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LETTER OF ADVICE

To the Prime Minister
The Honorable Mrs. Leona Marlin- Romeo
the Minister of Finance, the Honorable Mr. Michael Ferrier
Soualiga Road #1
Philipsburg, Sint Maarten



Philipsburg, March 8th, 2018

Our reference: SER /18/BP/08

Re: Letter of Advice concerning the draft ordinance on Development Bank and Government income generating measures 2018 [Dutch: 'Landsverordening van de houdende regels met betrekking tot het oprichten van en het verwerven of vervreemden van aandelen in de Ontwikkelingsbank van Sint Maarten en tot wijziging van diverse landsverordeningen teneinde de inkomsten voor de landskas structureel te verhogen']

Honorable Ministers,

The Social Economic Council (hereafter: SER) received the solicited advice request of the Minister of Finance concerning the above mentioned 'draft ordinance Development Bank and measures to generate income for Government 2018' (hereafter: the draft ordinance) on July 10th, 2017. At that moment, the SER board members for the tenure 2017-2020 were not yet appointed. In the advice request the former-Minister of Finance, Mr. Richard Gibson, requested that the advice should be submitted no later than July 25th, 2017. The SER can only render advice when the appointed board members have expressed their views and given their final position on the draft ordinance. Unfortunately, this date could not be met because the board members for the tenure 2017-2020 were appointed by decree on October 23rd, 2017. This Letter of Advice was discussed in the board meetings of January 18th and 25th, and February 15th and 22nd, and March 8th, 2018.

As the draft ordinance is compiled in Dutch and the Letter of Advice in English, certain laws and words mentioned between brackets [...] are in the Dutch language.

1.1 Summary of the explanatory memorandum of the draft ordinance

The explanatory memorandum of the draft ordinance (hereafter: the explanatory memorandum) states that the draft ordinance aims to achieve two important objectives of the Government:

1. structurally increase Government's revenue
2. mandate the Minister of Finance to establish a Development Bank.

The explanatory memorandum adds that a voluntary tax disclosure scheme will be implemented with the objective to incidentally increase the revenue of the Government for the year 2018.

The explanatory memorandum further states that Sint Maarten lacks its own Development Bank. The Development Bank would serve two objectives. First, it would enable borrowing to and participating in



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enterprises which execute projects that contribute to sustainable social economic development. Second, as a financial instrument for sustainable social economic development, the Development Bank would provide technical and administrative support and give recommendations concerning development policies.

The explanatory memorandum also explains that the reason for structurally increasing the revenue of Government is that since 10-10-10 the Government could not to realize its ambitions [gerechtvaardigde wensen] due to insufficient revenue. For example, improvements in infrastructure; road networks, supply of electricity and waste management, an increase in the number of police officers (security) and investments in correctional facilities (comply with the modern demands of human dignity) and many other ambitions that did not take place due to lack of or insufficient resources.

The explanatory memorandum identifies two reasons for a lack of revenues:

1. residents and businesses insufficiently comply with different tax legislation.
2. the Tax Administration is not optimally equipped to execute its tasks.

The Government will address both reasons in the near future, but acknowledges that the proposed solutions, to simplify the tax system and to improve the Tax Administration, both to improve compliance, will take time. The explanatory memorandum further states that the ambitions of Government cannot wait until that time, and now is the moment to increase the revenue of Government.

The explanatory memorandum proposes the following six (6) measures in the draft ordinance:

1. Mandate the Minister of Finance to establish a Development Bank and to acquire, [verwerven] to sell and to manage [vervreemden] its shares
2. Increase the price of permits for hazard games [speelvergunningrecht] and additional automatic inflation correction
3. Direct payments of telecom concessions to the Government, and not to the Sint Maarten Bureau Telecommunications and Post (BTP)
4. Introduction of an annual concession fee for the exploitation of the airport
5. Voluntary disclosure of (past) tax obligations scheme for the year 2018 [inkeerregeling]
6. Connect the voluntary disclose of (past) tax obligations with the option to acquire shares of the Development Bank

Moreover, the explanatory memorandum announces the intention of Government to broaden and strengthen the budget of Government by introducing a Departure Tax for air and sea passengers. This new tax aims to generate approximately NAfl. 36 million annually. This intention is not further elaborated on in this draft ordinance and therefore falls outside the scope of this advice.

1.2 SER's general concerns regarding the draft ordinance

The SER noticed that this draft ordinance addresses various topics that do not (necessarily) relate with each other. Some topics have little to do with one another. On the one hand this draft ordinance should establish a Development Bank and on the other hand, this same draft ordinance should introduce measures to generate revenue for the Government.



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The risk of bundling up different topics in one legislation, is that if Parliament does not agree with one topic in this draft ordinance, the entire draft ordinance could be rejected. In addition, it also enhances transparency and efficiency by separating different topics in different, corresponding laws.

The SER supports a balanced budget. Furthermore, the SER supports a balanced budget supported by structural instead of incidental revenue. Structural revenue is strongly preferred over stretching to reach incidental financing each year to achieve a balanced budget. In public financial management, predictability and stability are key. At the same time, the financial management of the Government is an important frame of reference, but not the only one; social economic development is another.

Concerning the connection with the Kingdom Law of Financial Supervision, the SER notes that the measures mentioned in the explanatory memorandum aid to balance the budget, and further observes that by (keeping) a balanced budget, the Government complies with one of the conditions of the Kingdom Law of Financial Supervision. Aforementioned law allows the Government to borrow at the (favorable) conditions defined therein. Additionally, the SER takes note that the CFT approved, under certain conditions, the NAfl. 30 million loan request connected to various projects, including the prison and Tax Administration¹. The explanatory memorandum explains that the project to improve the Tax Administration is budgeted for NAfl. 35 million in the multi-annual budget. The SER concludes that this project most likely depends on future loans under the Kingdom Law of Financial Supervision, and one of those conditions of that law is a balanced budget.

