

**TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 11)**

**EXPLANATORY MEMORANDUM**

1. General section

According to Article 53(2) of the Constitution of Sint Maarten, rules to promote balanced and responsible progress of elections shall be laid down by national ordinance. This draft national ordinance concerning the registration and finances of political parties should be viewed in that regard. This regulation is closely related to the Election Ordinance. The two ordinances should therefore be viewed in conjunction (see the notes to Articles 22 and 24 in that regard).

This draft has two objectives. The first is to promote a transparent and democratic structure of political parties. Through the proposed introduction of the association form, political parties are assigned the constitutional function in the legislation that they have long held in practice. As a result it is possible to impose legal rules regarding political parties that can ensure that the design and functioning of these organisations, which are so important for parliamentary democracy, have a proper legal structure that is transparent for the public and is democratic. It is important to note here that an association has members who contribute to the policy of the association in a democratic manner, by voting.

The second is the promotion of the integrity of political parties, the prevention of (the appearance of) conflicts of interest and the promotion of a balanced and clean political process. Excessively high donations to candidates of parties, in particular, entail a risk of a conflict of interest. For that reason, the prohibition of excessively high donations is proposed. In this way, balanced progress of elections is also promoted, as the funds that parties may receive for their election campaigns are standardised.

The preparations for the draft drew on the recommendations of the 'Konfiansa' report of the Constitutional Affairs Agency (1999), commissioned by the government of the Netherlands Antilles. Parts are also drawn from the National ordinance political parties of Aruba (A.B. 2001, 96).

2. Restriction of the right to stand for election

According to Article 31(1) of the Constitution, a restriction of a traditional constitutional right must be necessary and proportional, and must be described as specifically as possible. Similar requirements also apply pursuant to the ECHR. Necessity means that there is a justified objective for a restriction. It can be argued that mandatory registration as a political party gives rise to a restriction of the right to stand for election. However, in the view of the Administrative Board, this restriction is justified by the fundamental interest of a fair progress of elections. Only through the association form, prescribed by law, is it possible to ensure, through the requirements that the Articles of Association must meet, that a political party has a particular democratic structure and complies with certain financial reporting requirements. Furthermore, imposing restrictions on donations to parties and candidates affords political parties equal chances of financial resources.

3. Financial section

Naturally, the implementation of the draft will have financial consequences not only for political parties, but also for the government. Political parties can no longer receive unlimited donations and must form an association by notarised deed and maintain proper accounts. The once-only costs for setting up the association through a civil-law notary are limited. Furthermore, the government will have to pay remuneration for the chairman, deputy chairman, the three members and two deputy members of the Electoral Council. The total

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remuneration costs (attendance fees and special remunerations) are estimated at some ANG 75,000 per year. The remuneration is laid down by national decree, containing general measures, pursuant to Article 12. The costs will be charged to the budget of the Ministry of General Affairs. This is offset by the fact that the imposition of penalties will generate revenues that flow to the exchequer. The scale of this is not known.

#### 4. Article by Article Section

The draft comprises a number of sections. The first section contains the general provisions. The second section concerns the Electoral Council. The third section concerns the registration of political parties. The fourth and fifth sections cover the financial accounts of, and donations to political parties and candidates. The sixth section concerns supervision of political parties with regard to their finances, the seventh section concerns the administrative system of sanctions and the eighth sections the confidentiality obligation. The last section contains final provisions.

Article 1 concerns the definition of terms that are frequently used in the draft. The definition of a political party is, of course, key. The definition has been kept broad. In addition to activities aimed at the development of political concepts and political activation of the public, the key objectives of a political party include participation in elections by putting forward candidates. The other definitions speak for themselves.

Article 2 contains the core of the regulation. Only political parties that are registered by the Electoral Council can take part in elections. This condition ensures that the envisaged regulation of political parties is actually attained.

In section 2, Articles 3 up to and including 13 regulate the institution, membership and powers of the Electoral Council. The provisions concerning the Electoral Council draw on the Aruban regulation for political parties. In contrast to the Aruban model, the proposed Electoral Council is independent of Parliament and the government. The members of the Electoral Council are appointed by the Common Court of Justice, the vice president of the Council of Advice or the President of the General Audit Chamber, respectively. In the interests of transparency, political parties are authorised to appoint an authorised representative who can act as an observer at meetings of the Electoral Council at which the registration of the relevant party and its finances are a subject of discussion and decision-making (see in addition Article 18). In view of the tasks of the Electoral Council, it is proposed that in any event, legal and financial knowledge must be present in the Electoral Council.

