

# **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.*

## **ANNUAL REPORT 2014**



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## FOREWORD



Dear Reader,

You are presented with the 5th annual year report of the Council of Advice Sint Maarten.

The objective of this report is to publicize the Council's activities and views of the year 2014.

The Council will also give an overview of the amount of requested and given advices. In the annex you will find 2 examples of advice that are already published.

In the annual report of 2013 the Council started to expand on a theme. The theme "Language Issue in Legislation" was dealt with. This subject was also discussed during the Caribbean Councils Consultation that took place in October 2014 in Curaçao.

As you know legislation on Sint Maarten is in the Dutch language while English is the lingua franca.

This year the Council has chosen the theme "Instructions to the Governors" (see chapter 4).

Last year the Council received 46 request for advice and gave 34. The Council issued one unsolicited advice on the co-signing of ratified laws and regulations. This and more information is portrayed in image and numbers in this report.

You can also consult/read the report via our website [www.councilofadvicesxm.com](http://www.councilofadvicesxm.com)

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Mrs. M. Brooks-Salmon, LL.M., MA.  
Vice Chair 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, however the necessary time to complete an advice, depends on the complexity of an advice request and the amount of pending (urgent) advice requests to be handled by the Council.

### 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). Depending on the observations made by the Council in its advice, the Council can consider using one of the following dictums.

**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 (the heaviest 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 (the heaviest 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 2014

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.

On the 1st of January 2014, the composition of the Council was as follows:

<b>Chair:</b>	His Excellency, the Governor of Sint Maarten, drs. E. B. Holiday
<b>Vice-chair, also member:</b>	Mrs. Mavis Brooks-Salmon LL.M. MA.
<b>Members:</b>	Mr. Jan Beaujon Mr. Gaston Bell LL.M Mr. Marcel Gumbs (until December 19th 2014) Mr. Louis Duzanson
<b>Extraordinary members:</b>	Mrs. Marcella Hazel MA. Mr. Rik Bergman LL.M. Mr. Miguel Alexander LL.M.

#### 2.1.1 Mutations in the composition of the Council in 2014

In December 2014, the Council said farewell to Mr. Marcel Gumbs when he was appointed Prime Minister of Sint Maarten. The Board thanks him for his contribution.





On December 31<sup>st</sup> 2014, the composition of the Council of Advice was as follows:

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

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

## **2.2 Composition of the secretariat in 2014**

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.



On January 1<sup>st</sup> 2014, the composition of the secretariat of the Council of Advice was as follows:

<b>Secretary Director:</b>	-
<b>Legal advisor(s):</b>	Mr. Richard Jackson LL.M. Mr. Keith de Jong LL.M.
<b>Office Manager:</b>	Mrs. Florencia Wilson
<b>Allround Administrative Assistant:</b>	Mrs. Mireya Ostiana-Wijman

### **2.2.1 Mutations in the composition of the secretariat in 2014**

From September 2013 until January 2014 the Council functioned without a Secretary Director. This was a huge task for the Vice-chair who took on the tasks of the Secretary Director during this period. In January 2014, the new Secretary Director, Mr. Ajamu Baly joined the Council. The Council hired a HBO intern in January and August 2014, Ms. Nerissa Cornelia. The intern was mainly tasked with supporting the legal advisors and the administration.

On December 31<sup>st</sup> 2014, the composition of the secretariat of the Council of Advice was as follows:

<b>Secretary Director:</b>	Mr. Ajamu Baly LL.M.
<b>Legal advisor(s):</b>	Mr. Richard Jackson LL.M. Mr. Keith de Jong LL.M.
<b>Office Manager:</b>	Mrs. Florencia Wilson
<b>All-round Administrative Assistant:</b>	Mrs. Mireya Ostiana-Wijman

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 January, Mr. Tjeenk Willink and Ms. W. Sorgdrager gave a practical training to the Council and the secretariat on advising the Government and the Parliament;
- during the year the Secretary Director completed internships at the Council of Advice Aruba, Curaçao and the Council of State in the Netherlands;
- the Secretary Director attended a postgraduate course in May on Curaçao on ministerial responsibility;
- one of the legal advisors attended a seminar organized by the committee for Financial Supervision in February during the committee's Financial management days in Curaçao with the theme, Effective Management of tax compliance risks;
- one of the Council members, a legal advisor and the Secretary Director attended a course on sanctions and sanction systems in November in Curaçao;

In addition, during the year the Council and the secretariat attended five modules of the training the Leergang Sint Maarten:

- Constitutional Law;
- Administrative Law;
- Administrative enforcement;
- Technical legislative assessment of draft legislation;
- Policy analytical assessment of draft legislation.

This training provided by the Academie voor de Wetgeving in the Hague offers the members, the Secretary Director and the legal advisors an extension of their knowledge in the field of constitutional law, administrative law and the enforcement of the law, which are of importance for the responsibilities of the Council. Given the interest from both inside and outside Government, the Council decided to make it possible for other interested parties to follow the course as well.

The Council would like to take this opportunity to thank the Council of Advice of Aruba, the Council of Advice of Curaçao and the Council of State for their cooperation and assistance. The Council also expresses its gratitude to USONA for funding the abovementioned training expenses.

#### 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: Comptabiliteitslandsverordening) 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 in the beginning of the year with all Ministers<sup>1</sup> and the President of 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.

During the year the Council has actively tried to make the public more aware of its presence in various ways such as via a radio interview, a presentation to students of HAVO and VWO of the Milton Peters College in April and by taking part in the career day in November of the Milton Peters College.

The public can keep abreast of all important information, events and opinions of the Council via the website of the Council [www.councilofadvicexm.com](http://www.councilofadvicexm.com).

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1. A meeting with the Minister of Tourism, Economic Affairs, Traffic and Telecommunications did not take place due to conflicting agendas.

### 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 Sint 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 Lecture

The Council held a lecture in October with the theme, "Corporate Governance & the role of board members in Government owned companies. Keynote speakers for the lecture were member of the Council of advice, Mr. Louis Duzanson and Christian De Jong, Attorney at Law at the law firm BZSE. The moderator was Mr. Miguel Alexander, extraordinary member of the Council of Advice.