The considerations of the SER, mentioned under Background (1.3) and Elucidation (2.1-2.9) leading to the Advice (1.5) are concerned with how the choices made in the draft ordinance would impact social economic development, and if, from a social economic perspective, other alternatives would be preferred.

The SER notes that the structurally revenue increasing measures are all measures that address past neglect of or disappointing revenue streams. The explanatory memorandum clarifies that the increase of prices of permits for hazard games relates to the non-increase in prices for permits since 1979. The draft ordinance aims to correct this. The payment of telecom concessions to BTP, in effect since 2005, have not directly or sufficiently [niet onverwijld] been transferred to the Government, although this was indeed the intention. The Government does not specify the amount of and the period during which concession payments were not transferred. The draft ordinance aims to correct this for 2018 and onwards. Since 1997, the annual concession payments for the exploitation of the airport did not take place for different reasons. The draft ordinance aims to correct this for 2018 and onwards. Nevertheless, the SER recommends addressing these matters in separate national ordinances regulating BTP, PJIA and national ordinances that regulate the prices of permits for hazard games affairs.

The draft ordinance also introduces a voluntary tax disclosure scheme. A voluntary tax disclosure scheme is usually launched to give persons who failed to report income or wealth in previous tax years - due to deliberate intent or gross negligence on their part- under specified terms, a way to come clean without

¹ Letter of the Commission of Financial Supervision 'advies bij leenaanvraag investeringen 2017'.
http://www.cft.cw/jdownloads/All%20downloads/Adviezen/Sint%20Maarten/cft_201700088_advies_bij_leenaanvraag_investeringen_2017_sint_maarten.pdf



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facing criminal charges, because tax evasion [belastingontduiken] is a criminal offence in most jurisdictions, including in Sint Maarten².

Normally, a voluntary tax disclosure scheme is being introduced with the objective³:

- To broaden the national tax base;
- To curb non-compliance with existing tax laws;
- To discourage illicit financial flows and tax evasion.

A voluntary tax disclosure scheme, when used to meet above-mentioned objectives and under specific terms, can be effective.

The SER doubts, however, whether the voluntary tax disclosure scheme as introduced in the draft ordinance will be effective. This voluntary tax disclosure scheme aims to address the aggregated tax evasion concerning income and profit tax on Sint Maarten. But the terms laid down in the draft ordinance (waived fines, reduced taxes and the possibility to buy shares at a reduced rate) are not designed to fit into the overall tax compliance strategy of the (any) Tax Administration. The design of a voluntary disclosure scheme should be such that taxpayers who come forward voluntarily pay more than they would have done had they been fully compliant from the beginning, but face less punitive sanctions than evaders who make no disclosure but are detected by the Tax Administration.

With regard to the establishment of a Development Bank and the connection of its shares to the voluntary tax disclosure scheme, the SER does not support this initiative. The SER had some major concerns in its previous advisory reports on a Development Bank (August and September 2016), which were mentioned in the explanatory memorandum of the draft ordinance⁴, but the concerns have not been addressed. The SER understands that there should be an incentive for a taxpayer to come forward and therefore considers reducing penalties, and/or waiving prosecution rights justified. According to the SER, when deciding on incentives, the Government should consider the potential impact on the entire taxpayer population. As has already been noted, the terms should provide sufficient incentives for those engaged in non-compliance to come forward and not rewarding or encouraging such conduct in the first place.

Additionally, a short-term boost to revenues should not be at the expense of long-term compliance. Tax evaders need to be brought into compliance for good – not reinforced in the belief that they only need to comply when special terms are offered. Credibility could be lost and non-compliant behaviors reinforced if ‘special terms’ are offered regularly with no obvious deterrent.

Furthermore, the connection to the acquisition of its shares as part of the voluntary tax disclosure scheme is worrisome for multiple reasons.

The SER refers to its elucidation (2.2, 2.8 and 2.9) for the full argument.

² See articles 49 and 53 of the General Ordinance on National Taxes [Algemene landsverordening landsbelastingen]

³ For more information on voluntary compliance strategies see also Improving Access to Bank Information for Tax Purposes: the 2007 Progress Report (OECD) 2007.

⁴ See page 4 “Memorie van Toelichting”



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1.3 Background of Public Finances in Sint Maarten

For two years (2016 and 2017) the Government balanced its budget through several incidental revenue increasing and different expenditure decreasing measures. On the revenue side, the division of assets of the Netherlands Antilles and the transfer of capital from GEBE N.V. to the treasury come to mind. Furthermore, as the explanatory memorandum states, the Government did not execute new resource-heavy policies due to budgetary constraints. Moreover, the Government rearranged or is rearranging past and future obligations concerning social protection through changes in legislation: the expansion of AVBZ care-elderly care (SER advice December 2015), the decrease of pension contribution of Government employees from 25% to 22% (SER advice February 2016) and the temporary cessation of country contribution to AVBZ and Sickness funds (SER advice August 2016). Currently the Government still has outstanding obligations, mainly towards pension provider APS and Social and Health Insurances (SZV).

Concerning social economic development, the SER recognizes that the Government is an indispensable partner. Government provides services that influence economic activity and social and economic well-being of inhabitants. Especially because Sint Maarten is a Small Island Developing State (SIDS), the small scale of our island demands that a relatively large share of our resources is allocated towards Government institutions and the policies it executes. This means that the efficiency and effectiveness of Government institutions and policies is more important than in countries with economies of scale. The SER adds that the efficiency and effectiveness of the Government apparatus and the policies it executes, together forming the expenditure of the Government, have not been (publicly) examined nor questioned in recent years nor have the annual accounts been used to justify/ determine Government's spending⁵.

In other words, when discussing the need for revenue increasing measures, Government's expenditure should also be discussed. The SER realizes that this goes beyond the scope of this draft ordinance, but urges Government to also look at the efficiency and effectiveness of current expenditures, and therefore the need to cover expenditure with revenue.

