordinary members

The composition of the Council of Advice as per January 1, 2016 was as follows:

Chair:	His Excellency, the Governor of Sint Maarten, drs. E.B. Holiday
Vice chair, also member:	Mrs. Mavis Brooks-Salmon LL.M. MA
Members:	Mr. Jan Beaujon Mr. Gaston Bell LL.M. Mr. Louis Duzanson Ms. Marcella Hazel MA
Extraordinary members:	Mr. Rik Bergman LL.M. Mr. Miguel Alexander LL.M.

2.1.1 Mutations in the composition of the Council of Advice in 2016

In August, the Council welcomed Ms. Patricia Philips as an extraordinary member of the Council of Advice. Ms. Philips has a financial background and has ample experience as a civil servant to the Government of St. Maarten. She is currently retired and previously served as the Secretary General at the Ombudsman. The Council is pleased with their new addition.

The composition of the Council of Advice as per December 31, 2016 was as follows:

Chair:	His Excellency, the Governor of Sint Maarten, drs. E.B. Holiday
Vice chair, also member:	Mrs. Mavis Brooks-Salmon LL.M. MA
Members:	Mr. Jan Beaujon Mr. Gaston Bell LL.M. Mr. Louis Duzanson Ms. Marcella Hazel MA
Extraordinary members:	Mr. Rik Bergman LL.M. Mr. Miguel Alexander LL.M. Ms. Patricia Philips

The secondary activities of the members of the Council of Advice are included in annex 2

2.2 Composition of the secretariat in 2016

Article 11, first paragraph of the Council of Advice ordinance states that the Council has a secretariat with at the head the Secretary Director of the Council. The staff of the secretariat is appointed by national decree based on the recommendation of the Council. They are suspended and dismissed by national decree, after the Council is heard.

The secretariat supports the Council in the broadest sense of the word. It is responsible for preparing and recording the meetings of the Council, to carry out research on a high academic-level for various advice requests. It is also responsible for the preparation of draft advices. The secretariat assists the Council in maintaining and enhancing working relationships with Government, Parliament, the Councils of Advice of Aruba and Curaçao and the Council of State.

The secretariat also encourages contacts with other institutions/advisory bodies.

The composition of the secretariat of the Council of Advice as per January 1, 2016 was as follows:

Secretary Director:	De heer mr. Ajamu Baly
Legal advisor(s):	Mr. Richard Jackson LL.M. Ms. Eefje Janson LL.M. Ms. Jessica Weeks LL.M.
Office Manager:	Ms. Sheritsa Stroop
All-round administrative Assistant:	Ms. Keziah Jessemay

2.2.1 Mutation in the composition of the secretariat in 2016

The secretariat took leave of Legal advisors Ms. Eefje Janson and Mr. Richard Jackson in May and July 2016 and All-round Administrative assistant Ms. Keziah Jessemay in June 2016. In September 2016 the Council said farewell to Office Manager, Ms. Sheritsa Stroop. The Council thanks them for their contribution.

The Council welcomed Ms. Withney Murray as the All-round Administrative Assistant in July and in September, also welcomed Ms. Nathalie Tackling in the position of Legal advisor. In October 2016, Mr. Mischa Keppel was welcomed as Legal Advisor and Mrs. Tswana Nunes-Burleson as Office Manager of the secretariat.

The composition of the secretariat of the Council of Advice as per December 31, 2016 was as follows:

Secretary Director:	Mr. Ajamu Baly LL.M.
Legal advisor(s):	Mr. Mischa Keppel LL.M. Ms. Nathalie Tackling LL.M. Ms. Jessica Weeks LL.M.
Office Manager:	Mrs. Tswana Nunes-Burleson
All-round administrative Assistant:	Ms. Withney Murray



Figure 2 - Secretariat of the Council of Advice with His Excellency the Governor after taking the oath on November 30, 2016

The Rules of Order for the members and the secretariat of the Council of Advice are included in appendix 3.

2.3 Knowledge policy and training

The Council values the development of knowledge for the staff of the Secretariat, as well as for the members themselves. For the proper performance of its tasks, the Council is dependent on the extent to which knowledge is available. In addition to the library, which is supplemented as much as possible with current literature, the Council and the secretariat have attended various trainings and courses. The most important ones are listed below:

- in February 2016 the Acting Secretary Director participated in the ‘Financial Management Days’ seminar organized by The Board of Financial Supervision (Cft) in Curaçao;
- the Secretary Director took part in secretariat discussions between the Secretary Generals of the Council of Advice of Curaçao and Aruba that were held on Curaçao in March 2016;
- in March and in April 2016 two Legal Advisors attended a short internship at the Council of Advice of Aruba;
- a Council member and the Secretary Director participated in a course organized by the National Register Academy B.V. in the Netherlands in the period of March to June 2016 for members of Supervisory Boards;
- the Secretary Director and the Office Manager attended a seminar themed: ‘Information Security Day’ organized by the SOAB in May 2016;
- in September 2016, the members and the Secretariat followed a course given by the SOAB on the National Budget;
- in November 2016, the Secretary Director and two Legal Advisors participated in a Masterclass on Curacao themed ‘Independent administrative bodies’;
- a Council member and the Secretary Director attended a seminar organized by the Board of Financial Supervision (Cft) with the theme ‘Towards Sustainable Public Finances in December 2016’;



Figure 3 - The Council of Advice during the training on the National Budget along with the SOAB on September 20, 2016

2.4 Financial management

Based on article 26, second paragraph of the Council of Advice ordinance and articles 35, 40, 41 and 42 of the National Government Accounting Ordinance (in Dutch: Comptabiliteitslands-verordening) the vice-chair is in charge of the financial management of the Council. Article 26, first paragraph of the ordinance states that Parliament has to make all relevant facilities available to the Council so that the Council can properly and independently execute its duties, this in agreement with the Council and the relevant Minister. The Council submitted its draft budget for the year 2015 to the Minister of Finance and Parliament in accordance with the National Government Accounting Ordinance.

2.5 Communication

The Council held meetings during the year with all Ministers, the President of Parliament and the entire Parliament. The purpose of these meetings is to promote cooperation and to get an idea of what the Council can expect in terms of draft legislation and the possibility to coordinate this.

The public can keep abreast of all important information, events and opinions of the Council via the website of the Council www.councilofadvicesxm.com.

2.5.1 National ordinance open Government (Landsverordening openbaarheid van bestuur)

The manner in which the Council performs its tasks should be known to Government, Parliament, other institutions and the people of St. Maarten. The publication of the advices of the Council in line with the National ordinance open Government is one of the

available means of communication. Based on the ordinance the Minister of General Affairs publicizes the advices of the Council. Advices on draft ordinances may be publicized simultaneously with the submission of the draft ordinance to Parliament by Government or by the initiative takers. A copy of the advice of the Council, as well as the explanatory report from Government on the advice of the Council is sent to Parliament by Government. This is also done in the case it involves a draft initiative ordinance. Advices on all other draft legislation other than ordinances, where publication in the Official Publication (in Dutch: Afkondigingsblad) is mandatory, are published simultaneously with that publication. Advices in any other cases are published within six weeks after the advice is issued.

2.5.2 Lectures

The Council held a lecture in July entitled “Stable government an exploration of different Electoral systems”. This topic is extremely relevant especially considering the instability within Government that prevailed as a result of ‘ship jumping’ amongst the members of Parliament. The keynote speakers for this lecture were Professor Gerhard Hoogers and Professor Lodewijk Rogier.



Figure 4 - ‘Stable Government: an exploration of different Electoral systems’ July 4, 2017

2.5.3 Caribbean Councils consultation

On April 22nd the Caribbean Councils consultation was held in Aruba. The Caribbean Councils consultation is a meeting held every two years between the Councils of Advice of Aruba, Curaçao and Sint Maarten. During the Caribbean Councils consultation various areas of common interest are discussed and the Councils exchange knowledge and experiences amongst each other. The main theme of the consultation was ‘Cooperation and supervision in the Kingdom of the Netherlands: an exploration of constitutional boundaries’. As a result of these consultations, the Councils issued a joint unsolicited advice regarding the Dispute Settlement. This advice is listed in Annex 4.



Figure 5 - Caribbean Councils consultation on April 22, 2016 on Aruba

3. Output of the Council of Advice

3.1 Advice requests and advices

The Council received a total of 23 advice requests for the year 2016. The Council had a total of 27 draft legislation pieces for advice. The Council issued a total of 21 advices in the year, one of which was unsolicited. There were 3 advice requests that were suspended. The aforementioned is depicted in the staff diagram as seen below.



At the end of the year 2016 there were 4 advice requests that were pending. These advices were transferred to the new year.