### **2.5.3 Caribbean Councils consultation**

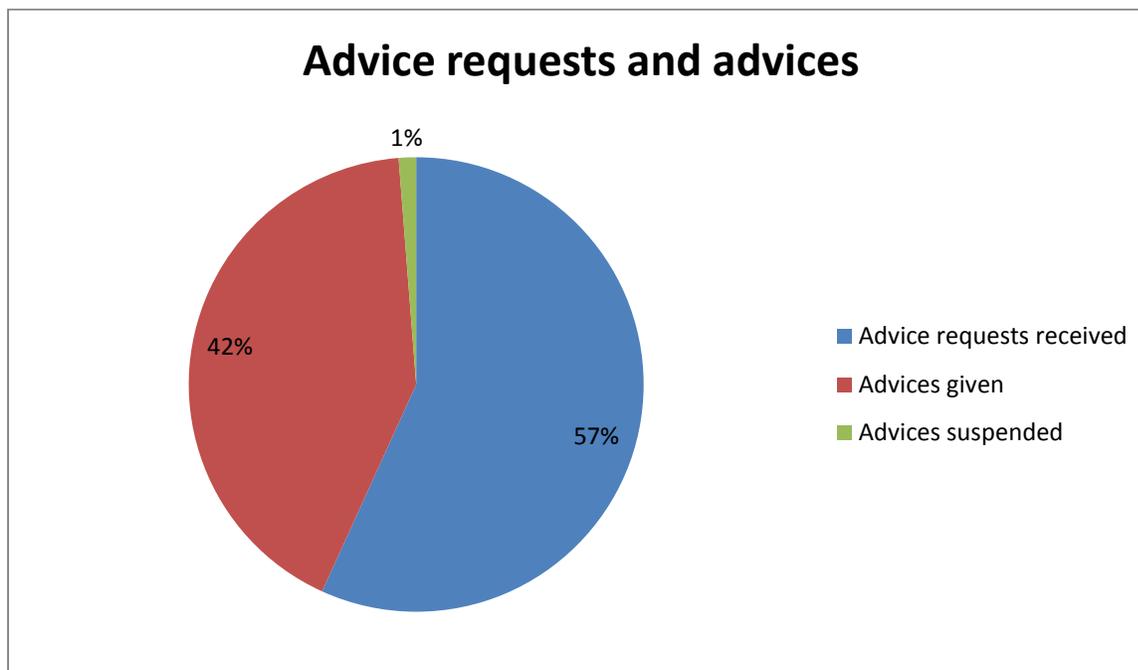
On October 24<sup>th</sup> 2014 the Caribbean Councils consultation were held in Curaçao. The Caribbean Councils Consultation is a meeting held every two years between the Councils of Advice of Aruba, Curaçao and Sint Maarten. During the Caribbean Councils consultation various areas of common interest are discussed and the Caribbean Councils exchange knowledge and experiences amongst each other. A few topics discussed during the consultation were the evaluation of the new constitutional structure of Curaçao and Sint Maarten and the position of the Governor; "Checks and balances". The instructions to the Governors were also extensively discussed. The instructions to the Governors are outlined in chapter four.



### 3. OUTPUT OF THE COUNCIL OF ADVICE

#### 3.1 Advice requests and advices

In 2014, the Council received 46 advice requests and gave 34 advices. The Council decided to suspend 1 advice request, due to the lack of a legally required advice that should have been sought by Government. The Pie chart below shows the above mentioned.



The Council issued one unsolicited advice to Government in 2014. This advice pertains to the co-signing of ratified laws and regulations by the Minister of General Affairs. At the end of the year 18 advice requests that were pending are transferred to the new year.

Overview inflow / outflow requests for advice in 2013	
Total number of received requests	46
Pending requests from the previous year	6
Total to be handled	52
Number of handled advice requests in 2013	33
Number of advice requests transferred to the new year	18

**Below is a list of advice requests for 2014:**

<b>CoA Number</b>	<b>Subject</b>
<b>LB/04-12, SM/08-12- LB</b>	Adjustments to different national decrees (ND) (AWW,AOVen ZV/OV) pertaining to the price index number of family consumption
<b>LB/05-12 SM/09-12- LB</b>	Adjustments to different national decrees (AWW,AOVen ZV/OV) pertaining to the price index number of family consumption.
<b>SM/07-13- LB</b>	Draft national decree of general order (ND) retracting the general decree of June 7th 1961regulating the awarding of voyage c.q. to pay for voyage expenses to or on behalf of Antillean youngsters who do not qualify for a student grant based on the legal regulations regarding granting student grants to study at educational institutions or to follow a study outside of the Netherlands Antilles. (AB. 1961, nr. 95).
<b>SM/05-13- LV</b>	Draft of the second Note of Amendment LV status tasks and authorities BIE (Bureau Intellectual Property)
<b>SM/13-13- LV</b>	Draft National Ordinance (NO) establishing the annual account 2012.
<b>SM/10-13- LB</b>	Draft ND of rules pertaining to the execution of articles 9, 10 and of 14 of the National Ordinance Care Institutions with regard to the foundation Sint Maarten Medical Center. (ND further regulation foundation Sint Maarten Medical Center.)
<b>SM/01-14- LB</b>	Draft ND amending articles 11.12/and 29 of the National Ordinance General Widow and Orphan Pension and to establish the premium percentage as referred in article 29, section 1, of this Ordinance..
<b>SM/01-14- LV</b>	Draft Ordinance to amend the National Ordinance Reporting Unusual Transactions in connection with the intended joining the Egmont Group.
<b>SM/01-14- DIV</b>	Request Planning Permit 07034, Bethlehem Estate, Plantz/ Bred NV
<b>SM/02-14- LB</b>	Draft ND of general order pertaining to rules concerning the execution of the Ordinance Care institutions.
<b>SM/03-14- LB</b>	Draft ND of general order to amend articles 7, section 1, 7a, section 1, and 26 section 3 to 5, of the ordinance General Old Age Insurance.
<b>SM/04-14- LB</b>	Draft ND of general order to amend the ND of general order indication of function of confidence in connection with extending the legal transitional period.
<b>SM/02-14- LV</b>	Draft NO to amend a few ordinances to sharpen integrity regulations for government activities, and to establish the Bureau Integrity.

CoA Number	Subject
aSM/05-14-LB	Draft ND of general order to establish further rules based on article 6 of the National ordinance ending labor contracts.
SM/03-14-LV	Draft NO to amend the Ordinance Legal Dues to raise the fees for passports because of the raise in fees to be transferred for kingdom dues for the passports.
SM/04-14-LV	Draft NO to amend the national Ordinance Budget 2014 in connection with financing some changed policy goals
SM/05-14-LV	Draft NO amending the Constitution and other ordinances to implement the Criminal Code and to amend that ordinance as a result of the verdict of the Constitutional Court.( Introduction Ordinance Criminal Code)
SM/06-14-LB	Draft Sanction Decree Ukraine.
SM/07-14-LB	Draft Sanction Decree Territorial Integrity Ukraine.
SM/08-14-LB	Draft ND of general order amending the Execution Decree driving license and the ND Personal transport in connection with the establishment of further regulation about temporal driving permit.
SM/09-14-LB	Draft ND of general order to amend the enclosure belonging to the National Decree medical tariff for social insurance in connection with indexing the tariffs for paramedics and establishing the tariff for treatments by the Foundation Care Provision White and Yellow Cross Sint Maarten.
SM/10-14-LB	Draft ND of general order amending the Organization Decree General Affairs because of the splitting of the Department of Legal Affairs and Legislation into two sections.
SM/11-14-LB	Draft ND of general order to amend the Voting Decree in connection with the expanding of an amount of voting districts
SM/06-14-LV	Draft NO to amend the Pension Ordinance civil servants and the NO Age Limit civil servants and Waiting Period regulation civil servants in connection with the raising of the pensionable age.
SM/07-14-LV	Draft NO to amend the NO Supervision Trust system in connection with the compliance requirements of the American Foreign Account Tax Compliance Act.
SM/12-14-LB	Draft ND of general order amending the Danger Decree Accident insurance in connection with the establishment of a premium percentage and to adjust the daily pay mentioned in the NO Accident Insurance and the NO health Insurance in connection with the development of the price index number of the family consumption.
SM/08-14-LV	Draft NO amending the NO spatial development plan in connection with replacing article 28a.
SM/05-14-	Unsolicited advice concerning co-signing of ratified legislation and regulation by the Minister of General