The SER refers to the Elucidation for the full arguments concerning the six (6) measures in the draft ordinance.

1.4 Summary of the SER's Elucidation

For the past 30 years the Government is aware of the lack of revenues at the Tax Administration. Unfortunately, the Government's focus is too much on the time it will take to improve the Tax Administration, instead of starting the process to actually improve the situation. Changing the tax system should be on Governments priority list. In addition, a voluntary tax disclosure scheme should always intend to complement the improvement in exchange of information and the ability of Governments to detect tax evasion. Voluntary tax disclosure schemes should serve as an integral part of a broader

⁵ The Finance Department of the Government confirmed that the last annual accounts of the Government of Sint Maarten that were approved were the annual accounts of 2015.



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compliance strategy – they need to be considered as part of a variety of compliance actions that Tax Administrations and Governments take in order to encourage all taxpayers to meet their obligations.

The draft ordinance is confusing. It is not clear why the drafters of this national ordinance choose to bundle all kind of different aspects together in one national ordinance that has 2 different objectives:

1. structurally increase Government's revenue
2. mandate the Minister of Finance to establish a Development Bank.

By packaging the different topics in one law, there is a significant chance that the entire law will not be approved by Parliament in case the lawmakers disagree on one topic.

The parameters of the Development Bank are not defined and the precise objective is still unclear. The extra information Government provides concerning funding from the European Investment Plan is incorrect.

The SER agrees that another method to calculate the prices of permits for hazard games is necessary because calculation based on the revenue as stipulated in the draft ordinance of hazard games in reality did not take place.

The SER shares the discontent [enig ongenoegen] of the Government that the payments of telecom concession have not been (directly) transferred to the Government. The SER adds that this is not the only issue with BTP, and therefore advises the Government to make use of the recommendations of the General Audit Chamber concerning BTP.

The SER agrees with the Government that concession fees need to be paid. However, the SER encourages Government to have an open and transparent relationship with all Government owned companies (GOC's) to balance the complicated relationship between GOC's and the Government and how to proceed regarding concession fees.

The SER is of the opinion that this voluntary tax disclosure scheme (with waived fines, reduced taxes and the possibility to buy shares at a reduced rate) is, by definition, a reward for past non-disclosure behavior. The voluntary tax disclosure scheme aims to address the aggregated tax evasion concerning income and profit tax. However, it is unknown which amount will be collected through the voluntary tax disclosure scheme. The SER is aware that implementing a voluntary tax disclosure scheme successfully depends on the needs, credibility, and the strength of the Tax Administration. Furthermore, by connecting the voluntary tax disclosure scheme with the possibility to buy shares in the Development Bank at a reduced rate, the Government sends out the message that non-compliant tax payers will be rewarded or favored over the compliant ones. When outlined correctly, voluntary disclosure schemes should benefit everyone involved: taxpayers making the disclosure, compliant taxpayers, and the Government. There is a thin line between encouraging non-compliant taxpayers to permanently improve their compliance and retaining the support and compliance of the vast majority of taxpayers who are already compliant. The SER encourages the Government to act carefully in this situation where it has to deal with two opposing demands.



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In addition, when introducing a voluntary tax disclosure scheme, the Tax Administration has to have credibility. The Tax Administration needs to be able to demonstrate that it detects and deals with the non-compliance activity that is targeted as part of the voluntary tax disclosure scheme. The manner in which the Tax Administration deals with those taxpayers who persist in being non-compliant should be stricter than the way it treats taxpayers who come forward voluntarily. Otherwise, there is no incentive to become compliant voluntarily. The severity of sanctions, be it interest, penalties, fines and/or prosecution need to be higher for those taxpayers who remain non-compliant and do not take advantage of the voluntary tax disclosure scheme. The SER believes that success of a voluntary tax disclosure scheme will depend on the public's understanding that the Tax Administration has the tools, strength and capability to deal with those that are not compliant.

Additionally, the objections against a Development Bank become more urgent when taxable persons who evaded profit and income tax in the past are put in charge of a Development Bank through their rights as shareholders. Moreover, to disconnect the disclosed amount from the taxable person [de connectie tussen inkeerregeling en aandeelhouderregistratie diffuus te laten zijn] may open the door to possible corruption within the Development Bank and misuse of the voluntary tax disclosure scheme.



1.5 **Advice:**

The SER unanimously advises the Government of Sint Maarten

1. To make it the first priority of the Government to (start) change(ing) the tax system now.
2. Not to establish a Development Bank (see 2.2 and also the SER's previous advisory reports with references SER 16/ BP/68 and SER 16/SA/60)
3. To review this entire draft ordinance and adjust existing, separate, national ordinances regulating BTP, PJIA and the prices of permits for hazard games accordingly in order to increase Government's revenue.
4. To continue with the increase and automatic inflation adjustment of prices of permits for hazard games (see 2.4) and as stated under advice point 3, do so in the corresponding national ordinance.
5. To continue to redirect the payments of telecom concessions directly to the Government. Additionally, the SER advises Government to use the recommendations of the audit of the General Audit Chamber concerning BTP⁶. This report clearly describes that, next to the issue of concession payments, many other issues concerning BTP are worrisome (see 2.5).
6. Due to the impact of hurricane Irma, to postpone the introduction of a yearly concession fee for the exploitation of the airport (PJIA) as described in the draft ordinance, until the year 2021 when it is expected that the airport will be fully operational again. With regard to the concession fees of PJIA, the SER also advises to start with a period of five (5) years, (instead of a period until 2030) and to use this period to restructure the relationship between Government and PJIA in accordance with corporate governance tools that balances the interest of both parties (2.6 and 2.7).
7. To have an open and transparent relationship with all Government owned companies (GOC's) to balance the complicated relationship between GOC's and Government and to have an open communication how to proceed with concession fees.
8. Not to continue with the voluntary tax disclosure scheme (see 2.8).
9. Apart from the fact that it is not feasible to establish a Development Bank (see Advice point 2), the SER also advises to disconnect the voluntary tax disclosure scheme from the option to buy shares in the Development Bank (should the Government, despite the SER's advice, still establish a Development Bank). The SER also advises to remove the possibility to put the Development Bank's shares on another person's name.
The option to buy shares in the Development Bank and the additional option to transfer the shares on another person's name may open the door to possible corruption within the Development Bank and misuse of the voluntary tax disclosure scheme (see 2.9). Furthermore, rewarding non-compliant tax payers poses too great of a risk for the Tax Administration in the sense that compliant tax payers may become non-compliant too.

