

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 18)

EXPLANATORY MEMORANDUM

1. General section

Articles 74 up to and including 77 of the draft Constitution contain a number of regulations on the General Audit Chamber. The General Audit Chamber is an independent control body responsible for investigating the effectiveness and legitimacy of the country's revenue and expenditure (Article 74 of the draft Constitution). According to Article 74(1) of the draft Constitution, the design and powers of the General Audit Chamber shall be regulated by national ordinance.

This draft is based on the 2002 National ordinance concerning the General Audit Chamber of the Netherlands Antilles (PB 2002, 135), which replaced the national ordinance of 6 April 1956 (PB 1956, 35) in full. The references to the island territories and the various transitional provisions in the Antillean ordinance have been omitted here.

One difference from the Antillean regulation concerns the suspension and dismissal of the members and deputy members. While in the Antillean regulation, this is in the hands of the Governor, in this draft, suspension and dismissal are matters for the Common Court of Justice. This relates to Article 75(4) of the draft Constitution, which provides that members of the Audit Chamber can be suspended or dismissed by the Court of Justice in cases laid down by national ordinance.

2. Article by Article Section

Article 1

The term 'in the broadest sense' refers to the fact that the Audit Chamber's powers to audit the financial and material management of the government's administration are not subject to any restrictions. It is therefore not possible for any part of that administration to be withdrawn from control by the Audit Chamber. Reference is also made to Article 42 in that regard.

Article 2

This Article contains the procedure to be followed if a vacancy arises among the members or deputy members, and is based on Article 75(2) of the draft Constitution. The procedure is designed to ensure that the chairman, the members and the deputy members have the confidence of both the Audit Chamber and Parliament.

This Article provides that when making a proposal to the Governor, Parliament shall follow the list of recommendations drawn up by the Audit Chamber to the extent that this appears useful to it. In making its proposal to the Governor, Parliament must make a selection from the candidates recommended by the Audit Chamber.

Article 3

According to the Netherlands Antillean national ordinance, members of the Audit Chamber must be aged at least 30. There are no good reasons for maintaining this age limit which, furthermore, is problematic in view of the requirement of equal treatment. For this reason, it is proposed that the age requirement be omitted.

Article 6

This Article lays down the offices that are incompatible with membership of the Audit Chamber. According to Article 75(6) of the draft Constitution, the provisions of paragraphs 6 up to and including 10 of Article 70 are likewise applicable to members of the Audit Chamber. Article 70(6) contains a list of incompatibilities of positions for members of the Council of

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Advice. According to Article 70(8) of the draft Constitution, it may be laid down by national ordinance that other offices may not be held at the same time as the membership. Article 6(1) of this draft national ordinance provides that the office of member of the Audit Chamber is incompatible with every other public office associated with fixed remuneration, an allowance or an attendance fee charged to the country or to an institution formed pursuant to a statutory regulation. This regulation goes significantly further than the regulation on incompatibilities with membership of the Council of Advice in the draft national ordinance concerning the Council of Advice. This is related to the fact that the independence of the members of the Audit Chamber is provided with more assurances in the Constitution than the Council of Advice. The exclusion of all paid secondary positions, as proposed in paragraph 1, is appropriate for this. Article 6(2) contains a general instruction and is included in various pieces of legislation in the Kingdom, such as the draft national ordinance concerning the promotion of integrity of ministers and the Council of State Act.

Article 7

This provision contains the oath, and is adopted from Article 77 of the draft Constitution.

Article 8

The task of the members of the General Audit Chamber is that of a supervisory authority that must express an objective opinion on the basis of the documents presented to them. Their work does not, therefore, require a full-time occupation. In connection with this, the members receive no salary but it is reasonable to award them an annual remuneration, particularly since their position is not compatible with the positions referred to in Article 6(1). The remuneration of the deputy members is lower than that of the members, but they receive an attendance fee for the meetings that they attend. If they deputise for a member for more than a month, paragraph 3 applies.

Article 9

According to Article 75(4) of the draft Constitution, the members of the General Audit Chamber may be suspended or dismissed by the Common Court of Justice. Article 16(3) of the (draft) Kingdom Act concerning the Common Court of Justice provides for the possibility for the Court of Justice or the members to perform the tasks assigned to them by national ordinance. If one of the cases referred to in paragraph 1 arises, dismissal is imperative. The grounds have been derived from the Antillean 2002 national ordinance concerning the General Audit Chamber and are consistent with those for members of the Council of Advice in the draft national ordinance concerning the Council of Advice.