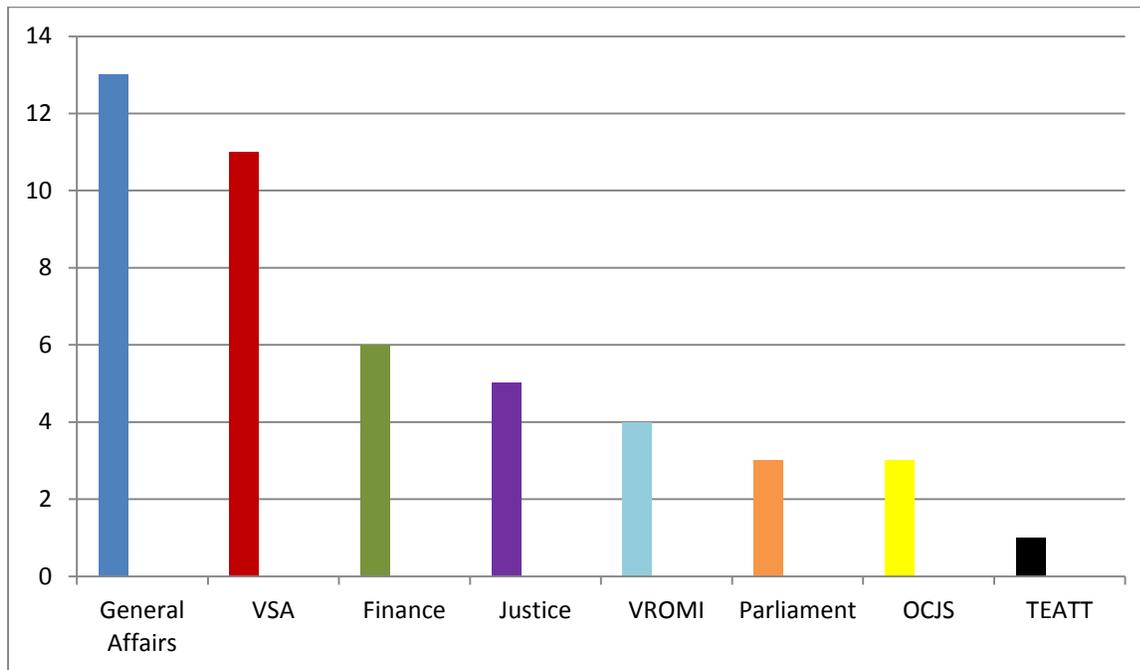
<b>CoA Number</b>	<b>Subject</b>
OA	Affairs
SM/13-14-LB	Draft ND placing workers at someone's disposal.
SM/09-14-LV	Draft NO establishing the Criminal Procedure Code.
SM/10-14-LV	Draft NO amending the NO on appeal in tax cases 1940, the NO Administrative Jurisdiction and related National Ordinances.
SM/11-14-LV	Draft NO Labor Contracts.
SM/14-14-LB	Draft ND of general order to amend the composition and attendance allowance of the committee of experts referred in article 5, section 6 of the NO spatial development planning.
SM/ 12-14-LV	Draft NO Public Health.
SM/15-14-LB	Draft ND of general order amending the Function Book Public Housing, Spatial Regulation, Environment and Infrastructure resulting from changes in the formation plan.
SM/16-14-LB	Draft ND of general order to establish the Council of Education and Labor market.,(Establishment Decree Council for Education and labor Market)
SM/17a-14-LB	Draft ND of general order Execution Decree BIG.
SM/17b-14-LB	Draft ND of general order Committee to evaluate the training and professional skills of medical practitioners.
SM/13-14-LV	Draft NO to amend the Constitution in connection with regulating the legal personality when representing the Country, embedding the function of the deputy Minister Plenipotentiary and to adjust a few technical inadequacies.
SM/18-14-LB	Draft ND of general order to establish rules concerning the salary of Educational Personnel. ( Salary decree Educational Personnel)
SM/02-14-DIV	Request to give advice on the Pension Regulation of Authorities.
SM/03-14-DIV	Urgent request for advice concerning the Kingdom Decree Instruction to the Governor regarding screening of Ministers.
SM/19-14-LB	Draft ND of general order regulating the models and administration of privileged persons.

CoA Number	Subject
SM/14-14-LV	Draft NO Identity Cards in connection with the introduction of identity cards for privileged persons.
SM/20-14-LB	Draft ND of general order concerning further rules regarding the procedure for depositing and renewing of trademarks and the owed compensation thereof.( Trade mark Decree)
SM/15-14-LV	Draft NO amending the Budget 2014 in connection with the creation of a basis for the guarantee for Winair and adjustment of some budget posts.
SM/16-14-LV	Draft NO establishing the budget of the Country for the year 2015.(Budget Ordinance 2015)
SM/21-14-LB	Draft ND of general order establishing the Organization Decree to change the Organization Decree Education, Culture, Youth and sport in connection with the splitting of the department Youth and sport Affairs into two departments.
SM/22-14-LB	Draft ND of general order to establish the commemoration coin in honor of the abdication of Her Royal Majesty Queen Beatrix of the Kingdom of the Netherlands, whereby the kingship is transferred to His Royal Highness Prince of Orange, Prince Willem-Alexander.
SM/23-14-LB	Draft ND of general order amending the ND comparative research cellular material in connection with the automated mutual comparing of DNA profiles among the countries of the Kingdom.

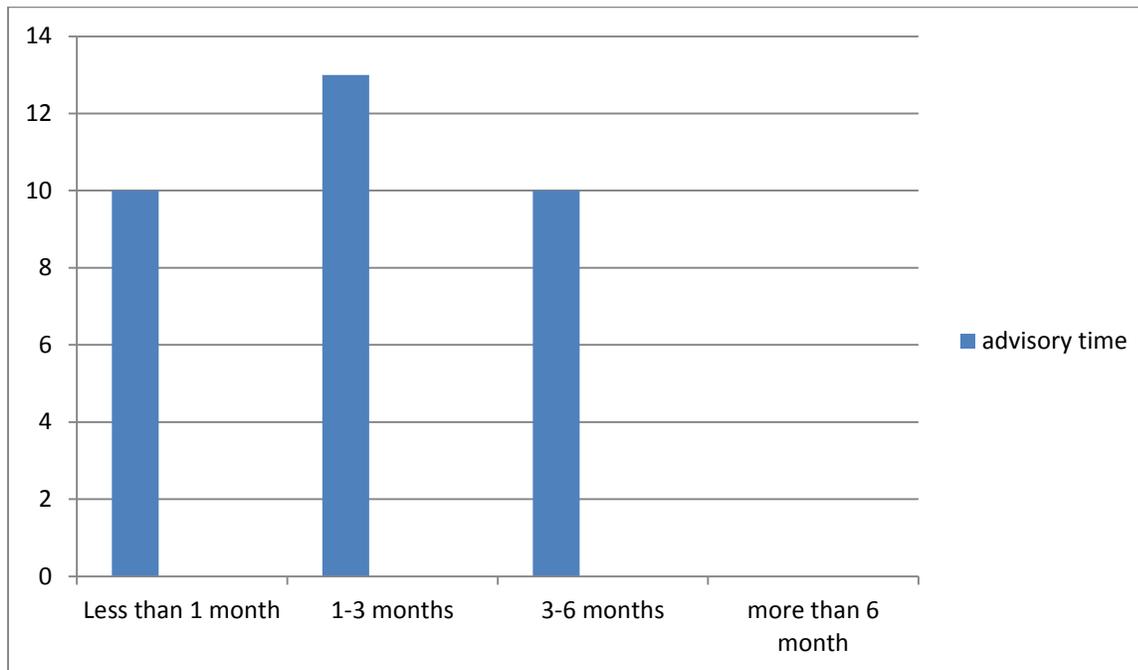
**Below is a list of draft initiative law requests by Parliament in 2014**

CoA Nummer	Subject
SM/ 01-14-ILV	Draft Initiative National Ordinance (INO) to revise the rules concerning timeshare. (Timeshare Ordinance)
SM/ 02-14-ILV	Draft INO to establish a Timeshare Authority.(Sint Maarten Timeshare Authority Ordinance)
SM/03-14-ILV	Draft INO to amend the Ordinance basis for nature management and protection Sint Maarten of April 19, 2013.(AB 2013, GT no. 809)

The chart below gives a list of advice requests in 2014 divided per ministry (including draft initiative laws of Parliament):



The average time spent advising on a request for advice in 2014 was 38 days. See below for an overview of the advisory time for 2014.



