



Parliament of Sint Maarten

Staten van Sint Maarten

Parliamentary Year 2018-2019-130


**National Ordinance amending Book 2 of the
Civil Code (Revised National Ordinance
Book 2 of the Civil Code)**

**Report
No. 5**

Parliament in its meeting of the Central Committee has exchanged views with the Government on the Draft National Ordinance amending Book 2 of the Civil Code (Revised National Ordinance Book 2 of the Civil Code).

Parliament considers the present draft to be adequately prepared when the questions below are answered in time for the public meeting so that the draft can be discussed in a public meeting.

The United Democrats-faction has taken note of the draft and ask the following questions. If the government has made a stand of the development of eenvormigheid, is that beneficial for the evolution of the autonomy and direction that we want to have with this country? The more we focus on eenvormigheid the more it is going to hamper us in our constitutional evolution to more autonomy. So if we are already discussing the technicalities of the law, amending them or not, that means that silently we have already made up our mind that we are going for eenvormigheid or unicity. The question is if country Sint Maarten wants to silently accept a direction that we are heading in already. The faction has its concern that if by doing this already without asking ourselves what are the consequences for the fortification of our autonomy, if we have to go in the direction of unifying and strengthening the eenvormigheid the way we are doing it now. The faction is of the opinion that we should ask ourselves that question before we start already discussing technicalities of



laws. The faction thinks that if we have come to the end changes in the law, that means that we are actually standing ourselves in the way to try to give our autonomy more evolutionary force. The faction has its question if country Sint Maarten is agreeing with us choosing already for this eenvormigheid.

The faction refers to FATF recommendation 8 and the second sub from the first paragraph which says that nonprofit organizations are particularly vulnerable and countries should ensure that they cannot be misused. It goes on to spell out, by terrorist organization posing as legitimate entities, to exploit legitimate entities as conduits for terrorist financing including for the purpose of escaping asset freezing measures and to conceal or obscure the clandestine diversion of funds intended for legitimate purposes of terrorist organizations. The faction zeroes in on article 59 which talks about the need for annual reports. It tells us that nonprofit organizations must provide yearly annual reports. These reports once provided must state the identity of the persons giving the money, that the funds were legitimately obtained, and the names of the board members so that the identity can be checked. The faction would like some clarity on this article. Noncompliance in any form by a nonprofit organization or failure to comply to have readily a yearly annual reports and the financials may mean that football clubs, churches, community councils may have to be closed. Or the prosecutor may shut them down because they have failed and not be able to provide these financial reports and the annual reports. The faction finds that it may come across that some of the amendments may be heavy handed. So we need to look at possibilities and take into consideration that football club that who may not provide those financials, that community council or that small church group. How can we find a middle ground? Amendments to the amendments may need to be brought where, we want to comply and work with approving the amendments but we need to find ways to mitigate the heavy-handedness and where we can meet half way especially for these organizations who may not be readily able to provide these financials.

The faction mentions that in the motivation for the changes the Minister refers to the organization for cooperation and development and that the most important part wished to achieve with this change is to eliminate the bearer shares. In doing that you also go into matter like foundations and what the Chamber of Commerce can do. The faction mentions that in 2015 the profit tax law was changed to encompass especially so-called trust offices. At that time erroneously all foundations were included in these changes to the profit tax law. While this is the purview of the Minister of Finance, ever since then successive Ministers have indicated their willingness and intention to basically correct that mistake. It has not happened. The faction would like the Minister to take note of this and pass it on to the Minister of Finance.

An important matter in the context of now the Chamber of Commerce undertaking this very specific responsibility as far as liquidation and writing out of business is concerned, is that it also includes the cancelation or not mentioning of the responsibility of the Chamber of Commerce. The Chamber of Commerce is now supposed to, in this draft law, take on a very specific action, yet the so called aansprakelijkheid of the Chamber is not included. The responsibility of the Chamber in terms of being able to either vet or not the handling of the Chamber is left out. The faction would like the Minister to go a little deeper into that matter.

The Government stated that if we had to basically change the name NV it will bring along a lot of work and administrative issues, especially regarding the offshore industry. The faction would like to the Minister to a little more explain that part there, the offshore industry versus what is being proposed now and that we maintain the so-called NV.

In the draft law by the Government it was referred to a commission of businesses that basically was heard in this respect. But actually, that commission was a commission on Curacao. Does the Minister not think that a similar commission or a similar forum also should be held on Sint Maarten?

Which are the npo's that fall within the definition and which don't fall in it? The faction would like clarity on the financial reports that need to be submitted. Is it a simple

financial report? Based on the discretion of who should it fall under the npo.

The National Alliance-faction has taken note of the draft with interest and ask the following questions. Is the government of Sint Maarten coconspirators in money laundering? If that is the case, the faction would like to know if the MOT is reporting unusual transactions from the side or on behalf of government. Once an entity is paying government taxes, that money is legal money. But when that business goes to the bank to get a bank account to deposit that money, it is illegal money. But the source of the money is from the same place. How is this possible, that on one hand when it comes to paying government taxes the money is good money, but when it comes to me going to the bank to deposit the same money coming from the same source, the bank is saying no we can't take your money and we are going to close your account because the source of your money is coming from illegitimate or illegal places? Can the Minister of Justice explain that strange phenomenon? Does the MOT report unusual transactions from the side of government receiving money?