In contrast to the cases referred to in paragraph 1, the cases referred to in paragraph 2 provide scope to form a subjective opinion. Paragraph 2 is adopted from the Antillean 2002 national ordinance concerning the General Audit Chamber. Sub-paragraph b could refer to misconduct or evidence of continual lack of care in the fulfilment of the office.

Article 10

This provision provides grounds for suspension and is drawn from the draft national ordinance concerning the Council of Advice and the draft Kingdom Act concerning the Common Court of Justice.

Article 11

This procedural regulation is drawn from the draft national ordinance concerning the Council of Advice and the draft Kingdom Act concerning the Common Court of Justice.

Article 16

The term 'absent' concerns the situation in which a vacancy exists. Paragraph 1 also regulates the replacement of the chairman by a member if the chairman is 'unable to act', which must

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be taken as referring to a sudden inability to attend in connection with unforeseen circumstances.

Article 17

The proposed text of Article 17 (which is consistent with Article 47, Chapter IV 'The Court of Audit' of the Dutch Accountability Act) provides for the possibility that decisions can be taken at a meeting at which two members are in attendance. If the votes are tied, the chairman has the casting vote. The chairman is replaced by one of the members not only if he is absent or unable to act, but also if he is unable to attend. The presence of the secretary is not required for issuing lawful orders.

Article 18

This Article prohibits members, deputy members and the secretary from attending meetings of the General Audit Chamber if matters are raised that directly concern them or persons with whom they have close kinship or other ties.

Article 20

This Article establishes that no-one who possesses funds or goods belonging to the country, in any way or under any circumstances, can avoid the obligation to account for the management of public assets performed. The person accountable retains responsibility in full if the funds or goods were entrusted by him partially to personnel employed under his responsibility. In connection with this, the persons referred to in Article 25 must regularly assure themselves that the funds or goods that have been entrusted by them to other persons are also present and are properly managed.

Article 21

The obligation contained in this Article is a result of the accountability regulated in Article 20.

Article 22

The statements referred to in this Article form the basis for the audit work. The provision of this information should be a standard matter and should therefore be embedded in the normal financial recording processes. Developments in the field of IT have opened up new possibilities to provide for the standard provision of information without the need for the relevant departments to reserve capacity or resources especially for this. If the technical possibilities prove to be insufficient, it is obvious that agreements will first be made with the holders of authority, so that these agreements can then be embedded in the normal working processes of the relevant departments.

The second paragraph is formulated as broadly as possible, so that the General Audit Chamber can have access to all statements that it considers necessary for its assessment of the management performed.

Article 23

This Article describes the objectives of the investigations conducted by the General Audit Chamber. These objectives are described as broadly as possible, so that the General Audit Chamber will be able to provide a well-founded view on the basis of the audits it performs. The principle here is financial self-management by each ministry.

In the meantime, the General Audit Chamber cannot be expected to base its final view solely on its own audit of the entire financial and material management. After all, in view of its responsibilities to the representative bodies, the implementing authority has its own control institutions, the primary one of which is the Bureau of Government Auditors Foundation (SOAB). The Audit Chamber can make use of the outcomes of the aforementioned internal audits.

The Audit Chamber does always retain the right to examine the smallest details of the management itself if it considers this necessary, and it may ensure that the executive devotes the necessary attention to the comments of its audit services. The Audit Chamber may

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therefore broaden or restrict its own audits, depending on how the audits by the internal auditors are performed.

The examination of the financial statements is an annual task of the Audit Chamber for Parliament. The reports it issues form the material on the basis of which Parliament can give its views on the financial statements.

Article 24

This Article follows from Article 21. The General Audit Chamber is assigned the task to ensure timely settlement of the country's receivables and liabilities. Although this task is already encompassed by the formula in Article 1, 'control of the financial and material management of the country in the broadest sense', it is nevertheless mentioned explicitly in this Article.

Article 25

As mentioned above, the SOAB is the main internal control body for the national government. The term 'designated auditor', as referred to in this Article, should therefore be taken to mean this institution. The objectives of the SOAB are laid down in Article 3 of its articles of association. On the basis of efficiency considerations, the General Audit Chamber may use the results of the audits conducted by the SOAB, but nevertheless decides for itself the extent to which it will do so.