Below is an overview of the issued advices in 2014:

#### To Government

CoA Number	Subject	Date of advice	Conclusion (in short)	Explanatory report
SM/05-13-LV	Draft of a second Note of Amendment to the Draft National Ordinance (NO) Bureau Intellectual Property (BIE) with regard to its status tasks and authorities	29-Jan-14	Not to send to Parliament	No
SM/13-13-LV	Draft NO establishing the annual account 2012.	29-Jan-14	Not to send to Parliament, until consideration	Yes
SM/10-13-LB	Draft ND of general order of rules pertaining to the execution of articles 9, 10 and of 14 of the National Ordinance Care Institutions with regard to the foundation Sint Maarten Medical Center. (ND further regulation foundation Sint Maarten Medical Center.)	4-Mar-14	Not to adopt, until consideration	Yes
SM/01-14-LB	Draft ND of general order amending articles 11.12/and 29 of the National Ordinance General Widow and Orphan Pension and to establish the premium percentage as referred in article 29, section 1, of this Ordinance.	18-Mar-14	Not to adopt, until consideration	No
SM/01-14-LV	Draft Ordinance to amend the National Ordinance Reporting Unusual Transactions in connection with the intended entry to the Egmont Group.	11-Feb-14	To send to Parliament, after consideration	Yes

CoA Number	Subject	Date of advice	Conclusion (in short)	Explanatory report
SM/01-14-DIV	Request Planning Permit 07034, Bethlehem Estate, Plantz/ Bred NV	24-Jun-14	N.A.	No
SM/03-14-LB	Draft ND of general order to amend articles 7, section 1, 7a, section 1, and 26 section 3 to 5, of the ordinance General Old Age Insurance.	18-Mar-14	Not to adopt, until consideration	No
SM/04-14-LB	Draft ND of general order to amend the ND indication of function of confidence in connection with extending the legal transitional period.	22-Apr-14	To adopt, after consideration	Yes
SM/02-14-LV	Draft NO to amend a few ordinances to sharpen integrity regulations for government activities, and to establish the Bureau Integrity.	15-Jul-14	To send to Parliament, after consideration	No
SM/05-14-LB	Draft ND general order to establish further rules based on article 6 of the National ordinance ending labor contracts.	15-Jul-14	Not to adopt, until consideration	No
SM/03-14-LV	Draft NO to amend the Ordinance Legal Dues to raise the fees for passports because of the raise in in fees to be transferred for kingdom dues for the passports.	14-Aug-14	To send to Parliament, after consideration	Yes
SM/04-14-LV	Draft NO to amend the national Ordinance Budget 2014 in connection with financing some changed policy goals	20-May-14	To send to Parliament, after attention has been given	Yes
SM/05-14-LV	Draft NO amending the Constitution and other ordinances to implement the Criminal Code and to amend that ordinance as a result of the verdict of the Constitutional Court.( Introduction Ordinance Criminal Code)	22-Jul-14	To send to Parliament, after consideration	Yes
SM/06-14-LB	Draft Sanction Decree Ukraine.	27-May-14	To adopt, after consideration	Yes
SM/07-14-LB	Draft Sanction Decree Territorial Integrity Ukraine.	27-May-14	To adopt, after consideration	Yes
SM/08-14-LB	Draft ND of general order amending the Execution Decree driving license and the ND Personal transport in connection with the establishment of further regulation about temporal driving permit.	14-Aug-14	Not to adopt, until consideration	No
SM/09-14-LB	Draft ND of general order to amend the enclosure belonging to the National Decree medical tariff for social insurance in connection with indexing the tariffs for paramedics and establishing the tariff for treatments by the Foundation Care Provision White and Yellow Cross Sint Maarten.	14-Aug-14	To adopt, after consideration	Yes

<b>SM/10-14-LB</b>	Draft ND of general order amending the Organization Decree General Affairs because of the splitting of the Department of Legal Affairs and Legislation into two sections, the based on education.	15-Jul-14	To adopt	Yes
<b>SM/11-14-LB</b>	Draft ND general order to amend the Voting Decree in connection to the expanding of an amount of voting districts	24-Jun-14	To adopt, after consideration	Yes
<b>CoA Number</b>	<b>Subject</b>	<b>Date of advice</b>	<b>Conclusion (in short)</b>	<b>Explanatory report</b>
<b>SM/06-14-LV</b>	Draft NO to amend the Pension Ordinance civil servants and the NO Age Limit civil servants and Waiting Period regulation civil servants in connection to the raising of the pensionable age.	21-Oct-14	To send to Parliament, after consideration	No
<b>SM/07-14-LV</b>	Draft NO to amend the NO Supervision Trust system on connection with the compliance requirements of the American Foreign Account Task Compliance Act.	19-Aug-14	To send to Parliament, after consideration	No
<b>SM/12-14-LB</b>	Draft ND of general order amending the Danger Decree Accident insurance in connection with the establishment of a premium percentage and to adjust the daily pay mentioned in the NO Accident Insurance and the NO health Insurance in connection to the development of the price index number of the family consumption.	19-Aug-14	To adopt, after consideration	No
<b>SM/08-14-LV</b>	Draft NO amending the NO spatial development plan in connection to replacing article 28a.	16-Sep-14	To send to Parliament, after consideration	No
<b>SM/13-14-LB</b>	Draft ND placing workers at someone's disposal.	19-Dec-14	Not to adopt, until consideration	
<b>SM/10-14-LV</b>	Draft NO amending the NO on appeal in tax cases 1940, the NO Administrative Jurisdiction and related National Ordinances.	16-Dec-14	To send to Parliament, after consideration	No
<b>SM/14-14-LB</b>	Draft ND to amend the composition and attendance allowance of the committee of experts referred in article 5, section 6 of the NO spatial development planning.	16-Sep-14	To adopt, after attention has been given	Yes
<b>SM/02-14-DIV</b>	Request to give advice on the Pension Regulation of Authorities.	16-Dec-14	N.A.	No
<b>SM/03-14-DIV</b>	Urgent request for advice concerning the Kingdom Decree Instruction to the Governor regarding screening of Ministers.	2-Dec-14	N.A.	No
<b>SM/15-14-LV</b>	Draft NO amending the Budget 2014 in connection with the creation of a basis for the guarantee for WINAIR and adjustment of some budget posts.	12/16/2014 (Withdrawn)	To send to Parliament, after attention has been given	
<b>SM/16-14-LV</b>	Draft NO establishing the budget of the Country for the year 2015.(Budget Ordinance 2015)	29-Dec-14	To send to Parliament, after consideration	