Windward Islands Bank source of wealth declaration. The faction mentions that the Central Bank is the regulator of the banks here on Sint Maarten in terms of every individual should have an up to date file. The faction mentions that it has gone through the ordinances and nowhere did it see where the Central Bank is indicating the information from clients to the bank. In other words, this source of declaration is not coming from the Central Bank but is coming from the Bank themselves, determining what they deem necessary should be asked of their clients. The form has, asset, asset value, source of wealth, and it goes on to say that you need to have employment income, salary compensation, onus, maturity life insurance policy, sale of investment liquidity investment portfolio, sale of property, inheritance, business income, gift, and others. This is what the bank is asking of an individual to update their file. Nowhere did the faction see where the Central Bank is asking for this information. Annex 1, source of wealth table. Employees name, employers address, salary per

annum, amount received, policy provider, policy number reference, date of surrender, maturity of surrender of life policy, sale of investment, liquidation of investment portfolio, sale of property, sole property address, date of sale, total sale amount, signed letter from notary or certified copy of sale contract or signed letter from real estate agent, inheritance, name of decease, date of death, relationship of customer, date received, total amount, signed letter from notary or a certified copy of the will, business portfolio, name and address of company, nature of company, amount of annual profit, copy of latest financial statement, gift, date received, donor source, sale of investment liquidation of investment portfolio, sale amount, type of investment, date of sale, period of time investment held; supporting document to be supplied, surrender of statement or bank statement clearly showing receipt of funds and investment, company name or signed letter detailing funds from a certified accountant; maturity or surrender of life policy information, amount received, policy provider, policy number reference, date of surrender; supporting document to be supplied, letter from insurer conforming surrender or copy closing statement. This is a source of wealth annex that the Windward Islands Bank is asking. Please explain where did this form come from? Who is asking for this? Where is the law that gives Windward Islands Bank the right and authority to ask for this information or they block your account? Where did the Central Bank say that this information should be provided? The faction is of the opinion that when we approve laws like these, it strengthens the bank to things like this.

The faction mentioned that the Minister mentioned that the providing of the source of wealth is a requirement from the Central Bank of Curaçao and Sint Maarten. The faction would like the Minister to provide that requirement.

The faction would like to know how it is possible that you can decide just to put this on the Chamber of Commerce without having a discussion with them nor with them saying that they want that responsibility. It was said in the newspaper by the Chamber of Commerce and by the executives of the

Chamber of Commerce that, no we did not ask for this, we had no discussion with the Minister on this.

The United St. Maarten Party-faction has taken note of the draft and mentions that they would like to protect the right to open bank accounts and keep and have bank accounts for the people of Sint Maarten. The faction mentions that some of the things stated in this law can now translate into all of a sudden this person can't have a bank account anymore. Is was mentioned that if a person does something contrary to the law they can be removed from a foundation. The faction mentions that contrary to the law can mean any law that is broken. Are you saying that at that point the prosecutor has the authority to remove someone from a foundation or a trust? If we are going to be implementing these things where people are being encouraged to do home banking, because they can't have their fundamental right to a bank account, that needs to be in this civil code, in this change to protect that fundamental right. Can we at least protect that the basic right to a bank account is there?

The faction would like to understand, in terms of the retroactive nature of bearer shares, if someone in 1982 has an asset from back then and their only proof that they own the shares is through bearer shares, what happens in that regard? What is the retroactive nature of this law? Are those no longer going to be recognized? Is there a rollover period? It can't be that by passing this law it doesn't mean that people that had bearer shares in the past that those bearer shares, by passing this law, immediately becomes null in void, because we are then potentially voiding millions perhaps billions guilders of assets of the people of Sint Maarten. The faction would like to know that is somehow protected in this law.

The faction believes that the phrase "if someone does something contrary to the law" is way too broad. Because the faction doesn't think it is fair, because all it means is that if the person has a criminal record that now gives the prosecutors unilateral rights to remove someone from a foundation. We are letting the judicial system basically say, you have a criminal record and you can't work on a foundation. The faction would like some clarity on this point. And if it is so then how it is written it should be changed. The faction believes that we

have to specify the reasons why someone can be removed from a foundation.

