

# Mutual Evaluation Report

## Anti-Money Laundering and Combating the Financing of Terrorism

Sint Maarten

January 8th, 2013

Sint Maarten is a member of the CFATF. This evaluation was conducted by the CFATF and was adopted as a 3rd Mutual Evaluation by its Plenary on **January 8<sup>th</sup>, 2013**.

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## Table of Contents

PREFACE - information and methodology used .....	5
Executive Summary .....	6
1.GENERAL .....	13
1.1 General information on Sint Maarten.....	13
1.2 General Situation of Money Laundering and Financing of Terrorism .....	20
1.3 Overview of the Financial Sector and DNFBP .....	23
1.4 Overview of commercial laws and mechanisms governing legal persons and arrangements .....	29
1.5 Overview of strategy to prevent money laundering and terrorist financing .....	37
2.LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES .....	45
2.1 Criminalisation of Money Laundering (R.1 & 2).....	45
2.2 Criminalisation of Terrorist Financing (SR.II).....	54
2.3 Confiscation, freezing and seizing of proceeds of crime (R.3) .....	59
2.4 Freezing of funds used for terrorist financing (SR.III).....	65
2.5 The Financial Intelligence Unit and its functions (R.26) .....	74
2.6 Law enforcement, prosecution and other competent authorities – the framework for the investigation and prosecution of offences, and for confiscation and freezing (R.27 & 28) .....	89
2.7 Cross Border Declaration or Disclosure (SR.IX) .....	101
3.PREVENTIVE MEASURES - FINANCIAL INSTITUTIONS .....	113
3.1 Risk of money laundering or terrorist financing .....	115
3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8).....	116
3.3 Third parties and introduced business (R.9) .....	130
3.4 Financial institution secrecy or confidentiality (R.4) .....	132
3.5 Record keeping and wire transfer rules (R.10 & SR.VII) .....	133
3.6 Monitoring of transactions and relationships (R.11 & 21) .....	137
3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV).....	139
3.8 Internal controls, compliance, audit and foreign branches (R.15 & 22).....	142
3.9 Shell banks (R.18) .....	146
3.10 The supervisory and oversight system - competent authorities and SROs.....	147
3.11 Money or value transfer services (SR.VI) .....	168
4.PREVENTIVE MEASURES – DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS (DNFBPs).....	169
4.2 Suspicious transaction reporting (R.16) (applying R.13 to 15 & 21).....	178
4.3 Regulation, supervision and monitoring (R.24-25) .....	182
4.4 Other non-financial businesses and professions Modern secure transaction techniques (R.20) .....	184
5.LEGAL PERSONS AND ARRANGEMENTS & NON-PROFIT ORGANISATIONS .....	185
5.1 Legal Persons – Access to beneficial ownership and control information (R.33).....	185
5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34) .....	189
5.3 Non-profit organisations (SR.VIII) .....	191
6.NATIONAL AND INTERNATIONAL CO-OPERATION .....	195
6.1 National co-operation and coordination (R.31 and 32) .....	195
6.2 The Conventions and UN Special Resolutions (R.35 & SR.I) .....	199
6.3 Mutual Legal Assistance (R.36-38, SR.V) .....	211
6.4 Extradition (R.37, 39, SR.V) .....	222
6.5 Other Forms of International Co-operation (R.40 & SR.V).....	226
7.OTHER ISSUES .....	232
7.1 Resources and statistics .....	232
7.2 Other relevant AML/CFT measures or issues .....	232
7.3 General framework for AML/CFT system (see also section 1.1) .....	232
TABLES .....	233
Table 1. Ratings of Compliance with FATF Recommendations.....	233
Table 2: Recommended Action Plan to Improve the AML/CFT System .....	243
ANNEXES .....	252

LIST OF ABBREVIATIONS ..... 253

Details of all bodies met on the Mission – Ministries, other government authorities or bodies, private  
sector representatives and others ..... 254