### Unsolicited advice

CoA Number	Subject	Date of advice	Conclusion (in short)	Explanatory report
SM/05-14-OA	Unsolicited advice relating to the co-signing of ratified laws and regulations by the Minister of General Affairs	22 July 2014	Take into consideration	No

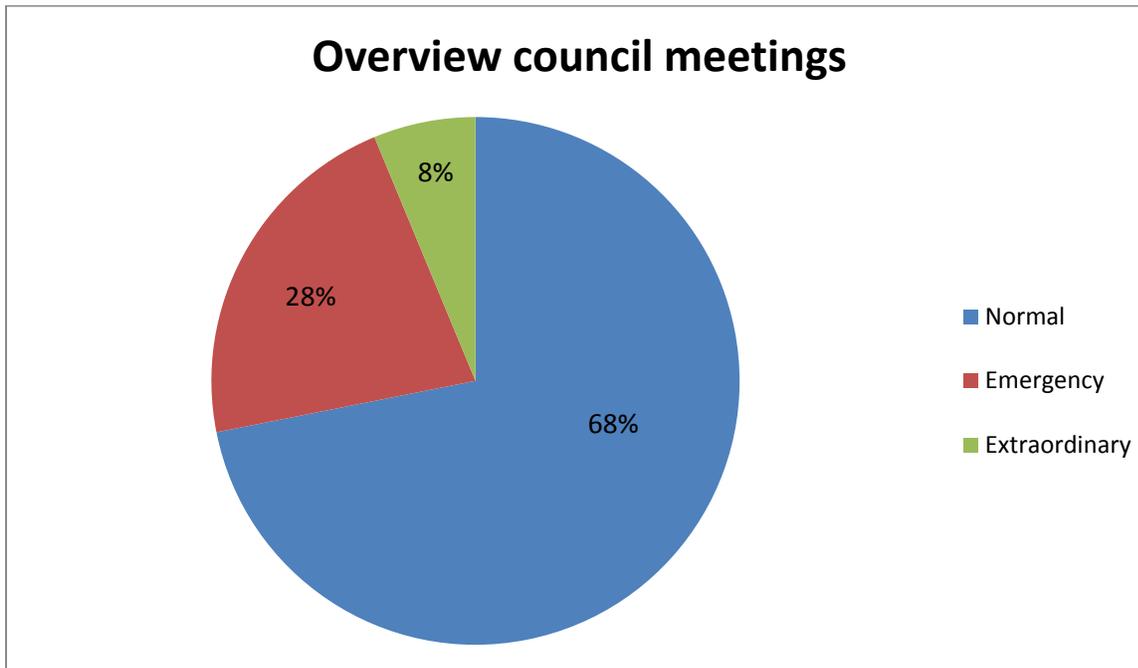
### To Parliament

CoA Number	Subject	Date of advice	Conclusion (in short)	Explanatory report
SM/ 01-14-ILV	Draft Initiative National Ordinance (INO) to revise the rules concerning timeshare. (Timeshare Ordinance)	24-Jun-14	Take into consideration the comments made in this advice	N.A.
SM/ 02-14-ILV	Draft INO to establish a Timeshare Authority. (Sint Maarten Timeshare Authority Ordinance)	24-Jun-14	Take into consideration the comments made in this advice	N.A.
SM/03-14-ILV	Draft INO to amend the Ordinance Basis for nature management and protection Sint Maarten of April 19, 2013. (AB 2013, GT no. 809)	22-Apr-14	To consider the comments made in this advice	N.A.

A selection of issued advices in 2014 is found in annex 4.

### 3.2 Meetings

A total of 32 council meetings were held during the year, including 23 regular meetings, 7 emergency meetings and 2 extraordinary meetings chaired by the Governor.



**Notes:**

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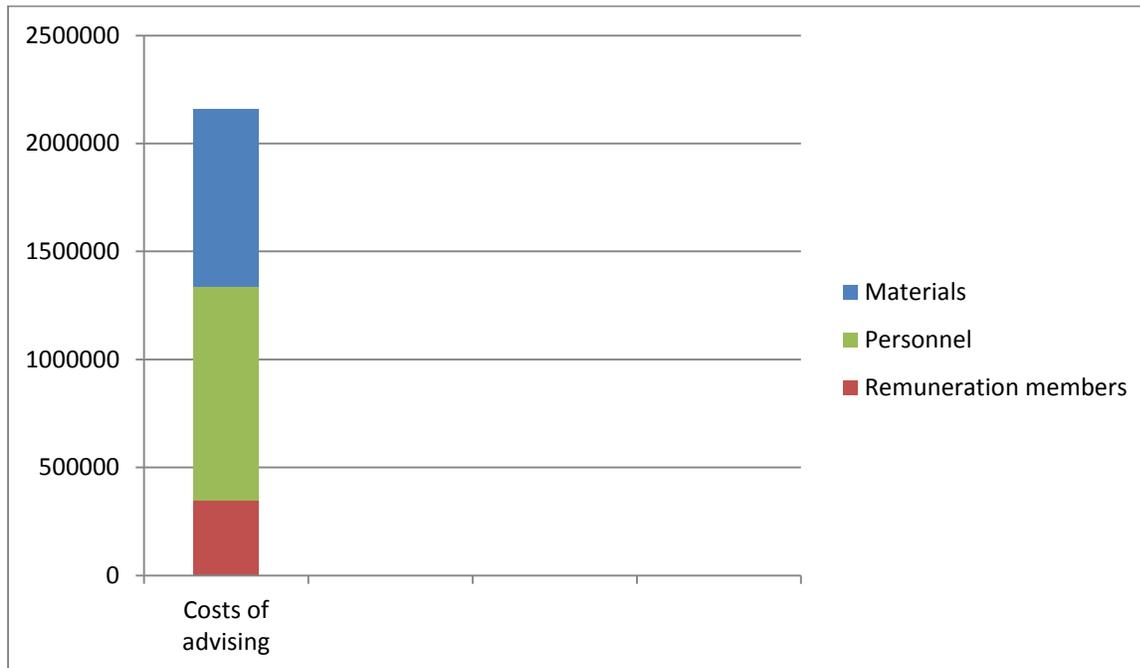
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### 3.3 Expenditures

The total cost of advising by the Council was budgeted in 2014 at NAf. 2,162,538.59.



Notes:

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## 4. Theme: Instructions to the Governors

### Good governance

During recent years the integrity of the governance of country Sint Maarten and the validity of interference of the Kingdom Council of Ministers to guarantee integrity has often been a topic of discussion not only on Sint Maarten but in the rest of the Kingdom as well.

### Instruction Integrity inquiry

In September 2013 the Kingdom Council of Ministers saw cause for giving the Governor of Sint Maarten an instruction to investigate the proper and upright functioning of the public entity of Sint Maarten regarding the aspect of integrity.

The Council of Ministers concluded that the government of Sint Maarten did not pay enough attention and care to the perceptions of the existence of corruption and the numerous incidents and rumors of breaches of integrity by politicians.

The research had to focus on well-known sensitive specific sectors such as prostitution, the gambling industry and tourism industry and on the generally well known sensitive topics like (permits for) infrastructure works and (other) large contractual tenders.

The instruction is based on the articles 15 and 20 of the Regulation of the Governor of Sint Maarten and article 43 of the Constitution of the Kingdom.