⁶ General Audit Chamber Sint Maarten, Audit naar de Governance Bureau Telecommunicatie en Post, 2015



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10. When discussing revenue increasing measures, the effectiveness of Government's expenditure should also be taken into account as part of the discussion to balance the budget.

We trust to have sufficiently informed you herewith.

Respectfully,

Ir. Damien D.E Richardson
Chairman

Gerard M.C. Richardson
Secretary-General



2 Elucidation on the advice

The elucidation below serves to support the advice points under 1.5.

2.1 Government's priority to change the tax system to increase tax compliance

The Government has been aware of its underperforming tax system for at least the past 30 years. The SER is of the opinion that the root of the problem is not being addressed by introducing a voluntary tax disclosure scheme. Voluntary disclosure schemes need to form part of a larger compliance strategy. They need to be considered as part of a variety of compliance actions that Tax Administrations and Governments take in order to encourage all taxpayers to meet their obligations⁷. The relevant question here to be addressed is thus: what is the Government doing about the lack of tax compliance?

In answering this question, the SER emphasizes the importance of understanding what drives taxpayer behavior and how it can be influenced to encourage greater compliance. The factors influencing taxpayer behavior are complex⁸ but a Tax Administration will have more influence over future behavior if its compliance strategy is responsive to the taxpayer's attitude to compliance⁹.

Over the past 30 years the various Governments applied measures that positioned Sint Maarten in exactly the same spot it was 30 years ago. To illustrate this, some of the measures taken over the years are¹⁰: Solidarity Tax (1987), Dutch Technical Assistance invasion (1989), the pay-as-you-file- Self-Tax Assessment system for Profit Tax was introduced (1997), deductions to income and profit taxes were eliminated or restricted which raised the tax burden (2001), an increase of Turn over Tax (3%-5%) was introduced to balance the 2011 budget (2010), and the policy document on remittance of taxes (2013).

Furthermore, in 1992 the Island Government of Sint Maarten was put under higher supervision by the Kingdom as Sint Maarten's administration did not comply with standards of good governance. In 1994 the higher supervision was delegated to the National Government of the Netherlands Antilles and Sint Maarten's supervision ended in 1996¹¹. This, as well as the Kingdom Council of Ministers' instructions Sint Maarten received in more recent years (2014 and 2015), should be a sign for the Government to address the tax compliance matter with priority.

The SER strongly believes that if overall tax compliance in Sint Maarten is not improved, in the next 30 years we will still be facing the same problems.

The explanatory memorandum to the draft ordinance states on page 17 that the voluntary tax disclosure scheme will be valid for one year. It is further stated that after the voluntary tax disclosure scheme is

⁷ Langenmayr, D., "Voluntary Disclosure of Evaded Taxes—Increasing Revenues, or Increasing Incentives to Evade?", CESIFO Working Paper No. 5349, May 2015

⁸ The USV Annals of Economics and Public Administration, Volume 12, Issue 1(15), 2012 Understanding the determinants of tax compliance behavior as a prerequisite for increasing public levies.

⁹ See the guidance note published in 2004 by the OECD's Forum on Tax Administration: "Compliance Risk Management: Managing and Improving Tax compliance."

¹⁰ Miriela G.L. Carolina and Lennie Pau, The shadow economy in the Netherlands Antilles, January 2007 page 9 available at http://www.centralbank.cw/uploads/files/Shadow_economy_in_the_Netherlands_Antilles.pdf

¹¹ De Jong, L (2005) The Kingdom of the Netherlands. A not so perfect union with the Netherlands Antilles and Aruba in: L. De Jong & D. Kruijt. Extended statehood in the Caribbean: Paradoxes of a quasi-colonialism, local anatomy and extended statehood in the USA, French, Dutch and British Caribbean. Pp. 85- 123 (Amsterdam: Rozenberg Publishers).



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finalized, a better equipped Tax Administration shall be able to address non-compliant behavior even more than before (the voluntary tax disclosure scheme was introduced). The SER emphasizes that this voluntary tax disclosure scheme is not the solution to increase tax compliance. The explanatory memorandum clearly states that the Tax Administration is not optimally equipped to execute its tasks. As long as this issue is not addressed, this voluntary tax disclosure scheme will not increase tax compliance. A Tax Administration that does not have sufficient credibility cannot demonstrate that it has the strength or tools to handle non-compliant taxpayers.

The Commission of Financial Supervision (CFT) in its letter to the Government of Sint Maarten dated April 13th, 2017, advised the Government to structurally increase the revenue of Government through for example increasing tax compliance. The SER, in agreement with CFT, additionally urges the Government to make it a first priority to change the tax system. As a macroeconomic policy instrument, the way the tax system is set up influences the economic performance of the country, but inevitably also influences compliance with the tax system.