Section 3 provides for the way in which the registration of political parties takes place. Article 15 is the key provision for this. The political party must be formed as an association by notarised deed. In view of the legal structure, the legal form of an association lends itself best as a vehicle for a democratic process.

The Articles of Association must meet a number of requirements. This draft stipulates which matters must in any event be regulated in the Articles of Associations. This concerns more general matters relating to the law of associations and matters relating to the specific function of a political party. Naturally, the provisions concerning the association in this context are without prejudice to the provisions of the Civil Code.

Article 16 provides that a request for registration must be submitted to the Electoral Council in writing. Paragraph 2, which provides that applications must be submitted at least six weeks prior to the date of the nomination of candidates for the election, is important. The terms concerning elections, including those concerning the nomination of candidates, are regulated in the Election Ordinance.

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The Electoral Council assesses whether a request for registration can be granted. It considers whether a political party exists, whether the required documents have been submitted in the correct form and whether the Articles of Association comply with the requirements referred to in this draft.

An application must be complete. Article 19 imposes this requirement. A complete application means that all the documents referred to in Article 17 are enclosed with the application. In view of the tight scheduling relating to decision-making concerning registrations, heavier demands can be placed on the applicant in that regard. An application will not be processed if it is not complete. Article 19(2) provides for the possibility of completing or improving documents.

Article 18 contains provisions concerning the authorised representative. An application for registration must also state whether an authorised representative to the Electoral Council is requested. The role of the authorised representative is laid down in Article 18(3). If the Electoral Council discusses and takes decisions concerning the registration of a political party and its finances, it is desirable, in the interests of openness and transparency, that the political party is able to hear directly which considerations play a role in the decision-making. It is important here that the authorised representative has the right only to observe at meetings where his own political party is the subject of discussion. This is necessary in connection with the partial disclosure of donations made to political parties.

Rejection of an application is possible pursuant to Article 19(3) and Article 20(2). Pursuant to Article 17, the interested party can file an appeal against a rejection with the Court of first instance. The Court rules in the first and sole instance. In the interests of proper preparation of elections, it is necessary that clarity regarding the registration or otherwise of a political party is obtained quickly. Protracted legal proceedings will not contribute towards that.

Article 21 regulates the amendment of a registration and speaks for itself.

Article 22 regulates the withdrawal of a registration. The registration of a political party is withdrawn only at the party's request, if the party has ceased to exist, if its Articles of Association no longer comply with the requirements following amendment or if the court rules that the party has lost its status as a legal person. An appeal against an administrative decision of the Electoral Council to withdraw a registration or scrap the description can be filed with the Court of first instance.

Pursuant to Article 24, a decision of the Electoral Court concerning an application will be notified in writing to the applicant and to the central electoral committee.

As a conclusion to the regulation of registration, Article 22 of the draft Election Ordinance provides that only parties registered with the Electoral Council can submit a list of candidates for an election. According to Article 22 of the draft Election Ordinance, the list must be accompanied by evidence of registration with the Electoral Council, as referred to in Article 24(1) of the National ordinance registration and finances of political parties.

Section 4 contains the provisions for the financial accounts of political parties. Political parties must function transparently. To that end, they must provide information in an annual report on matters such as the composition of their management, the number of members, the amount of contributions and the activities performed. A financial report must provide insight into the income, expenditure and financial position of the party. That report must be based on proper financial accounts. The annual report and the financial statements are sent to the Electoral Council. This body is authorised to audit the accuracy of the financial data. The Electoral Council sends the reports to the General Audit Chamber for assessment. The annual

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report and the financial statements are available for public inspection via the intermediary of the Electoral Council.

The regulation on the disclosure of donations is key to these provisions. Article 28(2), read in conjunction with Article 28(1)(c) provides that only donations of more than ANG 5,000 originating from a source other than a natural person are included in the annual report and the financial statements. This means that donations of less than ANG 5,000 from a company or donations from a natural person are not disclosed.

The registration contains the amount of the donation, the date and the name of the donor, unless the company has objected to the disclosure of its name. In that case, a description is provided of the category of institutions to which the donor belongs. For the time being, disclosure of donations by natural persons is not proposed. This regulation is adopted from the Dutch Subsidisation of Political Parties Act.

Articles 32 up to and including 42 in section 5 specifically concern the form of the donations, the way in which they can be made to a political party or a candidate and the supervision of this to be exercised by the Electoral Council.

Article 32 provides for a definition of the term 'donation'. This Article covers the possibility that donations can also be made in forms other than in cash.