Overview inflow / outflow requests for advice in 2015-2016	2015	2016
Total number of received requests	30	23
Pending requests from the previous year	18	4
Total of advices to be handled	48	27
Number of advice requests handled	38	21
Number of advices suspended	2	3
Number of advice requests transferred to the new year	4	4

Below is a list of advice requests for 2016:

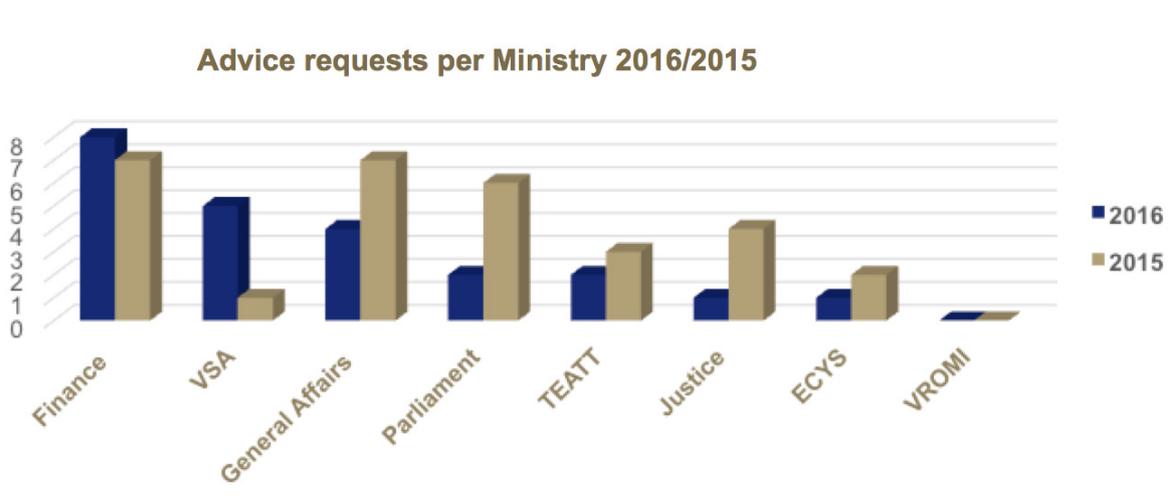
Government	
CoA Number	Subject
SM/01-16 NO	2nd amendment to the adopted National Ordinance adopting the budget of the Country of Sint Maarten for the year of service 2016 (National Ordinance on the 2016 Budget)
SM/02-16 NO	Draft National Ordinance amending the Constitution in connection with limiting the effects of members of Parliament changing party allegiance and the stability of government
SM/03-16 NO	Draft National Ordinance amending the Constitution in connection with extending the group of eligible voters for Parliament election
SM/04-16 NO	Draft National Ordinance amending the National Ordinance on monitoring the bank and credit system (National Ordinance updating and harmonizing monitoring by the Central Bank)

Government	
CoA Number	Subject
SM/05-16 NO	Draft National Ordinance monitoring money transfer offices
SM/06-16 NO	Draft National Ordinance containing rules on granting study financing (Study Financing Ordinance)
SM/07-16 NO	Draft National Ordinance amending the National Ordinance on general subsidy
SM/08-16 NO	Draft National Ordinance amending the National Ordinance on profit tax
SM/09-16 NO	Draft National Ordinance on waiving the tax debt over the tax years 2006 and prior
SM/10-16 NO	Draft National Ordinance adopting the budget of the Country of Sint Maarten for the year of service 2017 (National Ordinance on the 2017 Budget)
SM/11-16 NO	Draft National Ordinance revising formal tax law
SM/12-16 NO	Draft National Ordinance containing rules on the mandatory National Health Insurance
SM/13-16 NO	Draft National Ordinance amending the National Ordinance on motor Liability insurance containing rules pertaining to not extending proof of insurance
SM/13-15 NO	Draft National Ordinance adopting the budget of the Country of Sint Maarten for the year of service 2016 (National Ordinance on the 2016 Budget)
SM/01-16 ND	Draft National Decree containing general measures in connection with establishing the healthcare cost contribution by the Government to nihil that is submitted to AFZ with regard to the premium for health insurance
SM/02-16 ND	Draft National Decree containing general measures adjusting the daily wages for 2015, as mentioned in the National Ordinance on accident insurance and National Ordinance on Healthcare insurance in connection with the price index of household consumption
SM/03-16 ND	Draft National Decree containing general measures amending the decree executing article 4 and 5 of the National Ordinance on Gaming licenses for Gambling
SM/04-16 ND	Draft National Decree containing general measures adjusting the daily wages for 2016, as mentioned in the National Ordinance on accident insurance and National Ordinance on Healthcare insurance in connection with the price index of household consumption
SM/05-16 ND	Draft National Decree containing general measures amending the decree executing article 3 of the National Ordinance on Gaming licenses for Gambling
SM/06-16 ND	Draft National Decree containing general measures establishing detailed rules on public health (Public health Decree)
SM/07-16 ND	Draft National Decree containing general measures expanding the types of insurance agreements individuals can enter into with insurance providers based on the National Ordinance on general and particular healthcare cost and elderly care (Decree expansion of AVBZ & Elderly care)
SM/08-16 ND	Draft National Decree establishing a placement committee for privatization of administrative services
SM/03-15 ND	Draft National Decree containing general measures detention facility Sint Maarten
SM/04-15 ND	Draft National Decree containing general measures rules on the legal position of the police civil servant of the Police Corps Sint Maarten
SM/02-14 ND	Draft National Decree containing general measures pertaining to rules concerning the execution of the Care institutions Ordinance

DIV	
CoA Number	Subject
SM/03-15 DIV	Request for advice pursuant to Article 3, second paragraph, of the National Ordinance on the Promotion of Integrity of Ministers

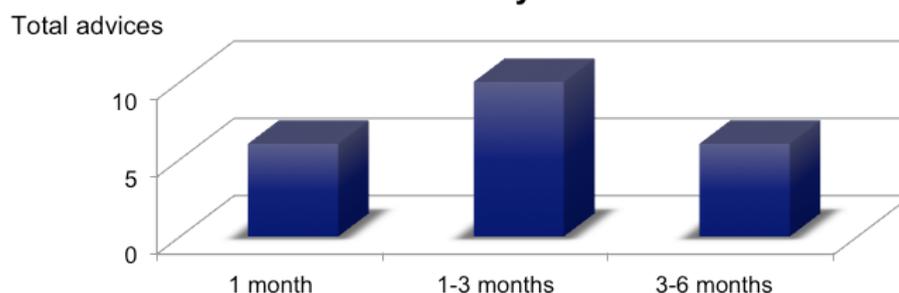
Parliament	
CoA Number	Subject
SM/01-16-INO	Draft Initiative National Ordinance on the integrity of (candidate) ministers
SM/02-16-INO	Draft Initiative National Ordinance adjusting the Constitution to broaden the tasks of the Constitutional Court and adjusting of the National Ordinance Constitutional Court and the National Ordinance Ombudsman in connection with the adjustment of the Constitution

The chart below gives a list of advice requests in 2016 divided per ministry (including draft initiative laws of Parliament):



The advisory time for advices at the Council depends on amongst other things the complexity of the advice request, the prioritizing upon request of the government or Parliament and the workload of and capacity at the Council. If the processing time were to be divided into categories of 1 month or less, 1 to 3 months and 3 to 6 months, then the distribution of the processing time in 2016 would be the following:

Advisory time



Below is an overview of the advices issued in 2016:

	Subject	Dictum
1	<i>Request for advice pursuant to Article 3, second paragraph, of the National Ordinance on the Promotion of Integrity of Ministers SM/03-15 DIV - Advice: Jan-5-16</i>	The Council advises the Prime Minister to take the comments in this advice into consideration.
2	<i>Draft National Ordinance on the National Budget of the Country of Sint Maarten for the year of service 2016 (National Ordinance on the 2016 Budget) SM/13-15 NO - Advice: Jan-19-16</i>	To send to Parliament, after consideration.
3	<i>2nd amendment to the adopted National Ordinance adopting the budget of the Country of Sint Maarten for the year of service 2016 (National Ordinance on the 2016 Budget) SM/01-16 NO - Advice: Feb-29-16</i>	To send to Parliament, after consideration.
4	<i>Draft National Ordinance amending the Constitution in connection with limiting the effects of members of Parliament changing party allegiance and the stability of government SM/02-16 NO - Advice: Jun-21-16</i>	Not to send to Parliament, until consideration.
5	<i>Draft National Ordinance amending the Constitution in connection with extending the group of eligible voters for Parliament election SM/03-16 NO - Advice: Jul-5-16</i>	To send to Parliament, after consideration.
6	<i>Draft National Ordinance amending the National Ordinance on monitoring the bank and credit system (National Ordinance updating and harmonizing monitoring by the Central Bank) SM/04-16 NO - Advice: Aug-23-16</i>	To send to Parliament, after consideration.
7	<i>Draft National Ordinance monitoring money transfer offices SM/05-16 NO - Advice: Sep-20-16</i>	To send to Parliament, after consideration.
8	<i>Draft National Ordinance containing rules on granting study financing (Study Financing Ordinance) Ontwerp Landsverordening, van de houdende regels voor het verlenen van studiefinanciering (Landsverordening Studiefinanciering) SM/06-16 NO - Advice: Dec-6-16</i>	Not to send to Parliament, until consideration.
9	<i>Draft National Ordinance amending the National Ordinance on general subsidy SM/07-16 NO Advice: Nov-1-16</i>	To send to Parliament, after consideration.
10	<i>Draft National Ordinance adopting the budget of the Country of Sint Maarten for the year of service 2017 (National Ordinance on the 2017 Budget) SM/10-16 NO - Advice: Oct-18-16</i>	Not to send to Parliament, until consideration.