Based on article 15 section one of the Regulation, the Governor keeps watch on the general interest of the Kingdom by means of or by virtue of instructions issued by royal decree.

The Governor, based on article 20 of the Regulation supervises compliance with the kingdom laws and general kingdom measures, of the treaties and decrees of organizations under international law.

Article 43 of the Constitution declares that guaranteeing the realization of fundamental human rights and freedom, legal security and soundness of government is a Kingdom matter.

### Instruction to research government finances.

In July 2014 the Kingdom Council of Ministers again saw cause for issuing an instruction. This time to the Governor of Aruba. The instruction intends to stop the establishing of the national ordinance regarding establishing the budgets of the ministries of the country for the

fiscal year 2014 and researching the validity of the estimates in the budgets and the long-term development of Aruba's government finances.

The Kingdom Government considers this instruction needed because the concerns about the tenability of the government finances are great, also due to the actual figures of previous years.

The instruction is based on articles 15 and 21 of the Regulation.

Based on article 21 of the Regulation, the Governor has the authority not to establish a national ordinance or a recommended national decree when he finds the ordinance or the decree is in conflict with the Constitution, an international law, a kingdom law or a general kingdom measure as well as if it is in conflict with interests of which the care or guarantee is a Kingdom matter.

#### Instruction to research candidate ministers

In October 2014 the Kingdom Council of Ministers once more saw reason to issue an instruction to the Governor of Sint Maarten. The Governor was instructed to refrain from establishing the national decrees to appoint ministers and the Prime Minister until research was done to the eligibility of the proposed candidate ministers, candidate Prime Minister and candidate Minister Plenipotentiary. The kingdom government deemed this instruction necessary, due to a few reports from which the Kingdom Council of Ministers conclude that there is reason for undesirable conflict of interest and abuse of power on all levels and at crucial entities of public governance on Sint Maarten.

To exclude improper influence and to avoid doubts beforehand to the credibility and integrity of government, the kingdom government sees reason to secure that adequate research takes place pertaining to the appointment of the candidate ministers, the candidate Prime Minister and the candidate Minister Plenipotentiary. This instruction is also based on articles 15 and 21 of the Regulation of the Governor.

#### Legality of the instruction.

In November 2014 the government of Sint Maarten requested the Council of Advice to advise on the legality of the instruction to the Governor of Sint Maarten regarding putting on hold the establishing of the national decrees for the appointment of the candidate ministers and the Prime Minister.

The government of Sint Maarten is of the opinion that the instruction is premature and unjust because the instruction lacked sound, concrete factual foundation, and that the instruction infringed on the autonomy of Sint Maarten.

The Council of Advice believes that an instruction by kingdom decree based on article 15 of the Regulation, may not create any new authorities for the Governor, because this would be in conflict with article 2 section two of the Kingdom Charter.

Herein is stated that the authorities, duties and responsibilities of the Governor as representative of the Kingdom government are regulated by kingdom law or for relevant cases by general kingdom measure.

An instruction to the Governor based on article 15 of the Regulation, should therefore fit within the context of the authorities which the Governor already has allotted to him by means of the kingdom laws or general kingdom measure.

The Council of Advice also concludes that article 43, section one, of the Constitution states, that the initial responsibility to take care of good governance lies with Sint Maarten and not the Kingdom.

Based on article 43, section two, of the Constitution, the Kingdom is second in line in responsibility, the so called guarantee function.

In this article the role of the Kingdom with regard to good governance is only granted if there is question of a situation whereby the soundness of government of a country is seriously lacking and where there is no redress of this intolerable situation present in the country itself. Interference by the Kingdom must be considered as last resort.

Due to the above the Council of Advice concludes that the instruction given to the Governor is not legitimate.

The Council of Advice of Curaçao, who were requested by Parliament of Curaçao for advice on the legal basis of the instruction to the Governor of Sint Maarten by the Kingdom Council of Ministers, as well as the Council of Advice of Aruba, are both of the opinion, though for different reasons, that the instruction to the Governor, is not legitimate.

For this reason the Council of Advice emphasizes the need of having a regulation for dealing with disputes between the Kingdom and the countries.

Article 12a of the Constitution, mandates the countries to make such a regulation without any restrictions. With such a regulation (legal) disputes between the Kingdom and the countries would be settled in an adequate and independent manner.

The absence of an adequate and independent settling of disputes is the reason of the existence of a legal vacuum in the Kingdom constellation.

## 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 Sint Maarten (in Dutch: *Draaiboek voor de regelgeving*).

## 5.2 Annex 2: Secondary activities of the members in 2014

Name	Secondary activities
Mrs. Mavis Brooks-Salmon LL.M. MA (Vice-chair also member)	-
Mr. Jan Beaujon (Member)	<ul style="list-style-type: none"> <li>- Chairman of the Board of Directors of the Nature Foundation Sint Maarten</li> <li>- Member of the supervisory board of the Foundation Cooperative Funds</li> <li>- Board member of the Foundation for the Conservation of monuments.</li> <li>- Advisor of The Windward Islands Bank (until 1st of July 2013)</li> <li>- Member of the Integrity Committee Sint Maarten (until October 2014)</li> </ul>
Mr. Gaston Bell LL.M. (Member)	<ul style="list-style-type: none"> <li>- Attorney at HBN Law (until May 2014)</li> <li>- Member of the Sint Maarten Bar Association</li> <li>- Substitute Member of the Disciplinary Board of Lawyers</li> <li>- Board member of the Foundation for Hope &amp; Music Development</li> <li>- Board member Diamond Avandero Corporation N.V.</li> <li>- Congregational Steward Methodist church Sint Maarten</li> <li>- Member of the Taskforce Methodist Church Building Project</li> </ul>
Mr. Marcel Gumbs (Member)	<ul style="list-style-type: none"> <li>- Director M.F.A. Gumbs &amp; Associates N.V. d.b.a. M.G.C. &amp; Associates</li> <li>- Director Blue Green Recycling N.V. (presently not active)</li> <li>- Director Flydom N.V. d.b.a. Jetbudget</li> <li>- President of the La Chaine des Rotisseurs Foundation of Sint Maarten</li> <li>- Member of the Friends of the Library Foundation</li> </ul>
Mr. Louis Duzanson (Member)	<ul style="list-style-type: none"> <li>- Chairman of the Corporate Governance Council (until 17<sup>th</sup> February 2014)</li> </ul>