**PREFACE - information and methodology used**  
**For the evaluation of Sint Maarten**

1. The Evaluation of the anti-money laundering (AML) and combating the financing of terrorism (CFT) regime of St. Maarten was based on the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF), and was prepared using the AML/CFT Methodology 2004<sup>1</sup>. The evaluation was based on the laws, regulations and other materials supplied by Sint Maarten, and information obtained by the Evaluation Team during its on-site visit to Sint Maarten from March 19<sup>th</sup> to March 30<sup>th</sup> 2012. During the on-site visit the Evaluation Team met with officials and representatives of relevant Sint Maarten government agencies and the private sector. A list of the bodies met is set out in Annex 2 to the Mutual Evaluation Report.
2. Sint Maarten had its first CFATF Mutual Evaluation in July 2000 and the second round Mutual Evaluation in October-November 2002 both as part of the Netherlands Antilles. This Report is the result of the third Round Mutual Evaluation of Sint Maarten as conducted in the period stated herein above. The Examination Team consisted of Ms. Celeste Mc Calla, Legal Expert (Jamaica), Mr. Stephen Thompson, Financial Expert (Bahamas), Mr. Francis Arana, Financial Expert (Cayman Island) and Ms. Shelley Amanda Nicholls-Hunte, Law Enforcement Expert, (Barbados). The Team was led by Ms. Alejandra Quevedo, Legal Advisor, CFATF Secretariat. The Experts reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (FT) through financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs), as well as examining the capacity, the implementation and the effectiveness of all these systems. The Team would like to express its gratitude to the Government of Sint Maarten.
3. This Report provides a summary of the AML/CFT measures in place in Sint Maarten as at the date of the on-site visit or immediately thereafter. It describes and analyses those measures, and provides recommendations on how certain aspects of the system could be strengthened (see Table 2). It also sets out Sint Maarten's levels of compliance with the FATF 40+9 Recommendations (see Table 1).

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<sup>1</sup> As updated February 2008.

## Executive Summary

### Background Information

1. This Report provides a summary of the anti-money laundering (AML) and combating the financing of terrorism (CFT) measures in place in Sint Maarten during the period March 19<sup>th</sup> to March 30<sup>th</sup> 2012 (the date of the on-site visit) and immediately thereafter. The Report describes and analyses those measures and provides recommendations on how certain aspects of Sint Maarten's AML/CFT system can be strengthened. It also sets out Sint Maarten's level of compliance with the Financial Action Task Force (FATF) 40 + 9 Recommendations (See. Table 1 '*Ratings of Compliance with the FATF Recommendations*').

### Key Findings

- Sint Maarten became an autonomous country within the Kingdom of the Netherlands on October 10, 2010. Sint Maarten was one of five island territories of the Netherlands Antilles. It has a relatively small open island economy, being tourism its main economic pillar. Sint Maarten's characteristics, such as geographical location, tourism, relative easy logistical accessibility, high mobility of goods and services, pose threats in terms of illegal activities like drug trafficking, human trafficking and money laundering (ML).
- Non-bank financial institutions are vulnerable to money launderers and terrorists as they seek to launder their funds derived from criminal activities. An example of a non-bank financial institution sector is the money remitters sector. Regarding terrorist financing (TF), an issue could arise in relation to drug trafficking via the island; however no concrete activities have been detected.
- ML as defined in the Penal Code addresses an intentional and habitual and culpable ML. However, the penalty for culpable ML appears to be not sufficiently dissuasive. TF is partially criminalised under the Penal Code by virtue of the extension of the offence of preparation to include TF. However this approach does not result in accordance with the TF Convention. With regard to the FIU (MOT), after due analysis of the unusual transactions received, in case of suspicion of ML/TF, these are disseminated to the PPO. However, the number of disseminations appears to be low.
- The Central Bank is responsible for the regulation and supervision of the financial services sector in Sint Maarten. However, the activities such as: financial leasing, financial guarantees & commitments; participation in securities issues and the provision of financial services related to such issues; and individual and collective portfolio management are not covered by the AML/CFT regime.
- DNFBPs are supervised by the Central Bank and the FIU (MOT). The Examiners found that there are no legislative requirements for: CDD to be undertaken when carrying out occasional transactions that are wire transfers, as per the Interpretive Note to SR VII; the obligation to undertake CDD when there is a suspicion of ML or TF, the requirement to conduct CDD when it has doubts about the veracity or adequacy of previously obtained customer identification data and the requirement to conduct continuous due diligence on the business relationship.
- There is no specific supervisory framework for the NPO sector, however its monitoring occurs in various ways such as the registration at the Chamber of Commerce where the information is publicly available and may be reviewed by any person at any time. There is no requirement for NPOs to submit information on records of transactions to any competent authorities.
- In Sint Maarten several authorities are involved in the combating of ML and TF. The Team was informed that there is periodically an 'investigation officers meeting', where the PPO, Customs officers, tax officers, local police (KPSM) and the FIU (MOT) meet to discuss matters on an operational level. There is a system for international