11	<i>Draft National Ordinance containing rules on the mandatory National Health Insurance SM/12-16 NO - Advice: Nov-15-16</i>	Not to send to Parliament, until consideration.
12	<i>Draft National Decree containing general measures in connection with establishing the healthcare cost contribution by the Government to nihil that is submitted to AFZ with regard to the premium for health insurance SM/01-16 ND - Advice: Apr-5-16</i>	To adopt, after consideration.
13	<i>Draft National Decree containing general measures adjusting the daily wages for 2015, as mentioned in the National Ordinance on accident insurance and National Ordinance on Healthcare insurance in connection with the price index of household consumption SM/02-16 ND - Advice: Apr-19-16</i>	To adopt.
14	<i>Draft National Decree containing general measures amending the decree executing article 4 and 5 of the National Ordinance on Gaming licenses for Gambling SM/03-16 ND - Advice: Apr-12-16</i>	To adopt, after consideration.
15	<i>Draft National Decree containing general measures adjusting the daily wages for 2016, as mentioned in the National Ordinance on accident insurance and National Ordinance on Healthcare insurance in connection with the price index of household consumption SM/04-16 ND - Advice: Jul-19-16</i>	To adopt.
16	<i>Draft National Decree containing general measures amending the decree executing article 3 of the National Ordinance on Gaming licenses for Gambling SM/05-16 ND - Advice: Jul-19-16</i>	Not to adopt, until consideration.
17	<i>Draft National Decree containing general measures establishing detailed rules on public health (Public health Decree) SM/06-16 ND - Advice: Nov-1-16</i>	To adopt, after consideration.
18	<i>Draft National Decree containing general measures expanding the types of insurance agreements individuals can enter into with insurance providers based on the National Ordinance on general and particular healthcare cost and elderly care (Decree expansion of AVBZ & Elderly care) SM/07-16 ND - Advice: Dec-15-16</i>	To adopt, after consideration.
19	<i>Draft Initiative National Ordinance on the integrity of (candidate) ministers SM/01-16-INO - Advice: Apr-5-16</i>	The Council advises Parliament to take the comments in this advice into consideration.
20	<i>Draft Initiative National Ordinance adjusting the Constitution to broaden the tasks of the Constitutional Court and adjusting of the National Ordinance Constitutional Court and the National Ordinance Ombudsman in connection with the adjustment of the Constitution SM/02-16-INO - Advice: Oct-28-16</i>	The Council advises Parliament to take the comments in this advice into consideration.
21	<i>Unsolicited advice regarding dispute resolution between the Kingdom and the countries. SM/01-16-UA - Advice: Jun-7-16</i>	No dictum.

3.2 Frequent advisory comments

The Council evaluates in principle each advice request on its own. Nevertheless there are points that often return in the advices: the frequent advisory comments. In 2016 the five most mentioned advisory comments were on the following aspects:

1. *Consultation of advisory bodies and stakeholders*

The remarks concerned incorrectly not hearing advisory bodies such as the Audit Chamber and the Social Economic Council, within whose advisory tasks the subject matter falls and incorrectly not consulting the (organization of) stakeholders that were affected by the regulation.

2. *Financial paragraph*

The remarks concerned inadequately substantiating the financial plans in the draft legislation. In particular article 10 of the National accountability Ordinance was infringed upon because the financial paragraph incorrectly did not delve into the financial consequences of the plans or underestimated these consequences.

3. *Legal certainty*

The comments concerned the inadequate respect for the legal position of citizens and business. Among other things, it has been pointed out that the legislation was unclear and unconditioned and that legislation was given retroactive effect which violated the legal certainty.

4. *Discrepancy between draft and explanatory note*

These comments concerned the observed differences between the draft legislation and the accompanying explanatory notes. In particular, comments were given about explanatory notes incorrectly containing norms (these should be part of the drafts) and about drafts and explanatory notes that contradicted each other.

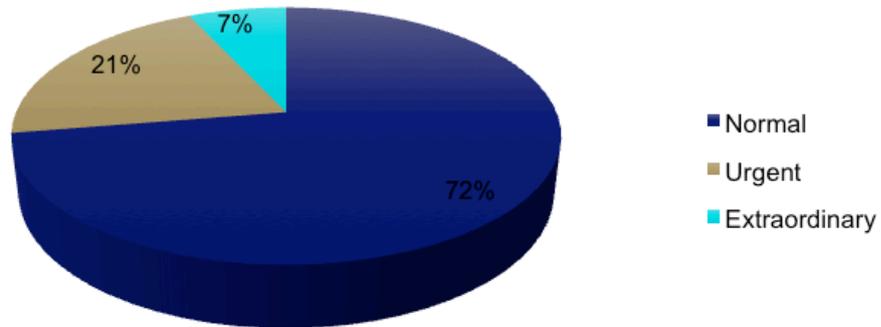
5. *Discrepancy between draft and higher ranking regulations*

These comments related to differences between the draft and regulations of a higher rank. In this context, it has been pointed out that drafts of National Ordinances are in violation of the Constitution of Sint Maarten and that drafts of National Decrees, containing general measures, incorrectly differ from National Ordinances.

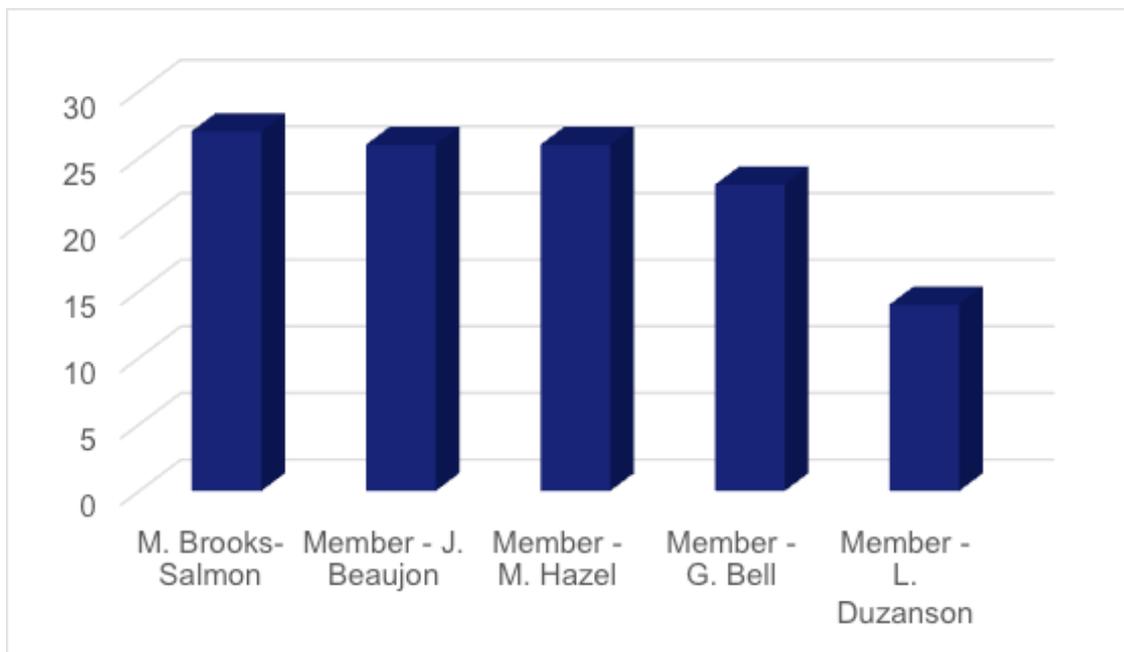
3.3 Meetings

A total of 29 meetings were held during the year 2016, of which 21 were regular meetings, 6 were urgent meetings and 2 were extraordinary meetings chaired by His Excellency the Governor.