2.2 Do not establish 'Development Bank Sint Maarten N.V.'

The SER notes that the articles in the draft law and the first paragraph of the explanatory memorandum are, with the exception of the connection with the voluntary tax disclosure scheme, nearly identical to the earlier draft law concerning a Development Bank the SER advised upon¹². The explanatory memorandum (page 4-6) gives new information, and argues that, since recently, Sint Maarten, as part of the Kingdom of the Netherlands, can benefit from the new European Investment Plan (EIP), and through the EIP also benefit from the European Interreg Programme. The Development Bank would be instrumental but not necessary to attract capital from the EIP. Sint Maarten could cooperate closer with the European Investment Bank (EIB), the institution executing the EIP, once a Development Bank is established. Other (European) countries are also cooperating with the EIB through their National Investment Banks. The SER concludes that the new information in the draft ordinance only relates to possible funding for the Development Bank from funds of the European Union.

The SER contends that the EIP is not accessible for Sint Maarten because it serves member states of the European Union¹³. In the terminology of the European Union, Sint Maarten is considered an 'Overseas Country or Territory' (OCT) and not (part of) a Member State. The also new European External Investment Plan serves, for now, only countries in the so called 'European Neighborhood' and in Africa because one of its goals is to address the root causes of migration from these countries to the European Union¹⁴. The SER agrees with the remark concerning the European Interreg Programme. The SER did not assess if a Development Bank would better facilitate grants or loans/investments from this specific programme.

Next to possible funding from different European Union finance mechanisms, the SER notes that the draft ordinance did not address many of SER's remarks in two previous advices. By choosing not to define the

¹² Ontwerp Landsverordening Ontwikkelingsbank Sint Maarten. SER Letter of Advice 'Draft ordinance containing measures regulating the establishment and acquisition of shares of the Development Bank of Sint Maarten' (August, 2016)

¹³ http://europa.eu/rapid/press-release_IP-16-4490_en.htm and <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0581&from=EN>

¹⁴ https://ec.europa.eu/europeaid/sites/devco/files/factsheet-eu-external-investment-plan-20170710_en.pdf and http://europa.eu/rapid/press-release_IP-16-3002_en.htm



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parameters of the Development Bank in the draft ordinance, but instead to leave those to be defined in the Articles of Association at a later time, the SER reiterates that the draft ordinance “is not mature enough and lacks vital information for a well-reasoned and balanced decision¹⁵ (by parliament)”. In other words, Parliament cannot sufficiently assess what type of Development Bank will emerge with the current draft ordinance.

The explanatory memorandum acknowledges one of SER’s earlier objections to a Development Bank, namely that there are sufficient funds available at the financial institutions in Sint Maarten, and that our own commercial bank and credit institutions are capable of financing future investments. Indeed, that was one of the objections of the SER related to *why* a Development Bank needed to be established, and the SER is thankful that Government recognizes this objection. Other objections of the SER related to the situation *if* a Development Bank would be established. The SER also remarked that “successful Development Banks have a clearly defined mandate, high corporate governance standards, strong risk management capability, proper regulation and supervision and a strong management team. Unsuccessful Development Banks are characterized by poor lending decisions, high amount of non-performing loans, political influence, capture by interest groups and diffuse mandates”¹⁶. Moreover, “Sint Maarten’s characteristics are a lack of compliance enforcement, limited human resources, interwoven interests in a small scale society and an instable political climate since 10-10-10”¹⁷. Next to the funding difficulties and the economic reality of limited investment possibilities, the governance of Government related entities, such as the proposed Development Bank, has often been difficult. Especially without defining any parameters (specific mandate, operational costs and full time employment, needed (shareholders’) capital, management and supervisory board and other corporate governance issues, etc.), a Development Bank becomes a risk or at best not an addition to the economy.

The SER notes that in the draft ordinance, two (2) of the measures concern Government related and owned entities: BTP and PJIA. The Government is disappointed regarding their contribution to the treasury. This disappointment is directly related to the governance of these entities; more specifically, how they interpreted their responsibility towards Government. With the current draft ordinance, the same type of disagreement between Government and a (future) Development Bank is likely.

2.3 Each topic a separate draft ordinance

The SER noticed that this national ordinance grouped all kind of different aspects together in one national ordinance that has 2 very different objectives:

1. structurally increase Government’s revenue
2. mandate the Minister of Finance to establish a Development Bank

By packaging the different topics under one law, there is a possibility that the entire law may not be approved by Parliament in case the lawmakers disagree on one topic. For the sake of transparency and

¹⁵ SER Letter of Advice ‘Draft ordinance containing measures regulating the establishment and acquisition of shares of the Development Bank of Sint Maarten, page 2

¹⁶ SER advice ‘Development Bank Sint Maarten, page 27

¹⁷ SER advice ‘Development Bank Sint Maarten, page 27



efficiency, the SER recommends that each different topic be arranged in a separate, corresponding draft ordinance.

2.4 Increase and automatic inflation adjustment of the price of permits for hazard games [speelvergunningrecht]

The draft ordinance aims to adjust the prices of permits for hazard games. This adjustment is needed because these prices have not been adjusted for the years 1979-2015. The SER adds that the inflation of the years 2016 and 2017 up to the current year when the draft law comes into effect should also be included in the adjustment of the price of permits. The increase (107.5%) will be implemented in three years (2018, 2019 and 2020; each year 35.83%). Additionally, the draft ordinance proposes an automatic inflation correction based on the yearly Consumer Price Index (CPI), increased with one (1) percent point from 2021 and onwards.

The explanatory memorandum explains why an increase is justified, how the increase is calculated and why the Government chooses for the calculation method for the period 1979 to 2015. This method adds the yearly inflation together, and applies that percentage to current prices of permits [optelmethode] instead of the usual inflation correction [samengestelde rekenmethode]. The usual inflation correction would increase the prices of permits for hazard games with 185.9%.

The SER agrees with the need to adjust the prices of permits for hazard games. The SER also agrees with the chosen calculation considering that the communication with the sector has created expectations concerning the increase. The SER further agrees with a gradual implementation of that increase.