cooperation; however domestic legislation for all law enforcement entities should specifically provide for international cooperation with their foreign counterparts. With regard to resources, several of the law enforcement agencies possess a shortage of suitably qualified officers trained in ML investigations.

### **Legal Systems and Related Institutional Measures**

2. Money laundering is punishable under the Penal Code (Articles 435a to 435c) and establishes the offence of ML in accordance with the Vienna Convention and with the Palermo Convention. No distinction is made in articles 435a and 435c between the criminalisation of the type of crime concerning ML. It focuses on targeting the proceeds of any crime. However, the Penal Code is not applicable to anyone who outside of Sint Maarten committed the crimes of ML; TF and most of the non-terrorist related predicate offences.
3. Most of the categories of predicate offences set out by the FATF have been criminalized in Sint Maarten by the Penal Code. However, in relation to illicit arms trafficking, smuggling and insider trading, market manipulation, and some environmental crimes were not verified as the laws were not provided.
4. With regard to SR. II, the Netherlands Antilles ratified the TF Convention on March 22, 2010 (also applicable to Sint Maarten). A number of amendments were introduced in the legislation of Sint Maarten. However, TF is not independently criminalised and therefore there is no comprehensive treatment of terrorist financing in the Penal Code as required by the TF Convention. Additionally, no specific penalty is reflected in the Penal Code for the offence of TF, the indirect or unlawful provision of funding for the commission of a terrorism offence and the wilful provision of funds etc. to individual terrorists are not criminalised.
5. Confiscation is regulated in article 35 of the Penal Code. In addition, the Penal Code ~~also~~ provides for the withdrawal from circulation and dispossession of unlawfully obtained benefit. Powers to identify and trace assets are based on the provisions of search and seizure and mandatory handover of documents and records. Article 119 of the Penal Procedures Code reflects that matters subject to seizure are all objects and claims that can serve to reveal the truth or to prove unlawfully obtained benefit as referred to in article 38e of the Penal Code. However, the powers to confiscate or take provisional measures in relation to terrorist financing or some predicate offences for ML are limited (please see ratings R1 and SR11). In addition, confiscation measures (under both pre-conviction and post-conviction circumstances) in the Penal Code do not always allow for the measures to be imposed without notice. Based on the insufficient statistics, the effectiveness of the confiscation regime could not be confirmed by the Evaluation Team.
6. Sint Maarten legal system for seizure covers freezing of funds and other assets. Besides the criminal procedure of confiscation there is also the administrative procedure. Based on the Sanctions National Ordinance, it was issued the Sanctions National Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s. and locally designated terrorists which deals with UNSCRs 1363, 1368, 1373, 1390 and 1526. In addition, Sint Maarten has issued the "Protocol concerning the procedures to be followed when freezing terrorist funds appearing on the list of the U.N." and the "Protocol concerning the procedures to be followed when freezing funds of locally designated terrorists". The Examiners raised a concern as it appears to be a limitation in the ability of Sint Maarten to implement freezing orders in accordance with subsequent terrorist related UNSCR without having to issue subsequent Sanctions National Decrees as necessary to implement UNSCR. This could have implications for responding to such matters without delay. The financial institutions (FIs) appeared to be generally knowledgeable about their obligations in relation to freezing obligations. This was not the case with the majority of DNFBPs.