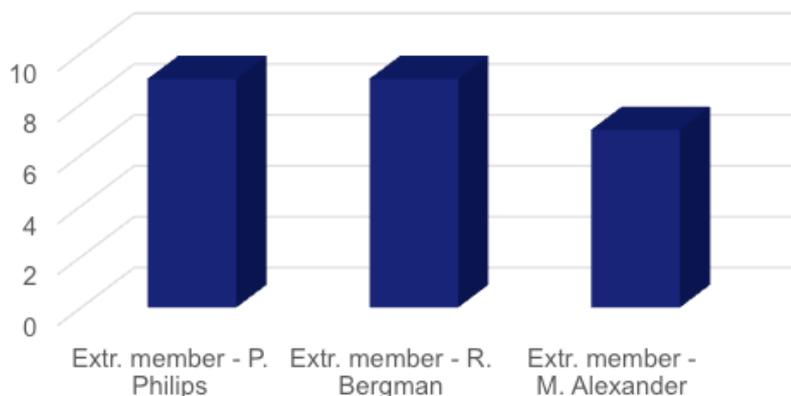
Overview meetings



Below is an overview of the attendance of the members of the Council:



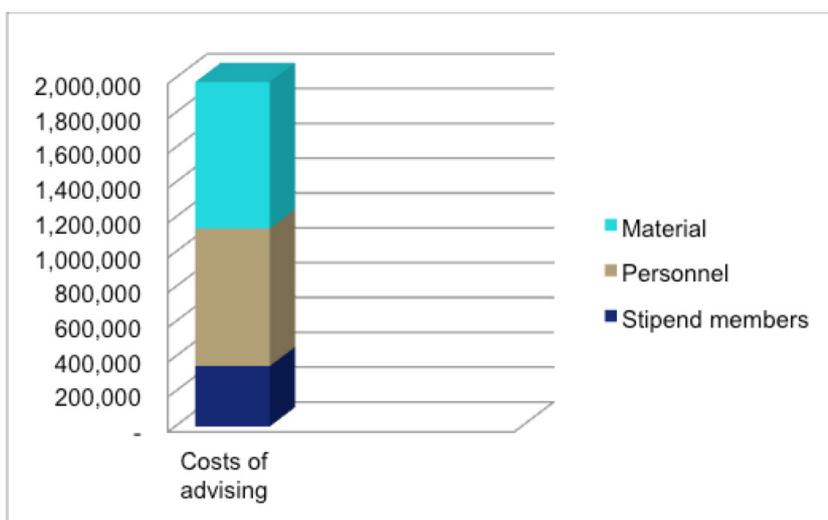
Below is an overview of the attendance of the extraordinary members of the Council:



3.4 Expenditures

The total cost of advising by the Council was budgeted in 2016 at NAf. 1,979,811.00.

Budgetpost	Expenditures
Material	NAf. 842,673
Personnel	NAf. 789,138
Stipend members	NAf. 348,000



4. Theme: The Constitutional Court regarding the amendment rule of the Council and publication of the advice

On 7 July 2016 The Constitutional Court of Sint Maarten made a ruling in a case between the Ombudsman and the Government of St. Maarten.¹ This dispute was related to the National Ordinance on the Integrity Chamber, in particular whether this was in conflict with the Constitution. To settle this dispute the Constitutional Court did not only look at the content of the National Ordinance on the Integrity Chamber², but also how it came about. The legal considerations at this point provide interesting constitutional reflections on two aspects of the role of the Council of Advice in the legislative process. It concerns the publicizing of the advices.

Second advice of the Council in event of drastic changes

Based on the constitution and the National Ordinance Council of Advice, the Council is consulted on all draft National Ordinances and National Decrees, concerning general measures.³ This advisory function will be undermined if a draft National Ordinance or National Decree containing general measures, undergoes significant amendments after the Council has rendered its advise on the draft legislation and a revised version is processed further without second consultation by the Council. Therefore, the rule is that, if the Council of Advice has already advised on a draft legislation and amendments take place thereafter that are not directly related to the advice of the Council, the Council must be consulted on the respective changes.⁴ Consequently, we refer to the “amendment rule”.

The rule was invoked by the Ombudsman in the case of the National Ordinance Integrity Chamber. In that context the Constitutional Court considers itself to be authorized to assess the manner in which the draft legislation is realized as well as that the amendment regulation is applicable within the evaluation. The following is a quote made by the Constitutional Court with respect to the aforementioned:

“The core issue is that the Constitution attaches great importance to the role of the Council of Advice and its participation in the legislative process, with the aim to obtain the needed legal expertise in rule of law and administrative preparedness in the respective process. It is for a reason that the Constitution guarantees the independence and impartiality of the Council of Advice as a High Council of State. Since the importance of the Council of Advice lies particularly in raising the quality of legislation and the legislative process, the Council should in principle be involved in the essential parts of the decision making – given that there are no urgent opposings reasons”⁵

This quote not only offers good judgement into the underlying trend of the amendment rule, but also offers guidance for the question of when the criteria for a drastic change has been met. It occurs in any event when the change is being made on essential elements of the decision-making process of a regulation.

1. Case number. 2015/1

2. National Ordinance August 21, 2015 Establishment of the Integrity Chamber, AB 2015, no. 18.

3. Article 69 Constitution and article 13 National Ordinance Council of Advice.

4. This is based on the the systematic relationship of articles 69 Constitution and article 13 National Ordinance Council of Advice. This is also confirmed in the explanatory memorandum of the Constitution, p. 80-81 and in the manual for the development of laws and regulations of Sint Maarten, version 1.1, p. 15.

5. Constitutional Court Sint Maarten 7th of July 2016, case number. 2015/1, paragraph 4.2.

In its ruling the Court further examined if the Government adhered to the amendment rule in the establishment of the National Ordinance Integrity Chamber. Based on the following considerations the court concluded that this is not the case:

“The Court considers that in the course of the legislative process the ratio between effectiveness, legal protection and supervision such fundamental changes have been made to the initial draft submitted to the Council of Advice (...) that further advice of the Council of Advice was clearly required. All the more, now that there is question of a new institution – the Integrity Chamber – which has not been introduced in other parts of the Kingdom. In addition, this draft regulation may be associated with far-reaching infringements on fundamental rights.”⁶

Based on this quote the amendment rule is applicable when in a draft regulation the ratio between effectiveness, legal protection and supervision has fundamentally changed. It can be said that these are essential components of a draft legislation and that therefore, any changes made after the Council of Advice has issued its advice, this must be resubmitted to the Council. In addition, the Constitutional Court includes the fact that there is mention of a new institution that does not exist elsewhere in the Kingdom. Pursuant to this matter the Constitutional Court when assessing the amendment regulation also takes into account any precedents (within the legal system of the Kingdom), whereby without a precedent the amendment regulation surfaces sooner. Finally, the Constitutional Court takes into account the circumstance that the draft legislation may be complied with great infringement of fundamental rights. From this it can be deduced that should possible amendments be in violation of fundamental rights, the Council of Advice must be consulted again. These legal grounds, offer separately and in relation to each other, better insight of the content and application of the amendment regulation.

6. Constitutional Court Sint Maarten 7th of July, case number. 2015/1, paragraph 4.6.

The publication of the advices of the Council

The advices of the Council of Advice are not available from onset to the general public. This is because the National Ordinance Open Government, and in particular article 10, sets the rules on publication of advices of the Council of Advice. This regulation contains inter alia standards regarding the deadlines for publication and that the Minister of General Affairs is the competent body to publicize the advices issued by the Council.

The article does not explicitly regulate that draft regulations submitted to the Council should be made public. Article 9, paragraph 1, of the National Ordinance Open Government does make provisions for such an obligation for non-official advisory committees, but this provision is not declared applicable to the Council of Advice.⁷ As a result, this National Ordinance contains no explicit obligation to publish the draft legislation submitted to the Council. Until the ruling, the practice was that these drafts were not made public.

This practice was one of the points of dispute in the case before the Constitutional Court. The Ombudsman desired to look into the draft ordinance for reference to the amendment regulations and to be able to fully evaluate the advice of the Council. The Government however, had specifically regarded this draft legislation as a secret document and only shared this in the judicial proceedings with the Ombudsman and the Court. Because of this dispute the Constitutional Court also ruled on the practice of not publicizing the presented draft National Ordinance to the Council. The Court pointed out:

“The democratic principle anchored in the Constitution ensures that the legislative process should be transparent. That requirement applies in particular for the benefit of the public representation, the Parliament. The current legislative practice in St. Maarten, where the Government draft legislation is presented to the Council of Advice is not made public and therefore not known to Parliament is incompatible and inconsistent with what is dictated by law in articles 69 and 84 of the Constitution. Therefore they cannot be maintained”

The Constitutional Court makes clear that draft National Ordinances submitted to the Council are to be made public. The democracy principle and the related need for transparency of the legislative process requires one to do so. It is also of high importance that the availability of the advices of the Council of Advice are properly scrutinized. The advices are based on draft legislation and to fully understand the advice it should be read in conjunction with the draft legislation.