SER supports the automatic inflation adjustment method. The additional percent point on top of the calculated yearly inflation from the Consumer Price Index will partly compensate for the calculation method concerning the increases for the years 2018-2020 (107.5% instead of 185.9% after three years). The SER acknowledges that another method to calculate the prices for permits is necessary because calculation based on the revenue as stipulated in the ordinance of hazard games in reality did not take place. The SER adds that the prices of permits for hazard games based on revenue is more in line with other tax legislation compared to the proposed measure in the draft ordinance (per type of activity independent of revenue connected to that activity), but acknowledges that a change is needed. The SER notes that the Government chooses to be pragmatic.

2.5 Payment of Telecom concessions directly to Government instead of to Bureau Telecommunication and Post (BTP)

The explanatory memorandum states that Government is somewhat displeased [enig ongenoegen] that the concession fees paid to BTP have not been paid directly [niet onverwijld] to Government even though this was mandated by the legislation governing this arrangement [ministeriële beschikking van 16 december 2005]. The SER shares this sentiment, and therefore supports this measure. However, the SER recommends that this matter be regulated in a separate national ordinance that deals with BTP affairs.

The SER adds that the audit by the General Audit Chamber concerning BTP clearly indicates that this is not the only issue with BTP, and therefore advises Government to make use of the recommendations of the General Audit Chamber.



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The General Audit Chamber recommends¹⁸ to the Minister of Tourism, Economic Affairs, Traffic and Telecommunications, among other things, to:

- determine a yearly performance contract with BTP to end the 'carte blanche' of the Director
- determine the labor conditions [arbeidsvoorwaarden] of the Director
- introduce structural meetings with BTP to evaluate the activities of BTP and accordingly take measures if needed
- end all previous arrangements concerning transfers to Government
- immediately transfer current and past obligations from BTP to the Government (in accordance with Ordinance BTP [Landsverordening betreffende de status, de taken en bevoegdheden van het Bureau Telecommunicatie en Post], article 21)

2.6 PJIA's yearly concession fee for the exploitation of the airport

The explanatory memorandum states that the Government is surprised [heeft bevreemd] that concession holder of the airport, Princess Juliana International Airport Exploitiemaatschappij (PJIA), does not have the obligation to compensate Government for the right to utilize the airport. The Government connects this lack of obligation with changes over time how Holding and Subsidiaries [werkmaatschappijen] relate towards each other, and ultimately towards Government. The Government owns the Holding, but the income and profit for the exploitation of the airport go towards the Subsidiaries. The Holding owns the Subsidiaries, but the Subsidiaries decide if and how much dividend will be routed to the Holding.

The SER observes that concession and dividend payments are different from each other, and the explanation concerning dividend payments does not explain the (lack of) concession payments.

The explanatory memorandum further describes that the current concession to PJIA lacks a legal basis [wettelijke grondslag] because it relates to an instruction [aanwijzing] concerning the aerodrome [luchtvaartterrein] and not exploitation of the aerodrome. The draft ordinance aims to correct this by honoring the existing 'concession' for the period of 2012-2030, but adds a yearly concession fee of NAfl. 6 million to the new instruction. The Government notes that other Government Owned Companies (GOC's) pay concession fees, and the amount (NAfl. 6 million) is based on similar arrangements [normaal te achten vergoeding] with other GOC's. Moreover, the draft ordinance proposes that each year the concession fee will be adjusted by the inflation rate as calculated by the Consumer Price Index (CPI) of the year before, and then increased with one (1) percent point.

PJIA is not funded nor subsidized by the Government and has to rely completely on its own financial resources. It is in recognition of this that successive Governments of Sint Maarten decided to grant PJIAE

¹⁸ General Audit Chamber Sint Maarten, Audit naar de Governance Bureau Telecommunicatie en Post, 2015, page 6.
Downloaded from
<http://www.arsxm.org/EN/Publications/Reports/audit%20on%20governance%20btp%20October%202015.PDF>



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NV a concession to operate the airport without charging a concession fee while allowing the airport to keep the so-called departure fees, which is not a tax, because only Government can levy taxes¹⁹.

The SER agrees that concession fees need to be paid, but the SER also recognizes that Government should not proceed with (increasing) concession fees for any of its GOC's, without discussing this with the respective GOC.

Post Irma, PJIA may not be in the position to start paying concession fees for the amount of NAfl 6 million per year. Taking this, as well as the fact that PJIA is not funded nor subsidized by the Government and has to rely completely on its own financial resources, into consideration, the SER suggests to postpone the introduction of a yearly concession fee for the exploitation of the airport (PJIA) as described in the draft ordinance, until the year 2021 where it is expected that the airport will be fully operational again.

As mentioned before, the SER recommends that this matter be regulated in a separate, corresponding national ordinance.

2.7 Restructure relationship GOC's and the Government

From the remarks in the explanatory memorandum regarding the consideration of Government to issue a public tender [openbare aanbesteding] for the exploitation of the airport, the SER noticed that the relationship between Government, PJIA and Subsidiaries needs improvement. The SER agrees with Government that issuing a public tender for the right to exploit the airport would negatively affect the interest of Sint Maarten. The SER therefore urges Government to have an open and transparent relationship with all Government owned companies (GOC's) to balance the complicated relationship between GOC's and Government and to have an open communication about the way to proceed with concession fees. The SER is currently working on the unsolicited advice 'visibility of taxation'. The relationship between Government and GOC's form part of that advice, and the SER will further elaborate on the profitability and responsibilities of GOC's in relation to Government's return on assets and equity in that advice.

