



To His Excellency the Governor of Sint Maarten
drs. E.B. Holiday
Falcon Drive # 3
Harbour View
Sint Maarten

RvA No. SM/09-14-LV

Subject: Draft National Ordinance adopting a new Code of Criminal Procedure (your reference number: LV-14/0011).

Advice: With reference to your request dated August 11, 2014 for the advice of the Council of Advice on the abovementioned subject and the discussion thereof at the meetings of the Council on December 2, 2014 and January 27, 2015, and the adoption thereof at the meeting of the Council on January 27, 2015, the Council informs you as follows.

The purpose of the draft National Decree is to adopt a new Code of Criminal Procedure in connection with legal and technical developments, such as the right of the suspect to consult an attorney prior to the interrogation, the revision of DNA legislation and the possibility of videoconference hearing.

The Council supports the purpose of the draft, but it has some comments with regard to the draft. It is of the opinion that, in this connection, some adjustment to the draft is desirable.

1. Policy analytical assessment

Information about the new Code of Criminal Procedure

The introduction of a new Code of Criminal Procedure obviously implies a change in the procedures to be followed each day by the investigating officer and other actors in the criminal process, on one hand, but, on the other, a significant change for the citizen as well. The Council expects that notably the judicial system, the legal profession, the judiciary and other stakeholders should be given further training. Furthermore, the citizen should be made aware, for instance, that, under Article 78, third paragraph, of the draft, he or she could be subject to a body search by a police officer of a different sex in an extreme case. The documents accompanying the draft did not show how the Government will



deal with the changes in the criminal process for the implementers thereof. The Council asks the Government to pay attention to the above.

2. Legal assessment

2.1 The draft

The director of a young offenders institution

Article 68 of the draft stipulates that each assignment of and change in counsel must be communicated to the public prosecutor, the attorney, the suspect, the examining magistrate and, if the suspect is detained in a detention center or prison, to the director of that facility.

The Council advises also to include in Article 68 of the draft that the director of a young offenders institution should be informed immediately of each assignment of and change in counsel with regard to juvenile suspects or convicts admitted to a young offenders institution based on Article 1:164, fourth paragraph, subparagraph a, of the new Criminal Code (“AB” [Official Gazette] 2013, No.2).

Based on the proposed Article 497, the parents (or guardians) and the attorney should be informed of written notices to the minor suspect, such as summonses, notices to appear, notifications and or notices.

The Council advises also to lay down in the draft that the director of a young offenders institution should be informed of written notices of juvenile suspects admitted to a young offenders institution based on Article 1:164, fourth paragraph, subparagraph a, of the new Criminal Code (AB 2013, No. 2).

Permission to the victim to inspect the procedural documents

The proposed Article 70b stipulates that permission may be granted to the victim to inspect the procedural documents. This permission will be granted by the court determining questions of fact before which the case is prosecuted and by the public prosecutor during the court hearing.

The Council notes that the president is in charge of the court hearing pursuant to the first paragraph of Article 310 in conjunction with Article 302 of the draft. Regarding to this, the



Council advises to substantiate why the permission to the victim to inspect the procedural documents should be granted by both the court determining questions of fact and the public prosecutor.

Personal data protection

The explanatory notes to Article 173 of the draft state that the existing reference in the Netherlands to “the person responsible for the data” (Article 125m, third paragraph, subparagraph b, of the Code of Criminal Procedure of the Netherlands) has not been copied in the draft because of the lack of legislation on the protection of personal data in Sint Maarten.

The Council notes that Sint Maarten does have legislation on the protection of personal data, namely the National Ordinance on the Protection of Personal Data. Therefore, the Council advises to adjust the draft and the Explanatory Memorandum.

The absence of grounds for challenging interpreters

The proposed Article 348, seventh paragraph, stipulates that the suspect may challenge the interpreter based on certain specified grounds. The draft, however, does not indicate the grounds on which an interpreter can be challenged by the suspect is based. The Council advises to state the grounds in the draft on which an interpreter may be challenged by the suspect is based.

The Public Prosecution Service

Under the proposed Article 410, the president has to provide a copy of the judgment and the record of the hearing to the suspect, his counsel and the injured party on request. Also for the purpose of the enforcement of criminal judgments, the Council advises that it also be stipulated in the draft that the Public Prosecution Service should be given a copy of the judgment.

Pursuant to Article 42, second paragraph, of the draft, any statement of the suspect, witness or expert, or the counsel or the attorney will be recorded in his or her own words as much as possible. The Council advises to substantiate why the draft does not stipulate as well that any statement will be recorded in one’s own words whenever the Public Prosecution Service so requests.