7. Contrary to paragraph two and three of article 9 that are applicable to the Council of Advice based on article 10, paragraph three of the National Ordinance Open Government.

These advices shall be made public simultaneously with the submission of the (final) draft to the Parliament by the Government or by the initiative takers. This also means that drafts of the National Ordinance that are submitted to the Council, but ultimately not submitted to Parliament do not have to be made public.⁸ This is in line with the ruling by the Constitutional Court because such drafts are still at an early stage in the legislative process and Parliament is not yet involved in the legislative procedure.

Conclusion

The ruling of the Constitutional Court concerning the National Ordinance Integrity Chamber offers interesting considerations of two aspects of the role of the Council of Advice in the legislative process.

With regard to the second advice of the Council of Advice after drastic amendments have been made, the Constitutional Court makes it clear that this is a must if they affect essential components of the decision-making regulations. A change in ratio between effectiveness, legal protection and supervision of draft legislation falls within this scope. The Court also explicitly includes the application of the amendment rule because there is no precedent within the Kingdom and the fact that the amendment can infringe on fundamental rights.

With regard to the publicizing of advices of the Council, the Constitutional Court also made it clear that the submitted draft legislation of National Ordinances to the Council must be made public. The democracy principle and the related requirement for transparency in the legislative process requires this. This means that the prior common practice, whereby these laws were not made public, can no longer be maintained.

8. Article 10, second paragraph, National Ordinance Open Government.

5. ANNEXES

5. Annexes

5.1 Annex 1 – Assessment tools Council of Advice

The policy-analytical assessment

The policy-analytical assessment deals with the critical analysis of the policy proposal.

An important point of interest is the elucidation to the proposal. Is the reason for this new law or measure clearly defined? And is this line of reasoning convincing?

The policy-analytical assessment consists of three sections:

1. Description of the problem: What is the problem? Why is this a problem? And for whom? What is the context? These and other questions come up for discussion.
2. Approach to the problem: is this regulation a(n) (effective) solution for the defined problem?
3. Execution and enforceability: is the proposed execution adequate and can the regulation be enforced? Are there sufficient means and manpower available to execute and enforce the regulation?

When dealing with the policy-analytical assessment, the Council though not necessarily exclusively, shall examine the question whether or not and if so, to what extent the measures which are encountered in the draft law are proportional and effective for the intended purpose. The Council respects the fact that the development of the chosen policy is the prerogative of Government and/or Parliament, and therefore exercises restraint while analyzing the policy.

The judicial assessment

The judicial assessment evaluates the judicial quality of the proposal. It concerns two main divisions:

1. Review against higher laws: is the proposal in conflict with (international) higher laws? The Council examines written as well as unwritten laws.
2. Does it fit within the existing law: does the proposal fit within the existing legal system? Furthermore, is the draft proposal even necessary within this framework?

The legal technical assessment

With the legal technical assessment the technical quality of the proposal and the elucidation to the proposal are evaluated. Technical aspects such as logical and systematic structure, consistency and terminology are assessed. This assessment is effectuated on the basis of the Instructions for regulation of Sint Maarten (in Dutch: Aanwijzingen voor de regelgeving) and the manual for the development of laws and regulations of St. Maarten (in Dutch: Draaiboek voor de regelgeving).

5.2 Annex 2 – Secondary activities of the members in 2016

Member	Secondary activities
Mrs. Mavis Brooks-Salmon LL.M. MA (Vice-chair and also member)	<ul style="list-style-type: none"> - Director children Catholic choir
Mr. Jan Beaujon (Member)	<ul style="list-style-type: none"> - Chairman of the Board of Directors of the Nature Foundation Sint Maarten - Member of the Supervisory board of the Foundation Cooperative Funds - Board member of the Foundation for the Conservation of monuments. - Member of the Supervisory Board of the Windward Islands Bank N.V - Member of the Supervisory Board of the Windward Islands Bank International N.V.
Mr. Gaston Bell LL.M. (Member)	<ul style="list-style-type: none"> - Member of St. Maarten Bar Association - Substitute Member of the Disciplinary Board of Lawyers Sint Maarten; - Board member of Foundation for Hope & Music Development; - Board member of Diamond Avandero Corporation N.V.; - Congregational Steward Methodist Church Sint Maarten; - Member of the Task Force Methodist Church Building Project.
Mr. Louis Duzanson (Member)	<ul style="list-style-type: none"> -
Ms. Marcella Hazel (Member)	<ul style="list-style-type: none"> - Official translator by Federal Decree - Advisor of the Community Council of South Reward
Mr. Rik Bergman LL.M. (Extraordinary member)	<ul style="list-style-type: none"> - Partner at BSZE Attorneys at Law/ Tax Lawyers St. Maarten - Board member of de University of St. Martin - Board member of the Parkinson's Foundation Sint Maarten - Member of the Disciplinary Board of Lawyers - Member of the St. Maarten Bar Association

<p>Mr. Miguel Alexander LL.M. (Extraordinary member)</p>	<ul style="list-style-type: none"> - Commissioner of: <ul style="list-style-type: none"> • Maduro & Curiel's Bank N.V. in Curaçao; • Reon Investments N.V. in Curaçao; • Samsom Curaçao N.V. in Curaçao; • United International Bank N.V. in Curaçao; • The Windward Islands Bank N.V. and • The Windward Islands Bank International N.V. - Director of eighteen (18) "offshore" partnership companies and one belonging to the BCD/BORON Group - Director/owner of: <ul style="list-style-type: none"> • Cazalex Holding B.V.; • Notarispraktijk Alexander N.V.; • Cazalex Pensioenen N.V. • Alexander Corporate Legal Advisors B.V.; • Alexander & Baaten Legal Services B.V. (10% shareholder) - Director of: <ul style="list-style-type: none"> • Foundation SONA; • Foundation Cazalex; • Foundation Private Fund Cazalex; • Foundation Financing Task Force Tax Treaties • Foubdation Pension Fund Chr. A. Peterson - Advisor to Notary office Kleinmoedig Alexander in Curaçao
<p>Ms. Patricia Philips (Extraordinary member)</p>	<ul style="list-style-type: none"> - Owner of APAS; - Board member of the Foundation for Advancement in Law - Board member of the Chuchubi Foundation; - Member 'Cradle Roll Secretary' Philipsburg Methodist Church - Financial Administrator Philips-burg Methodist Church

5.3 Annex 3 – Rules of Conduct

The Council of Advice strives to guarantee the principles of democracy and the Rule of Law in St. Maarten, by providing independent advice to Government and to Parliament, which is effective, accurate, and of high quality. In order to realize this, the core values of the Council are taken into account at all times. These values relate to: integrity¹, soundness² and justice³.

The integrity, soundness and justice aspects of these rules of conduct are already included in the Rules of Order of the Council of Advice. More specifically, these rules ensure that the independence and the impartiality of the Council, its vice-chair, members and extraordinary members are guaranteed individually. These rules are discussed in the paragraph below titled 'Guaranteeing Impartiality and Independence of the Council' and are the foundation for the proper and reliable functioning of the Council.

In short, the Council of Advice is an independent body, which in spite of possible external pressure shall not give advice in any other way than for which it stands. In the rules of conduct, an explanation is given regarding the manner in which the Council of Advice shall preserve its independence. Furthermore, in the rules of conduct in question, attention has been given to avoiding (political) partiality and the semblance of such. This entails that the vice-chair, the members and the extraordinary members of the Council of Advice shall state their views regarding the topics of advice, without (political) prejudice. The vice-chair, the members and the extraordinary members are also expected not to publicly propagate any political preferences, for example by affixing party-political stickers to their cars or attaching such flags to their cars.

In order to strive for the highest quality and impartiality in its advice, the Council will utilize assessment tools previously agreed upon covering three areas, namely (1) the policy-analytical assessment, (2) the judicial assessment and (3) the legal technical assessment. The advice shall not be realized on any other grounds than these. By using these assessment tools one is not only acting impartially in this case, but it further promotes the quality of the advice. After all, the Council derives its authority from the quality and impartiality of its advice.

Prior to compiling the advice the Council uses these assessment tools in order to produce high academic-level advices. The rules of conduct to enhance the quality of the advice shall be discussed below.