2.8 No voluntary tax disclosure scheme

Next to generating revenue for the Government, the explanatory memorandum states that two developments give reason to introduce the measure to voluntarily disclose past tax obligations for the year 2018. First, The Kingdom of the Netherlands has entered or is entering in different international tax treaties to exchange information with other countries, such as the United States, Australia, Spain and Canada, to reduce tax evasion. The Foreign Account Tax Compliance Act (FACTA) is especially relevant for persons who are taxable [belastingplichtig] in the United States but have assets in Sint Maarten. Second, the Government started a project to improve the Tax Administration. This improvement will lead to better control by the Tax Administration of (non-disclosed) tax obligations of taxable persons [belastingplichtigen]. Both developments together will increase the likelihood that undisclosed income

¹⁹ Source: <http://www.sxmairport.com/news-032415-SXM-Airport-Clarifies-the-Issues-of-Closed-Loop-Dividends-and-Concession-Fees.php>



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[verzwegen inkomsten] will be discovered, and this should therefore increase the motivation by taxable persons to disclose formerly undisclosed income.

Both past non-disclosed profit [winst] and income [zuivere opbrengsten uit de

table 2	2017	1st half 2018	2nd half 2018	2019 and onwards
tax on income	regular tariff	20%	30%	regular tariff
tax on profit	regular tariff	20%	30%	regular tariff
finances disclosure	15%	none	none	15%

inkomensbronnen] will be taxed by 20% if disclosed in the first six (6) months of 2018 and taxed by 30% in the second six (6) months of 2018. Taxable persons who make use of the voluntary tax disclosure scheme will not be fined for their disclosure, and the Government changes the maximum fine back to 15% of the non-disclosed profit and income after 2018 (see table 2). With this voluntary tax disclosure scheme, the Government aims to reach out to taxable persons who purposefully evaded profit and income tax in the past, but also to those who were not sufficiently aware of their tax obligations. The explanatory memorandum does not estimate how much the possible non-disclosed aggregate tax obligation concerning profit and income tax could be, but does make clear that it pertains to all past tax obligations of these taxes; no limit in time is set.

The SER notes that voluntary tax disclosure schemes with reduced tax rates are, by definition, a reward for past non-disclosure behavior. Taxpayers who initially meet their tax obligations, pay the tax due when it is due. When considering voluntary disclosures schemes, the Tax Administration needs to ensure that its voluntary disclosures scheme does not negatively impact existing levels of compliance. If there is a perception that taxpayers who have evaded taxes in the past are able to secure terms through this scheme that leave them better off than people who declared all of their income from the beginning, this may actually increase levels of non-compliance. The SER adds that the voluntary disclosure scheme does not contain a cost-benefit analysis.

When during the disclosing period the tax rates are lower than the regular tax rates, the tax evader gains the difference between regular and disclosure-tax rates. The disclosing schemes in the Netherlands, Aruba and BES island have, presumably, therefore no lower tax rates but offer reduced or no fines²⁰. The voluntary tax disclosure scheme in Curacao did generously offer reduced tax rates and no fines.

The voluntary tax disclosure scheme described in this draft ordinance offers both reduced tax rates, no fines. Moreover, the elaboration on the different articles explains why participants will not be prosecuted for (earlier) tax fraud under the penal code. The SER concludes that this is too generous. The SER recognizes that an extra effort from the Tax Administration to detect and collect past non-disclosed profit and income is unlikely, given the current state of the Tax Administration as described in the explanatory memorandum. Even with the planned investment in the Tax Administration, past non-disclosed income and profit would likely not be at the top of the priority list.

²⁰ Inkeerregelingen binnen het Koninkrijk, Spigthoff Advocaten & Belastingadviseurs, page 1-5, downloaded from [file:///Z:/10%20%20%20%20%20%20%20Advice/47%20Advice%20shares%20development%20bank%20and%20measures%20to%20increase%20Government%20income/04%20Documentation/Inkeringsregeling%20Curacao/J.Starreveld Inkeerregelingen binnen het Koninkrijk.pdf](file:///Z:/10%20%20%20%20%20%20%20Advice/47%20Advice%20shares%20development%20bank%20and%20measures%20to%20increase%20Government%20income/04%20Documentation/Inkeringsregeling%20Curacao/J.Starreveld%20Inkeerregelingen%20binnen%20het%20Koninkrijk.pdf)



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The voluntary tax disclosure scheme aims to address the aggregated tax evasion concerning income and profit tax. However, it is unknown what amount would be collected through the voluntary tax disclosure scheme. Furthermore, by connecting the voluntary tax disclosure scheme with the possibility to buy shares in the Development Bank at a reduced rate, the Government sends out the message that non-compliant tax payers will be rewarded or favored over the compliant ones. The SER is of the opinion that the voluntary tax disclosure scheme poses too great of a risk for the Tax Administration in the sense that compliant tax payers will now become non-compliant because that behavior is being rewarded. A cost-benefit analysis would have determined this risk clearer.

The explanatory memorandum recognizes that the voluntary tax disclosure scheme entails risks concerning the money laundering of criminal profits. The explanatory memorandum states that the written disclosure needs to explain where, how much and how taxable persons earned previously non-disclosed profit or income. The explanatory memorandum further states that concerning income derived from violations of the Penal Code, the Tax Inspector has the obligation to report these violations to the Public Prosecutor [Openbaar Ministerie]. The SER adds that the voluntary tax disclosure scheme could demand more resources from the Tax Administration, Public Prosecutor and Police. The SER did not assess if these organizations have sufficient resources to keep criminal profits out of the voluntary tax disclosure scheme. Clearly the latter would be unwanted because, if this would happen, it means that Government would assist in laundering criminal gains.

In concluding, the SER would like to bring Government's attention to the recommendation of the Commission of Financial Supervision (CFT). The CFT recommends, among other things, to decrease incidental financing, which has proven to be challenging in the past, and to structurally increase the revenue of Government²¹. Tax reform based on simplification of the system and broadening the tax base is a way to achieve that.

2.9 Connecting the voluntary tax disclosure scheme to the optional buy-in of shares in the Development Bank Sint Maarten N.V.