7. The Sint Maarten FIU (MOT), commenced after the dismantling of the Netherland Antilles on October 10, 2010 and it falls within the Ministry of Justice. However, the NORUT refers to the fact that the Ministry of Finance is the parent Ministry for the FIU (MOT). The Authorities advised that the NORUT will be amended on this regard. The FIU (MOT) is in the process of applying for membership of the Egmont Group. With regard to the analysis of matters, the analysis of UTRs is conducted by the two Analysts. The FIU authorities reported that the FIU had not yet acquired Analyst Notebook. Based on the trend of statistics presented, the staff complement does not appear adequate to handle the number of reports received.
8. Articles 4, 8, 16 and 22 of NORUT present a risk to the operational autonomy of the FIU and create opportunities for undue interference and influence. The Minister of Justice manages the database is particularly sensitive as the FIU does not have a permanent Head that is physically present at the FIU (MOT) on a daily basis. In addition, the Head of the FIU (MOT) does not possess the relevant powers or authority to contribute in the appointment, suspension or dismissal of his or her staff and the involving of the Monitoring Commission (according to the NORUT) in the approval of the budget and the management of the FIU database lessen the FIU's operational autonomy. The provision of guidance has occurred largely on a case by case basis that is with the individual reporting entity as opposed to with the various sectors. A review of the statistics has shown that some sectors do not report at all and others have reduced the number of reports sent to the FIU (MOT). Prior to 10-10-10, Annual Reports were prepared by the MOT Netherlands Antilles. No Annual Report for 2011 has been produced.
9. The Crime Pattern Analysis (2011) is a Report that contains an analysis of the criminal phenomena over the years 2008-2010, in order to obtain insight in the local crime situation. It should give local law enforcement authorities and the responsible Minister of Justice the possibility to prioritise types of investigations based on facts.
10. The PPO is responsible for the proper investigation of all crimes including the offences of ML and TF. Matters are generally forwarded to either the KPSM or the RST. PPO can also rely on the services of: Landsrecherche (Special Investigation Unit), VDSM, Customs, Coast Guard and Immigration Department (currently a part of the KPSM) and Tax Office. PPO is authorized to decide independently how to handle circumstances in dealing with persons suspected of ML or TF. Several authorities expressed that there were human resource challenges in the KPSM in that there was a staff shortage and did not possess personnel experienced to conduct financial investigations for ML. The examiners were informed that there were unlicensed MTCs operating within Sint Maarten. The Central Bank indicated that this matter was referred to the PPO.
11. Gathering of evidence has been laid down in the Penal Procedures Code. Pursuant to Article 119 of the Penal Procedures Code, all objects and claims that serve to uncover the truth or to prove unlawfully obtained benefits or all objects and claims that can be ordered for confiscation or withdrawal from circulation are subject to seizure. The PPO or the examining judge can seize objects subject to seizure. Authorisation by the examining judge is needed when dealing with the search of premises for seizure pursuant to Article 122 of the Penal Procedures Code.
12. With regard to Customs, Sint Maarten authorities have implemented a disclosure system with respect to the physical cross-border transportation of currency or bearer negotiable instruments in the amount of NAF 20,000. The immigration card does not require passengers to make a declaration. Customs Officers have the authority to carry out investigations on their own, but Customs has an agreement with the PPO that all the cases concerning money transport are handed over to the Police or RST who are more specialized. The Examiners were advised of the intention to purchase a scanner, however there is a reservation at the possibility of acquiring the same due to the high cost. There are no particular provisions observed in the NORUT and the NOOCMT with respect to the retention of currency or bearer negotiable instruments and the identification of the bearer(s) where there is a suspicion of ML or TF. This therefore signifies



that the UTRs disseminated to the FIU (MOT) may simply be threshold cross-border money transfers and may not reflect suspicion for ML or TF. There was no indication that Customs Sint Maarten makes any use of the UN- lists of entities and individuals associated with terrorism activities.