<p>Mrs. Marcella Hazel (Extraordinary member)</p>	<ul style="list-style-type: none"> <li>- <b>President of the Foundation Advanced Vocational and Adult Education (NIPA)</b></li> <li>- <b>Official translator by Federal Decree</b></li> <li>- <b>Advisor of the Community Council of Reward</b></li> </ul>
<p>Mr. Rik Bergman LL.M. (Extraordinary member)</p>	<ul style="list-style-type: none"> <li>- <b>Partner at BSZE Attorneys at Law/ Tax Lawyers Sint Maarten</b></li> <li>- <b>Board member of the University of St. Martin</b></li> <li>- <b>Member of the Disciplinary Board of Lawyers</b></li> <li>- <b>Member of the Sint Maarten Bar Association</b></li> </ul>
<p>Mr. Miguel Alexander LL.M. (Extraordinary member)</p>	<ul style="list-style-type: none"> <li>- <b>Chairman of the Antillean &amp; Aruban Notary Association</b></li> <li>- <b>Commissioner of:</b> <ul style="list-style-type: none"> <li>• <b>F. van Lanschot Overseas N.V. in Curaçao;</b></li> <li>• <b>Maduro &amp; Curiel's Bank N.V. in Curaçao;</b></li> <li>• <b>Reon Investments N.V. in Curaçao;</b></li> <li>• <b>Samsom Curaçao N.V. in Curaçao;</b></li> <li>• <b>United International Bank N.V. in Curaçao;</b></li> <li>• <b>The Windward Islands Bank N.V. and</b></li> <li>• <b>The Windward Islands Bank International N.V.</b></li> </ul> </li> <li>- <b>Director of eighteen offshore partnership companies and one belonging to the BCD/Boron Group.</b></li> <li>- <b>Director/owner of:</b> <ul style="list-style-type: none"> <li>• <b>Cazalex Holding B.V.;</b></li> <li>• <b>Notarispraktijk Alexander N.V.;</b></li> <li>• <b>Cazalex Pensioenen N.V.</b></li> </ul> </li> </ul>

- Alexander Corporate Legal Advisors B.V.;
- Alexander & Baaten Legal Services B.V. (10% shareholder)

- Director of:

- Foundation development Netherlands Antilles (SONA);
- Foundation Cazalex;
- Foundation private fund Cazalex;
- Foundation financing Task Force Tax Treaties
- Foundation pension fund Chr. A. Peterson

- Board member of :

- Foundation Prince Bernhard Culture Fund Netherlands Antilles and Aruba
- Curaçao Lions Club
- Foundation Protestants Christian Education
- Sint Maarten Cultural Foundation in Curaçao

### 5.3 Annex 3: Rules of Conduct

The Council of Advice strives to guarantee the principles of democracy and the Rule of Law in Sint 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: integrity<sup>2</sup>, soundness<sup>3</sup> and justice<sup>4</sup>.

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.

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<sup>2</sup> 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 influences.

<sup>3</sup> By soundness is understood: well founded

<sup>4</sup> By justice is understood: acting in accordance with democratic and constitutional principles, guaranteeing the fundamental human rights, including social civil rights.

## 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
  - a. The members and extraordinary members of the Council do not fill any offices or functions which are incompatible with membership and of which performance is undesirable in view of a proper fulfilment of the membership in the Council or the confidence therein.
2. Reporting main and other functions
  - a. Every (extraordinary) member must submit a written report to the vice-chair of his main or other functions, paid or not paid, at the time of or after his appointment.
  - b. The vice-chair submits a written report of his main or other functions, paid or not paid, which he holds at the time of or after his appointment, to the Council.
3. Criteria for main or other functions and other issues, which could cause a conflict of interest.
  - a. A conflict of interest constitutes a situation in which a person serves more than one interest, which could influence each other to such an extent, that the integrity of either one is at risk. Establishing of conflict of interest is therefore tantamount to the question, whether or not in the case of a(n) (extraordinary) member, other interests play such a role, thereby causing the possibility that an advice may not be realized objectively and impartially.
  - b. As criteria for the other offices or functions to be performed by the vice-chair and the other members of the Council, the following shall be used:
    - The risk that the vice-chair or the (extraordinary) member must excuse himself as a result of another function, personal or business interests;
    - The degree in which the organization or comparable organizations to which the main or other function is related, is a stakeholder, in a topic of advice;
    - The risk of conflict of interest.
  - c. The vice-chair or, as the occasion arises, the Council, subjects the main or other functions to be performed by the (extraordinary) member in question to the criteria mentioned in the abovementioned point.

#### **4. Reporting conflict of interest**

- a. Every (extraordinary) member who is of the opinion that there is a matter of conflict of interest involving himself or another member shall bring this to the attention of the vice-chair.**
- b. In cases whereby there is a matter of conflict of interest involving the vice-chair, the (extraordinary) member brings this to the attention of the oldest appointed member of the Council.**

#### **5. Maintaining independence and impartiality**

- a. The vice-chair or the other member in question of the Council shall not participate in the deliberations and shall not cast a vote, if this could be harmful to the impartiality and independence of the Council or if there is the appearance that the impartiality and independence of the Council could be damaged. The (extraordinary) member in question shall not take part in the deliberations in the abovementioned case.**
- b. The vice-chair shall notify the (extraordinary) member in question as soon as possible in writing whether or not, in connection with the impartiality and 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 the advice**

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

**9. Foundations 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 the issued advices**

### **5.4.1 Advice on the draft of a second Note of Amendment to the Draft National Ordinance Bureau Intellectual Property (BIE) with regard to its status tasks and authorities.**

**Date advice of the Council:** January 29th, 2014

**Summary:** This second Note of Amendment to the Draft Ordinance Bureau Intellectual Property (BIE) serves to, according to the Explanatory Memorandum adjust the draft to the new constitutional situation and the legal technical procedures of Sint Maarten. In addition, some content changes have been made related to the introduction of a Supervisory Board and a better safeguard of the independence of the Intellectual Property Bureau.

**Conclusion:** The Council advises Government not to send the draft ordinance to Parliament.

**What follows are some of the most important considerations of the Council:**

**General remarks.**

This draft was submitted to the Council for advice on July 29, 2013 with a request to treat it as a priority and to issue an advice within two weeks. The Explanatory Memorandum states that the compensation for handling the international registration of trademarks, which are done via the World Intellectual Property Organization (WIPO), will only be paid by WIPO to the Bureau of Intellectual Property of Sint Maarten (BIE), if the BIE is registered at WIPO before 2014.

The Council, by letter dated August 22, 2013 to the Government, announced that the advice request will be put on hold until receipt of a report from the responsible ministers about the financial implications of the draft. The financial section lacked the costs of the BIE partly because no decision had been taken on whether or not to outsource the registration activities of the Bureau of Intellectual Property to Curaçao or the Benelux-Bureau for Intellectual Property.

The government, through a letter dated 22 November 2013 (the letter) indicated that it was decided to outsource the registration activities to the Benelux-Bureau for Intellectual Property. The financial consequences are also mentioned in the letter. The government intends to adjust the Explanatory Memorandum to the second Note of Amendment in the stage of the Explanatory Report.

#### **The further handling.**

The second Note of Amendment seeks to amend the draft ordinance Bureau for Intellectual Property of the Netherlands Antilles which was presented to Parliament for approval on December 4<sup>th</sup> 2000.

Based on additional Article IV of the Constitution, Parliament may at the proposal of the Government decide to handle a draft ordinance which has already been brought before the Parliament of the Netherlands Antilles. Parliament will take over the handling of the relevant draft in the state in which it was at the Parliament of the Netherlands Antilles.

The effect of additional Article IV of the Constitution lapses, under additional Article IV, paragraph three, one year after the Constitution enters into force. In the opinion of the Council the decision to continue the handling of the draft ordinance BIE, had to be taken no later than October 9, 2011 by Parliament. The Explanatory Memorandum shows that a decision was taken on October 10, 2011. The Council concludes that the decision was taken one day too late and that on that basis the continuation of the handling of the draft ordinance BIE is in conflict with the Constitution.

The Council advises to present a new draft ordinance BIE to Parliament.

#### **Legal personality of the Government entity.**

Pursuant to section E of the second Note of Amendment the BIE will no longer be regarded as a public entity but as an independent administrative body. With this change, the draft will no longer have a provision incorporating the BIE with a legal personality. Possession of a legal personality is not a requirement to be able to speak of an independent administrative body. Without a legal personality the BIE will amongst other things not be able to employ staff on contract as is intended by the draft.