The explanatory memorandum states that the objective of this measure is that the capital from sold shares connected to the voluntary disclosed tax obligations facilitates that the Development Bank 'will hit the ground running'. The draft ordinance aims to increase participation in the Development Bank by further lowering the tax rates of the voluntary tax disclosure scheme paid to Government to either 10% or 20% if taxable persons make use of the option to buy shares for 25% of the undisclosed profit or income (see table 3). Moreover, the Government proposes that, in order to protect the privacy of taxable persons who make use of the option, they can acquire shares on another person's name if they so choose.

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http://www.cft.cw/jdownloads/All%20downloads/Adviezen/Sint%20Maarten/cft_201700063_begrotingsvoorbereiding_2018_sint_maarten.pdf



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table 3	2017	1st half 2018	2nd half 2018	2019 and onwards
tax on income	regular tariff	10%	20%	regular tariff
tax on profit	regular tariff	10%	20%	regular tariff
finances disclosure	15%	none	none	15%
Dev. Bank shares		25%	25%	

The SER opposes the connection of the voluntary tax disclosure scheme with the option to buy shares of the Development Bank. The objections of the SER concern multiple social economic aspects, added with legal concerns regarding the condition of buying shares and only on this premise taxable persons are eligible to a lower tax rate (10% or 20% instead of 20% and 30%). Additionally, as another option, those shares can be put on another person's name [derde (persoon)]. With the latter, this measure of the draft ordinance definitively enters murky water.

With regard to the condition of buying shares in a private business (Development Bank NV), and only on this premise be eligible to pay a lower tax rate, the SER has the following objections:

1. This premise is violating the principle of equality. The objective of the equality principle is that similar cases should be treated alike and have the same outcome. The Government may make an exception to this principle, once justified in an objective and reasonable manner [objectieve en redelijke rechtvaardiging]. With such an exception, one interest must outweigh the other.

Those persons who paid their taxes complied with the law and paid their taxes on time are already being treated unfairly compared to those who did not comply with the law (reduced tax rates, no fines). By providing an additional option to buy shares in a private business (Development Bank NV) and further lowering the tax rate for the non-compliant taxable persons, is far too generous and violates the principle of equality.

2. Furthermore, treating non-compliant taxable person more favorably than compliant taxable persons is not promoting tax compliance.

The other concerns of the SER are connected with social economic considerations.

First, the SER elaborated extensively on governance of Development Banks in previous advice, and again in this Letter of Advice (see 2.1). These concerns become more urgent if, additionally, taxable persons who evaded profit and income tax in the past are put in charge of a Development Bank through their rights as shareholders. The SER notes that currently both the governance and the rights of the shareholder of the Development Bank are not defined in the draft ordinance, but the voluntary tax disclosure scheme is. Even though the explanatory memorandum mentions non-disclosed past rent earnings as an example of expected disclosures, the SER assesses that it is far more likely that a small number of taxable persons with far higher non-disclosed past profit and income would make use of the voluntary tax disclosure scheme. And, if it would suit their interest, could make use of the option. This implies that a group of persons whose known shared characteristic is that, in the past, their personal interest (evade taxes) was more important than the interest of the community (fulfill tax obligation), would be in charge of a Development Bank that is supposed to support the interest of the community. The SER assesses that the latter is not credible. Additionally, the SER assesses that any international fund or institution that stimulates sustainable development would find the above mentioned known shared characteristic of the



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shareholders sufficient reason to cease cooperation in relation to the due diligence process international institutions are known for.

Second, the option to buy shares reduces the incidental revenue the Government would receive from the voluntary tax disclosure scheme. More precisely, it would reduce the expected revenue in the first half of 2018 by 50% (from 20% to 10% of disclosed amount) and by 33% in the second half (from 30% to 20% of the disclosed amount). The core argument behind the measures is that Government needs to increase revenue, and, consequently, these amounts will be missed.

Third, Government does not need shareholders in the Development Bank through the voluntary tax disclosure scheme. Alternatively, after removing the option to buy shares and changing the tax rate of the voluntary tax disclosure scheme, the Government could simply use the incidental income to buy shares in the Development Bank and retain control through its rights as shareholder or use the extra income for other policies. This would also mean that Government remains responsible for the Development Bank. The SER has already elaborated that a Development Bank should not be established under the current draft ordinance, and therefore prefers the latter (use incidental revenue for policies).

Fourth, establishing a Development Bank through public funding but without governance parameters goes against how our Government system is setup. Outsourcing part of the (perceived) public benefits to a Development Bank that is also publicly funded (by previously evaded taxation) but without the governance in place (no parameters of the Development Bank are defined) doesn't anchor the (perceived) benefits for the population. Clearly, different forms of public-private partnership exist, but these should be entered with a maximum of governance, not a minimum. And additionally, through their shareholders' right, by allowing taxable persons who evaded profit and income tax in the past to determine the course of the Development Bank, the (perceived) benefits become more unlikely to benefit the population.

Fifth, the option to buy shares in the Development Bank allows taxable persons who make use of the option in the voluntary tax disclosure scheme to formalize and retain control of their non-disclosed profit or income for 10% of its value. They retain control through their shareholders' rights or by selling their shares (directly) after acquisition, and contribute less than their original tax obligations to the treasury. How much less also depends on other taxes which were not paid to gain undisclosed profit or income.

Sixth, the draft ordinance additionally allows to transfer shares [op naam zetten van] to another person [een derde]. This includes other legal entities next to natural persons [natuurlijke personen]. The elucidation argues that this is a valid option to protect the privacy of participants. The SER states that this option, to disconnect the disclosed amount from the taxable person [de connectie tussen inkeerregeling en aandeelhouderregistratie diffuus te laten zijn] may open the door to possible corruption within the Development Bank and misuse of the draft voluntary tax disclosure scheme. This possibility far outweighs assumed privacy concerns of taxable persons who evaded taxes in the past. The SER advises the Government to disconnect the voluntary tax disclosure scheme from the Development Bank.