Political parties and, in election periods, candidates too, must register all donations. The design of the register is provided for in Article 34. The purpose of registration is to enable the Electoral Council to check that no donations in excess of the statutory maximum are received (see below).

In the registration, the name of the donor, the amount and the date are shown for every donation. Goods and services that the party receives, for which no equivalent consideration is provided, are also regarded as donations. Each year, records maintained by a party for the preceding year are sent to the Electoral Council. The Council is required to check the accuracy of the statements with the aid of the General Audit Chamber. In order to promote the reliability of the records, donations in excess of ANG 5,000 must not be received in cash.

In any one year, a person, company or institution may donate a maximum of ANG 30,000 to a party. Donations may be made only by enfranchised residents, non-Dutch residents who have lived in Sint Maarten for at least five years and companies and social organisations registered in Sint Maarten. Cash donations are prohibited if they exceed a sum of ANG 5,000 and anonymous donations are not permitted. In addition, a person, company or institution may donate no more than ANG 20,000 to a candidate of a party in any one year. This distinction, which gives parties an advantage over candidates, is made because the system is based on political parties. The reason for this restriction is that with donations of ANG 30,000 or more per year, there is a greater risk of a conflict of interest. The combined size of donations from a person, company or institution to a political party and the candidates of that political party may not exceed a sum of ANG 50,000 per year. This is provided in order to prevent avoidance of the envisaged restriction of the size of donations through donations to e.g. several different candidates on a list.

Article 35(2) also provides that no donations shall be accepted from legal persons in which the country has a financial interest. Either as a shareholder or as a provider of subsidies. In the interests of transparency and in order to avoid any appearance of a conflict of interests, the exclusion of legal persons with another financial relationship with the country, such as suppliers of goods or services, could also be considered.

Article 36 is intended to prevent undermining of the provisions of this ordinance and thereby, of the election process through the use of intermediaries (including legal persons).

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#### Article 38

The Electoral Council may request the General Audit Chamber to conduct an examination of a political party's financial statements submitted on the basis of Article 37. Anonymised summaries of the audit reports of the General Audit Chamber are available for public inspection at the Electoral Council.

Article 43 contains a general regulation on supervision. The Electoral Council may investigate whether the information received from political parties is correct. To that end, the Council may address political parties, their candidates and donors of political parties at any time. The Council may request information on actions relating to the matters regulated in this national ordinance and can require access to financial accounts. It is also authorised to check submitted registrations of donations received and if necessary, to conduct further investigations into whether a party has observed the current rules concerning the finances of a political party.

On the introduction of a new regulation, it is necessary to create a sanctions mechanism in order to promote compliance. Articles 44 up to and including 52 serve for administrative enforcement. It is proposed that the Electoral Council be granted the power to impose an order subject to penalty in response to an infringement of one of the provisions of section 4. This could involve a political party that has not sent records to the Electoral Council in time. An order subject to penalty is not a penal sanction envisaging punishment, but an administrative sanction aimed at restoration. Article 51 also includes the possibility of collecting the penalty by writ of execution. A number of supervisory powers are also granted to the Electoral Council, such as an obligation to co-operate (Article 43).

Finally, in the event of the infringement of some provisions, it is necessary also to provide for criminal enforcement, for example for the infringement of the prohibition on making or accepting donations in excess of ANG 5000 (see Article 54). After all, an order subject to penalty offers no relief with provisions of this kind. The offences are violations that can lead to detention for up to three months and a financial penalty of ANG 10,000. At the same time, following a conviction, the criminal courts can impose disenfranchisement or removal from the office of minister as an additional punishment (Article 54(3)).

Article 53 provides that a Member of Parliament must submit a declaration with his credentials, stating that he has not acted in contravention of this national ordinance. If that statement later proves to be incorrect, this could lead to criminal prosecution for fraud. The same obligation is included for the appointed ministers. If prosecution for fraud leads to pre-trial detention or conviction, the offender is suspended by law, pursuant to Articles 36 and 50 of the Constitution.

Article 56 contains a transitional regulation. If candidates are nominated for election as Members of Parliament within six months of the entry into force of this national ordinance, the National ordinance concerning the registration and finances of political parties, with the exception of section 2, does not apply and the provisions of the Election Ordinance apply, with 'Electoral Council' to be read as 'central election committee'. This is necessary because the national ordinance concerning political parties entails implementing costs, including the formation of an association by notarised deed. The Aruban Implementing Order for the National ordinance on political parties (A.B. 2001, 100) contains the same transitional regulation.

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