I. Guaranteeing Impartiality and Independence of the Council

By definition, membership of the Council is a part-time function and is therefore often performed in addition to a main function and/or another job. One must not lose sight of the fact that performing other functions promote the social involvement of the members, which in turn helps the advisory process. The following should, however, be taken into account:

1. Functions incompatible with the vice-chairship and the membership of the Council

1 By integrity is understood: adhering to the legislation because one is convinced that this is the proper manner in which to act, not because of external

2 By soundness is understood: well founded

3 By justice is understood: acting in accordance with democratic and constitutional principles, guaranteeing the fundamental human rights, including social civil rights.

independence of the Council, there are objections to occupying the main or other function; the (extraordinary) member in question neither be able to participate in the deliberations nor vote in regard to the topic at hand. In that case the (extraordinary) member in question shall be heard by the Council.

- c. If it concerns the vice-chair, the notice meant in the previous sentence shall be effectuated by the oldest appointed member. In that case the vice-chair shall be heard by the Council.
- d. If the vice-chair, in connection with the impartiality and independence of the Council has objections to the (extraordinary) member occupying a main or other function, the (extraordinary) member in question will neither be able to participate in the deliberations nor to vote regarding a topic of advice. If this (extraordinary) member persists in occupying the position or function in question, the entire Council shall decide.
- e. If a member or extraordinary member, in connection with the impartiality and independence of the Council has objections to the vice-chair occupying a main or other function or participating in the deliberations and participating in the voting with regard to an advice topic and the vice-chair persists in the exercising of the office in question or the function in question, the entire Council shall decide.

Rules of conduct for promoting quality of the advice

6. Research

- a. Before the Council of Advice arrives at a standpoint on the draft proposal for which advice will be given, a thorough research shall be conducted with regard to the topic of the proposal. The Council shall strive to maintain an academic level.
- b. In order to guarantee the objectivity of the Council's advice, the Council of Advice shall rely solely on facts, or on views, which are widely shared academically/based on academic research.

7. Participation of members and extraordinary members

The members and extraordinary members shall make their expertise available before the start of the research and before a draft advice is drawn up.

8. Guaranteeing the quality of advice

The Council of Advice shall take the time necessary to come to an advice.

9. Foundation for assessments

The Council of Advice reviews a draft or proposal solely on the basis of the previously established assessment tools, consisting of a policy- analytical, judicial and legal technical assessment. These assessment tools are analogous to those of the Council of State in the Netherlands.

Policy–analytical assessment

The policy-analytical assessment (Du: BAT) deals with the critical analysis of the policy proposal.

An important point of interest is the elucidation to the proposal. Is the reason for this new law or measure clearly defined? And is this line of reasoning convincing?

The policy-analytical assessment consists of three sections:

1. Description of the problem: What is the problem? Why is this a problem? And for whom? What is the context? These and other questions come up for discussion.
2. Approach to the problem: Is this regulation a(n) (effective) solution for the defined problem?
3. Execution and enforceability: Is the proposed execution adequate and can the regulation be enforced? Are there sufficient means and manpower available to execute and enforce the regulation?

When dealing with the policy-analytical aspect, the Council though not necessarily exclusive, shall examine the question whether or not and if so, to what extent the measures which are encountered in the draft law are proportional and effective for the intended purpose. The Council respects the fact that the development of the chosen policy is the prerogative of Government and/or Parliament, and therefore exercises restraint while analyzing the policy.

Judicial assessment

The judicial assessment evaluates the judicial quality of the proposal. It concerns two main divisions

1. Review against higher law: Is the proposal in conflict with (International) higher law? The Council of Advice looks at the written and unwritten law.
2. Does it fit within the existing law: Does the proposal fit within the existing legal system? And, is the draft proposal even necessary within this framework?

Legal technical assessment

With the legal technical assessment the technical quality of the proposal and the elucidation to the proposal are evaluated. Technical aspects as logical and systematic structure, intrinsic consistency and terminology are scrutinized. This assessment is effectuated on the basis of the Instructions for regulation of Sint Maarten and the Guidelines for the realization of legislation and regulation for Sint Maarten.

10. Drawing up the advice

The task of the Council of Advice is to think along constructive lines with the legislator and regulator. The advice must therefore be effective and concentrated on the relevant issues which the topic or proposal is related to. If appropriate, the Council may endorse the vision of the legislator or the regulator.

In conclusion

Even though it falls outside of the scope of the rules of conduct, the Council concludes with the following points, which are taken into account for promoting the core values and enforcing the relevant rules of conduct.

These rules of conduct are equally applicable to the Secretariat.

The Council of Advice shall act as transparent as possible. The Council shall publish its advices in its annual report, on its website and in the media, when the advices have been

made public by Government. In this way, everyone is able to take note of the activities of the Council. Indirectly these publications moreover, may contribute to the compliance with the rules of conduct. After all transparency offers the possibility of verifying if the Council has complied with the rules of conduct. In order to make the work of the Council as accessible as possible for the local population, advices shall be translated where possible or an English summary shall be provided.

In conclusion the Council of Advice, shall as stated in article 22 of the Rules of Order, execute a self-evaluation, once a year, prior to July 1st, which is solely intended for internal use of the Council, in order for the Council to remain vigilant at all times regarding compliance with the rules of conduct as such. On the basis of this self-evaluation the rules of conduct may be revised if there is reason to do so.

5.4 Annex 4 – Selection of advices issued

Unsolicited advice regarding the resolution of disputes between the Kingdom and the countries

Note: This is an English summary of the Dutch advice

RvA no. SM/01-16-OA

Subject: Unsolicited advice ex Article 14, second paragraph, of the National Ordinance Council of Advice regarding dispute resolution between the Kingdom and the countries.

Advice: Discussed during the meeting of the Council on June 7, 2016, and adopted during the meeting of the Council on June 7, 2016.

1. Reason for the advice

During the meeting of the Councils of Advice of Aruba, Curacao and Sint Maarten in Oranjestad (Aruba) on April 22, 2016, the Councils deliberated about several constitutional aspects of cooperation, supervision and conflict resolution within the Kingdom of the Netherlands (Kingdom).

Because a debate about the regulation of dispute resolution ex Article 12a of the Charter for the Kingdom of the Netherlands (the Charter) is on its way, the Councils decided in Oranjestad to advise their Governments and (if legally possible) parliaments about the constitutional aspects of this dispute resolution.

2. Article 43 Charter as an independent source of problems

The safeguard function of Article 43 of the Charter has evolved in recent decades in the most important basis for interfering by the Kingdom in the countries. At the same time it is not entirely clear where the boundaries lie of this Article. With Article 43, the Kingdom Government can warn, admonish and threaten. With the establishment of more or less forced cooperation arrangements, for example based on Article 38 of the Charter, the intervention possibilities of Articles 43 and 50 of the Charter almost always play a role in the background. The statutory possibilities for the countries of the Caribbean part of the Kingdom to act against a measure based on Article 43 if necessary are limited due to the democratic deficit. After all, the Kingdom Government de facto coincides with the Dutch Government.

In addition, there is the so-called selectivity of this safeguard function because these standards are in practice not applied to the country of the Netherlands by the Kingdom. Also, in the application of Article 43 of the Charter, there is lacking the control of an independent judge. These factors form the core problem that should be taken into consideration when composing the regulation regarding the dispute resolution.

3. Dispute resolution by an independent judge

Because the four countries in the Kingdom are de facto not equal or equivalent to each other, the presence of a judicial review of conflicts between the countries and between the countries and the Kingdom Government is crucial. Precisely because of the coinciding of Dutch and Kingdom institutions, the dispute resolution must stay far away from Governments involved, including the Kingdom Government, and given to an independent judicial body. Now that Article 12a of the Charter has been introduced in October 10, 2010, it is important for the countries of the Kingdom that regulation regarding independent dispute resolution ex Article 12a of the Charter is introduced soon.

If it is up to the Netherlands (and since it is a compulsory Kingdom Act, the Netherlands can ultimately overrule the objections of the other countries with its own wishes), the final regulation of Article 12a of the Charter will get the character of a Crown Appeal (“Kroonberoep”) and look similar to or even be identical to the one stipulated in Article 26 of the Financial Supervision Act of Curacao and Sint Maarten and the National Ordinance of Aruba on Temporary Financial Supervision.

It can be concluded that the system envisaged by the Dutch Government for the implementation of Article 12a of the Charter does not comply with the principles as embraced by Government of the Kingdom of the Netherlands when introducing Article 12a of the Charter in 2010. A Crown Appeal, even in the aggravated form in which it is presented here, is not a procedure in which strictly legal disputes concerning the interpretation of the Charter are settled by an independent dispute resolution authority. Also in the Benthem judgment,⁴ the Crown Appeal was not regarded as a court of law.