Why would the Minister bring a law that gives this level of power to an entity, that is the Chambers of Commerce? Why would the law not state that the Minister of TEATT can instruct to remove this business license? Or that the Minister of TEATT, who the Parliament can hold accountable, can say Chamber of Commerce you have to remove this person from this registry, or you have to remove this person from this foundation. The Minister of TEATT can even do this internally from within the business license department. The Minister of TEATT is the one issuing the license and the one the Parliament appoints and oversees. The faction would really like to understand why we would implement such a thing. The faction questions if we want to also add this responsibility to a practically completely independent organization from government, where they have such immense power to remove from people from registries and foundations. What happens if the director wakes up tomorrow and states that he thinks this foundation is doing some shady stuff so he will remove them from the registry? What are the criteria? The faction mentions that even if the criteria is solid the faction believes that that has to be removed. Replace the Chamber of Commerce and put that responsibility under the Ministry of TEATT. The faction believes that is a very simple amendment that the Minister can do through a nota van wijziging. The faction states that if it doesn't get a very prudent explanation as to why we are using the Chamber of Commerce to be such a heavy-handed police in this thing, the faction can't imagine an explanation that would justify doing that as oppose to making it under the Minister of TEATT who is our appointed person to handle economic affairs in the country. Not an organization that does their own elections for boards and has its own director. The faction thinks that that is a crucial point that needs some urgent attention. The faction sees some urgent need for changes in this particular law. Passing as is, is out of the question for the faction. The faction looks forward to working, formally or informally, wherever possible with the Minister to see how we can find this art of compromise here. The faction encourages other Members of Parliament to please take into account the points raised and cautions other MP's to please take into account the veracity of what we

would pass if we were to pass this as is. We would be crippling our country and putting into the hands of a prosecutor, of the Chamber of Commerce and of the banks.

The faction points to our national ordinance protection of data. If you look at article 42, it talks about the establishment and task of the supervisory committee for the protection of personal data. There are various requirements as this needing to be in place. Is this already in place? Is this functioning? Is the Minister aware? The faction would like to know if they have been consulted with in order to know if this committee has looked in to these things like privacy information, that banks and institutions implementing these laws that they actually don't overreach in terms of data protection. What is the status of this committee? Have they giving any opinion or views on the 3 laws being handled?

When we talk about eenvormigheid we have to consult particularly with our brothers and sisters in the Parliaments of Curaçao and Aruba.

Who were the legal professionals you referred to?

The Chamber is a ZBO and is the organization that handles the registration of businesses. However the faction mentions that the issue is handling such registration on and off is one thing, but when you look at the far reaching and un delineated task that the Chamber has in being able to remove someone from a register, that is something is again, the faction is looking out for the people of Sint Maarten. A lot of times when laws come, we say there is a possibility that there could be terrorism financing, there is a possibility that someone is doing crime. We understand that and we are here to find ways to curb those things, but it cannot be at a blanket power given to an organization to simply be able to do it. If you want to do that then you have to create that border and very clear definition. The faction mention that they have not seen that and it is now shown really how the Chamber is able to make a proper delineation. Are you saying that if the director of the Chamber goes on the website of the MOT and sees that this person here appears to have done an unusual transaction, you are now saying that the Chamber can look at that and then follow the rest of the guidelines and inform the person that within 6 weeks their company will be removed from the register? Is that really just to curb terrorism and

money laundering? Are you saying that the Chamber of Commerce now can become the liquidator of the company? Should that be in the hands of just one entity to take such far reaching decisions without going through the legal steps first? This is not very clear to the faction. The faction mentions that reference was made that Aruba has it like that. When the faction checked Aruba's legislation and contacted fellow Members of Parliament from Aruba, they said our legislation reads that when there is an irrevocable conviction related to money laundering, that is what is there. We can cause some serious subjective problems in the country.

We have seen the fact that over 1.3 billion of guilders of unusual transactions happen. Are we saying that the Chamber of Commerce will monitor all those 1.3 billion in transactions and start to say I am closing you and you down? That is a very dangerous situation. It may not be the spirit of the law, but it is what the faction sees written here. That has to be fixed. It just cannot be passed in Parliament like this allowing such a blanket situation for the Chamber. The faction is of the opinion that this would be very reckless and dangerous.

With regards to the data protection committee. Seeing that this committee has not been established as yet, what recourse is there to confirm as to whether article 25 in particular and the others that have to do with the data protection of people have been complied with? Is this in compliance with the national ordinance for data protection and privacy?

When we talk about foundations in Sint Maarten, the law is not delineating different foundations. The faction does not see that limitation in terms of the foundation in article 59 or article 89. There must be some type of limit. There are foundations here that have critical functions and it cannot be that an individual member has a personal issue, commits a criminal act and that puts the entire foundation in jeopardy. The faction believes the way the law reads is very stern and, in a situation, where the Chamber of Commerce decides for whatever reason that's the direction, they are going we are giving them the legal right to hurt such a foundation. Rather than simply only looking at the individual, it seems to the faction that it targets the entire npo. The faction would like to

understand the difference. If an individual commits a crime, or is convicted, how does that reflect on the entire foundation? Is the foundation given an opportunity to remove this person first or is it automatically that this foundation is removed from the register?

What about the need to apply to the international regulations pertaining to the right to have a bank account? This is regulated in the Netherlands in the Financial Supervision act article 4.3.1.8. This built off their effort to comply with international regulations. Is the position of the Minister that he is willing to support amendments to include that?

This report is to be considered the Final Report.

Stipulated in the meeting of the Central Committee of September 12th, 2019.

The Reporter,

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