Furthermore, it is not unusual for an external auditor (the term 'other parties' in paragraph 1 refers to this category) to receive instructions from the government. In such a case, the General Audit Chamber is authorised to access all the material held by the external auditor, and that the Audit Chamber needs for the performance of its task. The external auditors are required to submit the data requested to the Audit Chamber.

Article 26

This Article is intended to remove any doubt with regard to the scope of the powers of the General Audit Chamber to claim information that it needs for the performance of its task. This information relates not only to figures, but to the provision and gathering of information in the very broadest sense.

Article 27

This Article lays down the path that the General Audit Chamber must follow if consultation with the institutions referred to in this Article does not lead to the required results.

Articles 28 and 29

These Articles describe the path that must be followed in the event of objections of the General Audit Chamber with regard to the financial management performed and the accounting for this. In its inquiries concerning the aforementioned points, the Audit Chamber may observe inaccuracies concerning the legitimacy.

It is also possible that the inquiries do not provide a reasonable degree of certainty concerning the legitimacy. The inaccuracies may give rise to objections, of which the Audit Chamber will notify the minister concerned. The body concerned must make an effort to eliminate the Audit Chamber's objections. Objections concerning inaccuracies may relate to incorrect statements of (groups of) items and/or the legitimacy of (groups of) items. The minister may, for instance, eliminate the Audit Chamber's objections by correcting an incorrect reference to an article of the budget.

By taking the necessary measures, the administrative body concerned can avoid the errors noted by the Audit Chamber being repeated in the future. The Audit Chamber could find reason in the nature and scale of the measures taken to withdraw the objection. If the minister does not eliminate the Audit Chamber's objection concerning the legitimacy, Parliament must be contacted in order to eliminate the objection by means of a national ordinance, an indemnity procedure.

It is also possible that the Audit Chamber finds no demonstrable inaccuracies concerning the soundness of the financial accounts or the legitimacy of certain items, but at the same time,

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cannot assure itself with a reasonable degree of certainty that such inaccuracies do not occur. The reasons for this may lie in:
shortcomings in the administrative organisation (including the internal audit) of the country;
shortcomings relating to the control of abuse and improper use in the implementation of statutory regulations;
shortcomings in the internal audit. After all, as already noted above, the General Audit Chamber may make use of the audits of the SOAB. If this is not possible because, for example, the SOAB does not examine all revenues, costs and balance sheet transactions, it will be difficult, if not impossible for the Audit Chamber to give a view on that section of the financial management performed.
All of these shortcomings can lead to objections on the part of the Audit Chamber with regard to the financial management. A minister will also have to try to eliminate these objections. If, in the view of the Audit Chamber, the objections are not sufficiently eliminated, for example because the Audit Chamber is not convinced that the shortcomings will not be repeated in the future, this cannot lead to an indemnity procedure in the form of a national ordinance, as the Audit Chamber found no infringement of statutory regulations as referred to in Article 29(1). Article 29(3) provides that the Audit Chamber must report such cases in the report referred to in Article 38 and if necessary, can include a note on this in the drafts concerning the adoption of the closing of the accounts by the country. Pursuant to paragraph 4, the minister concerned is required to respond to the objections raised by the Audit Chamber as referred to in paragraph 3, in additional notes to the proposal for the adoption of the closing of the accounts.

Article 30

The effectiveness inquiries relate to the question of whether the country's resources are deployed in a manner that generates the best returns; in other words, if the envisaged policy goals are realised with this as far as possible. Lawful expenditure is not sufficient for a positive view of the General Audit Chamber, the country's resources must also be collected and deployed as efficiently and effectively as possible. This is also part of the due care required of persons with political responsibilities, for which they can be called to account by Parliament. Paragraph 1 charges the General Audit Chamber to also devote attention to the organisation of the country in its audit work. This means that it also has the task of determining whether the country is geared to its task, for which questions concerning efficiency and effectiveness must be answered.
The management of bank accounts in the name of the country is also subject to the effectiveness inquiries by the General Audit Chamber.

Articles 31 and 32

Article 31 provides for the possibility for Parliament to request the General Audit Chamber to conduct certain inquiries.
Article 32 opens the possibility for the General Audit Chamber to undertake other work, having attained the approval of Parliament.

Article 33

By national ordinance of 23 September 1999 (PB 1999, No. 147), provisions were included in the current national ordinance concerning the General Audit Chamber with regard to the inquiries by the Audit Chamber into the administrative integrity of holders of political authority and government civil servants. These provisions are laid down in Article 33.