The reason for the reluctance by the Kingdom Government to make a provision within abovementioned frameworks seems to be largely motivated by the conviction that a separation between a judgement on legal matters and a judgment on policy matters is often not or not adequately possible. Another factor is presumably the objections of the Council of State and the Dutch Government, based on Article 120 of the Constitution of the Netherlands, against a form of dispute resolution in which a final judgment on the legality (and with that the binding) of (formal) Kingdom regulation is put in the hands of an independent body. The Dutch Government therefore opted for a variant in which a dispute about a (draft of a) Kingdom Act could be raised, but the final ruling on its constitutionality remains in the hands of the Kingdom Government, as is now already the case.

In the opinion of the Council of Advice, the arguments of both the Council of State and the Dutch Government are not convincing. A less formal and literal reading by the Council of State and the Dutch Government could have (or

⁴ EHRM 23 oktober 1985, AB 1986, 1, NJ 1986, 102.

even should have) lead to the conclusion of what was obviously meant here with Article 12a of the Charter: an independent body competent to resolve competency disputes that can occur (and also have occurred) between the Kingdom and one or more Caribbean countries of the Kingdom about whether or not something falls within the jurisdiction of the Kingdom in a satisfactory way for all countries involved (and which cannot be sufficiently resolved by Article 12 of the Charter). Just as this happens in many other (quasi) federal systems.

The rather artificial separation made by the Council of State and the Dutch Government between the reviewing of legal matters and policy matters is also illustrated by the almost undisputed introduction in 1994 (in the Netherlands) of the jurisdiction of the administrative court to review decisions of the central Dutch Government to annul municipal and provincial regulations. In Article 229 of the WolBES, the same authority is laid down for the Island Council of Bonaire, Sint Eustatius and Saba to oppose the annulment of their ordinances. It is hardly defensible that the Public Body of Bonaire, whose autonomy has no constitutional anchoring at the moment, has the power to put the annulment of their ordinances forward to a judge, while at the same time the countries of Aruba, Curacao and Sint Maarten – of which the autonomy is guaranteed in the highest constitutional document of our Kingdom and is incomparably much larger than that of Bonaire – should be denied such a power to bring legislation (which limits that authority) forward for judicial review.

The reference to the closed system of the Constitution of the Netherlands in relation to the power to legislate and the ban on judicial review ex Article 120 of the Constitution of the Netherlands is equally curious. First of all, it should be noted that Article 120 belongs to the Constitution of the country of the Netherlands: it is not part of the constitution of the Kingdom (it is not established by Kingdom Act) and therefore has no binding force in relation to Kingdom Acts.

In the opinion of the Council of Advice the judgement regarding the Harmonization Act⁵ does not provide any grounds for stating that Kingdom Acts could not be tested against the Charter. But even if one considers that the absence of a Kingdom Act implementing Article 49 of the Charter precludes the possibility of an independent body to test (draft) Kingdom Acts against the Charter, then still that is not a valid argument in the opinion of the Council. By virtue of Article 12a, the legislator of the Charter has consciously established a new provision in which the Kingdom legislator is required (other than Article 49, in which he is only authorized) to establish regulation regarding dispute resolution. This provision therefore applies in this perspective as a *lex specialis* in relation to Article 49. Although the text of Article 12a leaves much room for different modalities, the history of its parliamentary proceedings makes it clear that the Kingdom legislator's intention is to establish an independent (read: judicial) form of dispute resolution that addresses issues of

⁵ HR 14 april 1989, NJ 1989, 469.

competency and jurisdiction regarding drafts of Kingdom Acts and Kingdom Decrees.

It should be noted that the Financial Supervision Act of Curacao and Sint Maarten – and, as an extension thereof, most likely the proposed Kingdom Act that implements Article 12a of the Charter – states that the Council of State's judgment is binding in so far as it concerns legal matters. But, of course, it leaves it up to the Kingdom Government to judge *if* the judgment concerns legal matters. And in the event that the Council of Ministers cannot decide unanimously on whether or not this is the case – given the interests at stake, that is quite likely – the final opinion of the Council of Ministers of the Kingdom has to be reached via the existing procedure of Article 12 of the Charter. The dissatisfaction with that procedure has been the main reason for introducing Article 12; therefore this does not help to move in the direction of solving the issue.

Furthermore, the Crown Appeal as is incorporated in the Financial Supervision Act of Curacao and Sint Maarten and the National Ordinance of Aruba on Temporary Financial Supervision is, on closer inspection, not an appeal procedure at all. It is, according to the definitions of the Dutch General Administrative Law Act, an objection procedure. The same body that gave the initial judgment - the King in his capacity as Head of the Kingdom – gives, after protest against the initial judgment, also the final judgment, through intervention of the Council of State. This leads to the situation that the King in his Royal Decree (“Koninklijk Besluit”), as a response to the appeal of Government of a country, gives a judgment about his own initial Royal Decree in which he gave instructions on account of the Kingdom Government. Such a legal figure has never before existed in our legal system (a Crown Appeal was always an appeal: the Crown decided on the legal and administrative sustainability of decisions of lower governing bodies than himself) and raises questions about the inviolability of the Crown, the indivisibility of the Crown, the functioning of ministerial responsibility in respect of these two principles and (in relation to that) the parliamentary involvement.

4. Conclusion

It is indicated in this advice that the safeguard function of Article 43 of the Charter has developed in the last few decades as the main basis for interference by the Kingdom, without it being entirely clear where the limits of this norm lie. Moreover, it has been established that these standards are not actually applied to the Netherlands by the Kingdom, that the Kingdom Government coincides with the Dutch Government and that the application of Article 43 of the Charter does not come with a review by an independent judge.

On the basis of the above, the Council considers that a general regulation of dispute resolution between the Kingdom and the countries cannot be introduced as long as the objections and questions mentioned in this advice are not well thought out, addressed and answered.

The Council also considers that disputes within the Kingdom can only be resolved by an independent judicial body – competent for legal disputes concerning the interpretation of the Charter. It is exactly such a body that can correct inconsistencies of the Charter and can form a prelude to more balanced relations in the Kingdom. The manner in which this independent judicial body is designated, arranged or composed falls outside the scope of this advice.

Draft of the National Ordinance to adopt the budget of Country Sint Maarten for the fiscal year 2017

Note: This is an English summary of the Dutch advice

RvA no. SM/10-16-LV

Subject: Draft of the National Ordinance to adopt the budget of Country Sint Maarten for the fiscal year 2017 (National Ordinance Budget 2017)

Advice: With reference to your request dated September 5, 2016, for the opinion of the Council of Advice on the abovementioned subject and the discussion thereof during the meeting of the Council on September 16, 2016, October 4, 2016, October 14, 2016 and October 18, 2016 and its adoption in the meeting of the Council of October 18, 2016, the Council informs you as follows.

The draft, according to the considerations, serves to adopt the budget of the country for the fiscal year 2017. The Council endorses the effort put in by Government to take into consideration as much as possible the timeline of the budgetary cycle established by law, and to present a draft budget earlier than in previous years to the Council.

In addition, the Council agrees with the cautionary approach of Government with regard to arriving at a balanced budget. However, in the opinion of the Council, the draft budget is weakened by a lack of clear policy frameworks (per Ministry) as well as a proper explanatory memorandum (hereafter: explanation). In the opinion of the Council, no complete, measurable and verifiable picture of the fiscal year 2017 has been outlined. In spite of elections or changes of the guard, Government is not released from its obligation to submit a budget which meets the legal requirements. The lack of conscious policy planning, which is linked to unsubstantiated explanations, also weakens the authority-, control- and policy function of the budget as a derivative of the right of Parliament to approve the budget. The Council advises Government, taking into consideration the preceding, to pay special attention to showing more clearly, measurable policy plans, which must not only be formulated and elucidated clearly, but which must also be related to

the budgeted amounts for the fiscal year in question (or the subsequent fiscal years in the long-range budget).

1. Directives for Responsible and Substantiated Budgeting

The Council expects that in the coming years, more and more corrections may be made to the presentation, quality, structure and content of the draft budgets to be presented for advice. While steps have been taken during the past years to this end, the Council has observed that during the past years the information provided, the explanation, policy and financial information in general have been deficient. The Council advises Government to continue to build on the already realized progress of the budgets and (in particular) the related positive advice of the College Financieel Toezicht Curacao and Sint Maarten (hereafter CFT) of April 2016. Before specifically addressing the content of draft budget 2017, the Council, because of the above mentioned, wishes to bring attention to a number of essential elements of (draft) budgets, in which the Council hopes to see more improvement. In this manner, one can strive for better annual budgets and, following this, long-range budgets. This shall facilitate the making of the budgets, improve the understanding of the budgets and promote the continuity of Government finances.