The Council recommends to grant legal personality to the BIE and to regulate in the draft which juristic acts the representative of the BIE is able to carry out and under what conditions. This could include getting loans, pledging or transfer of ownership of (registered) goods, cancellation of debts et cetera.

#### **Financial paragraph.**

The letter indicates that the coverage for the initial start-up costs of NAf 610.000,- will come from the claim that Sint Maarten has on the Netherlands for the proceeds of the patent system after October 10th 2010. It is expected that this claim will amount to NAf 925.445,-. The corresponding underlying mutual arrangement between the Netherlands and Sint Maarten has not yet been established. The distribution between Curaçao and Sint Maarten is not yet established. Given these uncertainties, the Council advises to wait with the introduction of the draft until certainty is obtained about the size of the claim and the date of payment of the claim.

#### Structure and organization.

Although the registration work will be outsourced to the Benelux-Bureau for Intellectual Property, the presence of a physical office on Sint Maarten is deemed necessary because according to the Explanatory Memorandum many of the tasks described in article 3 of the draft, such as advising the government and the drafting of new legislation, may in fact only be properly carried out by staff working on Sint Maarten.

The Council recommends to further explain how the tasks laid down, in article 8, article 10 of the Trademark Ordinance and article 3 of the draft ordinance BIE, will be divided between the physical office in Sint Maarten and the Benelux-Bureau for Intellectual Property. Considering these roles, the existing management at the Benelux-Bureau and the salary costs, the Council advises to further explain why it is necessary for a director, two legal experts, one staff member, administrative personnel and a Supervisory Board consisting of a minimum of three board members to be employed by BIE. In the Explanatory Memorandum to the original draft it is also mentioned that a supervisory body consisting of several persons, will bring into question the intended efficiency and cost optimization and therefore does not make sense.

#### Entry into effect.

The proposed article 26 stipulates that the ordinance BIE, will go into effect as of January 1, 2014, if the ordinance is ratified before November 12, 2013. The Council advises to adjust this article because it is already clear that ratification of the ordinance has not taken place prior to November 12th 2013.

The Council advises to further motivate if entry into effect retroactively to January 1, 2014 is still necessary. The Instructions for Regulation article 25, first paragraph, determines that a regulation can go into effect retroactively only if there is a special reason to do so. Therefore the provision must be prepared in accordance with instruction 126 of the Instructions for Regulation.

#### The Registry.

The Council notes that there is a chance that the Bureau for Intellectual Property of Curaçao, will not make a copy of the trademark registry of Sint Maarten available. In that case, according to the letter, the registry will have to be created through the purchase of data from Thomson CompuMark. The proposed article 22 guarantees that the trademark rights acquired in the Netherlands Antilles before October 10, 2010 and the trademark rights acquired in Sint Maarten after October 10, 2010, will be maintained without the requirement of a confirmatory deposit. The Council notes that the letter does not indicate that a complete registry can be compiled with the purchase of data from Thomson CompuMark. If no complete registry can be compiled, confirmatory deposits will have to be made at the expense of the country of Sint Maarten. The Council asks the government to motivate to which extent such a situation has been taken into account.

**5.4.2 Advice on the draft Ordinance to amend the National Ordinance Reporting Unusual Transactions (MOT) in connection with the intended entry to the Egmont Group.**

**Date advice of the Council:** February 11<sup>th</sup> 2014

**Summary:** This draft ordinance serves to amend the Ordinance on Reporting of Unusual Transactions in order to meet the requirements and conditions for entry into the Egmont Group.

**Conclusion:** The Council advises Government to send the draft ordinance to Parliament after the comments of the Council have been considered.

**What follows are some of the most important considerations of the Council:**

**The minister of Finance.**

The term "minister" will no longer refer to the Finance Minister but to the Justice Minister. In articles 22g and 24 of the MOT Ordinance and Article 17 paragraph 2 of the Organisation Decree on Justice this change is not taken into account. The Council advises to amend these articles.

The Council also notes that tasks are assigned to the Minister of Finance in article 1, first paragraph, under a, under 11 ° and 13 ° of the MOT Ordinance. The Council advises to clarify whether this is still desirable in view of the fact that the Minister of Justice is primarily responsible for the reporting center.

**Independent administrative body.**

The New Membership Criteria Plan of the Egmont Group states that the reporting center should be able to perform its tasks autonomously. The reporting center should be able to engage independently and without the consent of others, go into agreements with other institutions and must have sufficient financial resources to carry out its functions in full autonomy and independence.

The resources of the reporting center should be acquired free of political interference and used for the benefit of the operational independence of the reporting center.

The Council notes that the proposed article 2, is in conflict with the Explanatory Memorandum and the Organization Decree on Justice. The Explanatory Memorandum states that the minister is completely politically responsible for the functioning of the reporting center. According to the Organization Decree on Justice the reporting center falls under the Ministry of Justice.

However, the proposed article 2 states, in conflict with the above mentioned, that the reporting center shall autonomously and independently perform its tasks and activities.

The Council is of the opinion that an administrative body cannot be autonomous and independent as stated in the draft if the minister has complete political responsibility for the functioning of the administrative body. In compliance with the criteria of the Egmont Group, the Council advises to make the reporting center an independent administrative body without legal personality.

#### The right of access

The explanatory notes to article I, under P, of the draft states that it is necessary to let Chapter VI of the MOT Ordinance lapse because it is incompatible with the nature and character of the registry to provide everyone access to the registry.

The Council points out to the Government that under article 5 of the Constitution and article 27 of the Ordinance on the Protection of Personal Data, a person has the right to approach the responsible party and make a request to inform him on whether personal data pertaining to him is being processed. The responsible party shall inform the person in writing within four weeks, if personal data pertaining to him is being processed. If such data is being processed the notification shall contain a complete overview thereof in comprehensible form, a description of the purpose or purposes of the processing, the category of data to which the processing relates and the recipients or categories of recipients, and the available information about the origin of the data.

#### Article I, under E

The Council points out to the Government that under article 31 of the Constitution a restriction of fundamental Constitutional rights is permissible only if the restriction is necessary and proportional and described as specific as possible. Parliament can only approve a draft ordinance containing restrictions of fundamental Constitutional rights or decide to present such a draft with an absolute majority of votes of the sitting members.

The proposed article 5 stipulates that the reporting center is authorized to consult the registers and information sources of all persons and institutions. The Council is of the opinion that this article goes further than is required by the Egmont Group. The criteria of the Egmont Group does not state that the reporting center should have access to information of all persons and institutions.

*In addition to information from public sources, the FIU should have access to information collected and/or maintained by, or on behalf of other authorities and, where appropriate commercially held data.*



With this in mind, the Council advises to adjust article I, under E, in accordance with the right to privacy and sanctity of the residence, as enshrined in articles 5 and 7 of the Constitution.

#### **Financial paragraph**

The Council notes that the financial section of the Explanatory Memorandum states that entry into the Egmont Group comes with the obligation to pay an annual membership fee, and that these and other membership associated fees amount to about \$ 10.000,- per year.

The Council advises, given the precarious financial state of the country, to further explain the other membership associated fees and to indicate whether these fees will already be at the expense of the country in 2014. These fees have notably not been taken into account in the Countries budget of 2014.