Article 34

The agreements referred to in paragraph 1 of this Article can relate, among other things, to the provision of experts by the General Audit Chambers of the countries of the Kingdom to each other for the performance of specific inquiries. However, the regulation of a structural partnership between the Audit Chambers of the Kingdom must be based on Article 38(1) of the Charter.

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Paragraph 2 provides for agreements concerning exchanges of current information that may be of importance for the functioning of Audit Chambers in general terms.

Article 35

In practice, international organisations sometimes provide financial support for Netherlands Antillean institutions or for certain projects in Sint Maarten. Firstly, this may include subsidies provided by the European Union (EU). In such a case the Court of Auditors of the EU is responsible, pursuant to European legislation, for auditing the expenditure of the financial aid provided.

Article 35 aims to provide that in the cases referred to above and in similar situations, agreements can be reached between the Audit Chamber of Sint Maarten and a foreign audit chamber regarding the way in which, and the conditions on which they will work together, or the way in which the Audit Chamber of Sint Maarten will conduct the audit at the request of the foreign audit chamber.

Article 36

The financial management by state-owned companies and foundations may be subject to control by external auditors. Article 36 authorises the Audit Chamber to open inquiries itself, in which it may make use of the information provided by the administration.

Article 37

In view of the relatively small size of its staff, in practice the General Audit Chamber may, in certain cases, need expertise for its inquiries that is not available among its own staff. Article 37 opens the possibility of deploying external experts in such cases.

Article 41

This Article must be regarded as a supplement to Article 26. In order to be able to perform its tasks effectively, the Audit Chamber must have access to all the documents concerning the budgetary and financial management.

Article 42

This provision concerns the obligation of all institutions and legal persons that receive subsidies from the country or that manage funds provided by the country to submit statements to the Audit Chamber. Paragraph 2 shows that the obligation also concerns the common institutions, such as the Common Court of Justice, as regulated in a mutual arrangement between the (new) countries.

Articles 44 and 45

These articles are designed to make investigation of 'confidential expenditure' by the General Audit Chamber possible. It is not admissible in a modern regulation that the expenditure of public funds should be partially hidden from the view of the independent auditing body. However, this expenditure forms part of a category that is not intended for detailed disclosure or for access for third parties, in view of the national interest. This calls for the greatest possible restriction and care with regard to the person and/or institutions that are authorised to authorise or view these expenses. Article 46 therefore provides that notices by the General Audit Chamber concerning these expenses may be sent only to the Prime Minister.

Article 47

Obviously, persons who conduct investigations in relation to this national ordinance must exercise due care with regard to the data that they view. In principle, these may be used only to the extent that they are needed for the preparation of a report and in principle, therefore, are deployed only within the context of the General Audit Chamber's task. There is one exception to this, which is laid down in paragraphs 2 and 3. This concerns the situation in which there is a suspicion of a criminal offence, or of an investigation into this. In such a case, it is not the task of the General Audit Chamber to extend the inquiries into that field. As soon

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as it has a suspicion of a criminal offence, it must inform the institutions with powers that do include investigation of such matters.

This concerns the Department of Public Prosecutions and the national CID. The General Audit Chamber must reach agreements with these institutions concerning the way in which such cases must be handled in practice. Matters such as the stage at which the General Audit Chamber should involve the Department of Public Prosecutions and the national CID must be raised in that regard.

Article 48

Reports of the General Audit Chamber are public as soon as they are received by Parliament. The results of the investigations are recorded in these reports and to the extent necessary, the comments of the institutions to which the investigations relate are also taken into account. It is not desirable that a report should be published in draft form at an early stage, i.e. before these comments have been processed.

Article 49

In order to be able to perform its task well, the Audit Chamber must have sufficient staff and resources. In order to ensure this, it is proposed that Parliament, by agreement with the Audit Chamber and the minister concerned, should provide the General Audit Chamber with all facilities for the proper and independent performance of its task. According to paragraph 2, the chairman of the Audit Chamber shall perform the budget management. This is a new provision.

Article 50

This provision is necessary to ensure that the General Audit Chamber is able to obtain the information that it needs for its investigations. Breaches of the confidentiality obligation laid down in Article 47 are already penal offences pursuant to the Criminal Code. There is therefore no need to make such breaches penal offences separately in this draft.

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