The Council advises Government to attach more value to the principle of the policy budget as stated in article 14 of the Government Accounts National Ordinance. Article 14, second paragraph, of the Government Accounts National Ordinance establishes that the budget is explained per chapter as well as per function. The following paragraphs, three up to and including six, of the same provision mention the information which must be contained in the explanatory memorandum to the budget, including the factors which form the basis for the assessments and, to the extent possible, information about the extent of the activities or performances which are contemplated. The Council is of the opinion that the budget at hand is not yet ready at this time, taking into consideration the foregoing, to show and include the policy plans in such a clear manner in the explanatory memorandum, but nevertheless again requests special attention from Government, when they make up the budget, to take into account the foregoing.

This would mean that a policy plan must not only be formulated clearly, but also that an indication should be given of which activities/projects shall be executed, in order to realize that plan and in particular which measurable results are expected to form the basis for this during its execution and how all of this is expressed in the corresponding budget items. The Council deems it advisable that policy plans are linked to the budgeted amounts in the fiscal year in question, or in the subsequent fiscal years in the long-range budget. It is also important to include a time planning for the realization of these plans.

In addition, the Council advises attention in the explanatory memorandum to the (brief) account of the current situation. After all, proper policy formulation can only be effective if a proper evaluation of the current situation forms the basis for the policy. This also informs everyone of the problems with which Government and the Country have to deal with and the manner in which Government wishes to solve these, and even leaves room for identifying positive policy aspects which Government wishes to expand and re-enforce. All this executed (in context), facilitates the evaluation of the policy pursued and makes a contribution to the fairness and verifiability of the budget as well as the future perspectives of the Country. This may also contribute to better mapping out the future perspectives and the continuity and stability of the financial position of the Country.

2. Budget cycle

Pursuant to the Government Accounts National Ordinance, the budget cycle is not only comprised of making up and executing the budget, but also giving account. This is a continuous process which is coordinated and monitored by the Minister of Finance. The Government Accounts National Ordinance recognizes various procedural provisions for this cycle, which also contain data. In view of the precarious financial position of the Country, the Council advises strict compliance with these procedural provisions and corresponding data. In this framework, the Council also points out to article 100, third paragraph, of the Constitution, on the basis of which the budget must be presented to Parliament at the latest on September 1st. The Council has ascertained moreover, that the Governments Accounts National Ordinance, erroneously is not in accordance with the Constitution, because article 38 of the Governments Accounts National Ordinance prescribes that the draft budget should be presented to Parliament at the latest on the second Tuesday of September. The Council considers this discrepancy inadvisable and observes at the same time that Government has not met any of the two deadlines. The Council asks attention for this.

3. Legal Requirements: Explanatory Memorandum and Policy Budget

The national ordinance to adopt the budget and the corresponding explanatory memorandum must be in complete compliance with the provisions and the requirements which have been included in the Rijkswet (Kingdom Act) Financieel Toezicht Curacao and Sint Maarten (hereafter: RFT), the Constitution and the Governments Accounts National Ordinance. It is very important that the budget is balanced and that the budget is made up in such a way that it is orderly and verifiable in order to give interpretation to the legally established "checks and balances". In order to promote this, a thorough and detailed explanation is of extreme importance. The Council underlines the necessity of making up budget items which have their

explanation and translation in a corresponding and especially satisfactory explanatory memorandum.

The Council observes that the budget 2017 in various aspects does not meet the requirements of the RFT, the Constitution and the Governments Accounts National Ordinance. In the first place, the information which Government presents in the draft, in the opinion of the Council has not been formulated in a manner which is Specific, Measurable, Acceptable, Realistic and Time-bound (SMART) and has been insufficiently explained. In the second place, the policy objectives do not correspond with the requirements stated in article 14 and article 15 of the Governments Accounts National Ordinance. These can therefore not be verified. The Council asks attention for this.

The Council advises to adjust the explanatory memorandum to the budget 2017 in such a way that interpretation and explanation is given to the budget items included for this fiscal year and to structure this explanatory memorandum as such. In order to promote the understanding of the budget, the Council advises the inclusion of elucidations which are strictly related to the fiscal year 2017 in the specific explanatory memorandum for that fiscal year. This in connection with the observation of the Council that the explanatory memorandum to the long-range budget are related in a number of areas to expenses and receipts, which are related to the fiscal year 2017 and therefore give an explanation of the budget 2017 instead of the long-range budget. In this manner, for example entire paragraphs are dedicated to revenues for 2017 of the Central Bank of Curacao and Sint Maarten, the concession fee and dividend payments of the Gemeenschappelijk Electriciteitsbedrijf Bovenwindse Eilanden (hereafter: GEBE), the collection of casino fees, etc. In view of the fact that the aforementioned items only apply to the fiscal year 2017, according to the Council, they therefore do not form part of the long-range budget. In view of article 13 of the Governments Accounts National Ordinance, the Council advises the adjustment of the long-range budget and to only mention revenues and expenses which are actually spread out over several years and to explain these extensively.

The explanatory memorandum to the Governments Accounts National Ordinance mentions that policy plans of the Government form the basis for the budget. The Council advises the expansion of the existing elucidation with the policy plans of the Government.

The Council observes that in the current draft no clear and in particular no measurable policy terms have been formulated. It is true that on page 7, it has been stated that the Government in the budget at hand, irrespective of the lack of clear policy terms, has opted to indicate per Ministry which important policy priorities for 2017 and following years are in force. However the Council observes that these policy priorities are of a general nature. In view of the lack of specific policy terms and an adequate explanation, a

situation has occurred in which items and policy terms can be evaluated and verified in a less accurate and intrinsic manner.

Government argues that the elections at hand are the reason for the supplying of concise and generally formulated policy priorities per Ministry. Elections or outgoing status of Cabinets do not release Government from the obligation to present a budget which meets the legal requirements. The Council advises the Government to supplement the draft so that it meets the requirements of fairness and verifiability. In this way, all expected revenues and expenses in the budget 2017 must be explained satisfactorily.

4. Loans and arrears of payment

On page 8 of the draft, the Government states that there is an investment need, in which shall be provided by a loan. The investment need and the position of Government in this regard is worrisome. The Council bases its worries on the reactions of the Cft to the progress reports 2016, submitted up to the present time. In his reaction to the second progress report 2016, dated August 25th 2016, among other, the following has been stated by the Cft:

“The Cft states that based on the realizations in the first six months, one must observe that the budget 2016 at this time is not in agreement with the standards of art. 15 RFT Sint Maarten and that at this time, interpretation is being given to an insufficient extent to the points of the instruction. This means therefore that the conditions to be allowed to borrow for new investments are being not complied with.”

It is notable that the Country is under the impression that it shall be able to comply with an investment need of NAf 59 million, while the Cft has observed at this time that "the budgeted balance for the end of 2016 of [ANG] 25.3 mln. as a result of the realizations in the first six months has worsened by [ANG] 11.0 mln." The Cft has concluded that in the event of an unchanged policy, the budget balance at the end of 2016 shall fall short even more. Because of this, in 2016 we shall not be able to make good the minimum of NAf 20 million in shortfalls. The Council is of the opinion that, in view of the foregoing, providing for this investment need by means of a loan requires a more detailed explanation.

At any rate, because the Country was not allowed by the Cft to take out any loans in 2016, the year 2017 includes investments, in an amount of NAf 51 million which could not be realized in 2016, for the aforementioned reason. Government states that another NAf 6 million must be added for the Tax department reform and moreover an additional amount of NAf 2 million for new investments. With regard to this latter NAf 2 million, the fact is furthermore that the supporting budget documents do not show what the purpose is of that amount. This shall have to be further clarified by the Government. Furthermore the Council observes that in the draft, a calculation of the interest expense norm is missing. The Council asks attention for this.

(...)

7. Capital account expenditure

With regard to the Capital account for the budget 2017, in all chapters, budget items 'deferred investments' have been included. These expenses have however, not been explained at all. That is why the Council cannot form an opinion as regards to these expenses on the Capital account. That is why, in the opinion of the Council, the explanatory memorandum requirements, as included in article 15, second paragraph, section b, of the RFT and article 14, third paragraph, of the Governments Accounts National Ordinance have not been complied with. The Council asks for attention for this.

In this respect, the Council advises, as part of the explanatory memorandum, to mention each year in an attachment or on a list, forming part of the budget, the amounts and the corresponding explanations and descriptions of the unrealized, annulled and new investments which fall under each loan taken out, of the annual budget.

(...)

11. Conclusion

In conclusion, the Council advises Government to not send the draft national ordinance to Parliament, until the observations of the Council have been considered.