2.2 The Explanatory Memorandum

Evidence of a terrorist crime

Title XVIII of the Third Book of the draft (articles 1771 et seq.) provides rules concerning special investigative powers. In the Articles of this Title, the term “evidence of a terrorist crime” is used. The explanatory notes to these Articles do not indicate, however, what should be understood by evidence of a terrorist crime. The Council advises to supplement the Explanatory Memorandum on this point for reasons of legal certainty.

The right to legal assistance during interrogation

The subject of legal assistance of the suspect is discussed in the explanatory notes to Article 48 of the draft, which includes both the right to consult and the right to legal assistance during interrogation of the suspect. The Council notes that, recently, the Supreme Court of the Netherlands (hereinafter: the Supreme Court) held that it is logical for the legislator to address the implementation of the required legislation concerning legal assistance during interrogation with diligence.¹ The Supreme Court considers that it cannot be ruled out that, if the legislation is not forthcoming, it could arrive at a different opinion at any time in the assessment of future cases in which questions about the content and scope of the right to “legal assistance during interrogation” are put before the Supreme Court. The Council advises to include the judgment of the Supreme Court in the Explanatory Memorandum.

Lack of a financial section

Article 10 of the National Accountability Ordinance stipulates that the explanatory memorandum to the draft of a national ordinance should contain a separate part stating the financial consequences for the Country and the coverage by the Country. The Council advises to include a financial section in the Explanatory Memorandum.

Security search

The explanatory notes to Article 78 of the draft state that a security search has not been included in Article 78, because this has already been provided for by Article 13, fourth and fifth paragraph, of the Police Kingdom Act of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba (Police Kingdom Act).

¹ “HR” [Supreme Court of the Netherlands] April 1, 2014, ECLI:NL:HR:2014:770.



The Council notes that the (mutual) arrangements for the implementation of Articles 12 and 13 of the Police Kingdom Act, prescribed by Article 14 of the Police Kingdom Act, have not yet been adopted.

Adolescents in the law of criminal procedure

The European Court of Human Rights (ECHR) has indicated in several judgments that if a suspect is a minor, he must be treated in a manner that takes full account of his age, degree of maturity, intellect and emotional conditions to promote his understanding of and participation in the process.² The Council advises to substantiate to what extent this was taken into account.

3. Legal-technical assessment

The annex contains comments of an editorial and legal-technical nature. These comments are deemed to form an integral part of this advice.

4. Conclusion

In conclusion, the Council asks the Government to send the draft National Ordinance to Parliament after the observations of the Council have been considered.

Thus adopted at the meeting of the Council of January 27, 2015.

The Secretary
[was signed:]
Mr. mr. A.G. Baly

The Vice-Chair
[was signed:]
Ms. mr. drs. M.C.C. Brooks-Salmon

² ECHR May 30, 2013, No. 35985/09 (Martin/Estonia), ECHR December 11, 2008, No. 4268/04 (Panovits/Cyprus), ECHR December 16, 1999, No. 24724/94 (T./The United Kingdom) -



ANNEX to the advice of January 27, 2015, RvA No. SM/09-14-LV

Comments of an editorial and legal-technical nature

The draft contains a number of editorial and legal-technical imperfections. The Council gives the following non-exhaustive examples.

The draft:

- a. In Article 411a, first paragraph, the term “original suspect” is used. The Council asks the Government to consider limiting itself to using the term: suspect.
- b. For the purpose of consistency, the Council advises to replace the phrase “the fourth Title of the fourth Book” in the fourth paragraph of Article 387a by “Title IV of the fourth Book”. This notation is also used in Articles 152a, 200, 455, 476 of the draft. The Council’s suggestion also applies to Articles 637, fourth paragraph, 638, first paragraph, and 640, second paragraph of the draft.
- c. For Articles 578, 595, second paragraph, and 593, first paragraph, of the draft, the Council advises to refer to the “Minister of Justice” instead of the “Minister”.
- d. The proposed Article 70b, first paragraph, refers to “the court determining questions of fact”. The Council asks the Government to consider further defining this term in a definition clause.
- e. *[Not applicable in English]*

The Explanatory Memorandum:

- a. The explanatory notes to Article 48 state that an agreement was reached on EU Directive (10190/13) on May 28, 2013 with regard to the right of access to a lawyer in criminal proceedings and the right to communicate at the time of arrest. They do not mention between what parties this agreement was reached. The Council advises to state in the explanatory notes between what parties the agreement on the EU Directive was reached.
- b. In the explanatory notes to Article 152a, the word “Article” should be removed in the following sentence: “In the fifth paragraph Article, appeal is made possible for the Public Prosecution Service and the plaintiff or applicant”.
- c. The Council notes that the explanatory notes to Article 261h erroneously refer to the substantiation requirement laid down in the second paragraph of Article 403 instead of the first paragraph.
- d. The Council advises to provide the Explanatory Memorandum with page numbers for the sake of clarity.