### **Preventative Measures – Financial Institutions**

13. The AML/CFT framework for the financial sector constitutes the National Ordinances and executive decrees, regulations, provisions and guidelines (P&Gs). The NORUT and the NOIS contain provisions for the Central Bank to conduct examinations, including those to test for compliance with the AML/CFT rules and regulations. They also cover the sharing of information with other competent authorities and overseas regulators on a reciprocal basis.
14. The preventive measures contained in the P&Gs must be implemented by all supervised institutions. The Team ascertained from its discussions with industry representatives during the on-site mission that regulated entities regard the P&Gs as enforceable by the Central Bank. The Examiners concluded that the P&Gs are “other enforceable means” (OEM) under the FATF Methodology.
15. The Central Bank considers the following FIs to be very ML/FT low risk due to the nature of their businesses: credit unions, savings and credit funds, pension funds and funeral insurance companies.
16. With regard to CDD, the NOIS requires all service providers to identify all clients and the ultimate beneficiaries of the client using reliable and independent sources, before rendering a service to the client. FIs are required, to obtain and record the customer identification information of both natural and legal persons. However, there are no provisions in law or regulation to conduct ongoing due diligence and to conduct CDD when it has doubts about the veracity or adequacy of previously obtained customer identification data. Additionally the obligation to undertake CDD when there is a suspicion of ML or TF, regardless of any exemptions or thresholds is not set out in law or regulation. According to the P&Gs, the FIs must at least consider the following risk categories while developing and updating the risk profile of a customer: (i) customer risk, (ii) products/services risk, (iii) country or geographic risk, and (iv) delivery channels risk. Through discussions with FIs during the on-site visit, the Examination Team was able to confirm that in general the FIs are aware of and understand the AML/CFT requirements under the NOIS and P&Gs. However, it was a challenge to acquire the KYC information for existing accounts.
17. With regard to PEPs, the P&Gs contain the requirements to deal with PEPs. However, there are no clear requirements within the P&Gs for FIs to put in place an appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP. The P&Gs for CI contain specific provisions on correspondent banking activities. It was indicated that since the other non-banking financial institutions conduct transactions on behalf of their clients through CIs, no specific provisions related to correspondent banking relationships have been issued for the non-banking financial institutions. CIs are not permitted to enter into, or continue, correspondent banking relationships with shell banks.
18. According to the P&G, FIs are required to have policies in place or take measures to prevent the misuse of technological developments in ML or TF schemes. In addition managing the risks must include specific and effective CDD procedures that apply to non-face-to-face customers. The P&Gs for CI and IC & IB provide measures regarding reliance on third parties. The concept “adequately supervised” is not in line with the requirements of essential criteria 9.2.

19. There is no secrecy law in place in Sint Maarten that inhibits the implementation of the FATF recommendations by the FIs. However, the FIU (MOT) as supervisor should have the possibility to exchange information with other local and international supervisory authorities.
20. Article 15a of Book 3 and Article 15 Book 2 of the CC refer to keeping data obligations. However, these provisions do not make clear the obligation under E.C. 10.1 to maintain all necessary records and transactions. This obligation should be in law or regulation. However, meetings with FIs during the onsite visit confirmed that, in effect, all necessary records and transactions are kept. The obligations to keep relevant data in Article 6 of the NOIS do not make a reference to business correspondence. Sint Maarten lacks comprehensive guidance with respect to wire transfers. The P&G for MTCs has a short section regarding wire transfer(s). With no detailed provisions for wire transfers in the relevant P&G's the possibility of non-adherence to the requirements increases.
21. The P&Gs required FIs to pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. In addition, P&Gs includes sector-specific requirements with respect to the special areas of attention for unusual transactions, due to the particular type and complexity of the transactions of the clients of the various types of FIs. In addition, the P&Gs establish that FIs are required to give special attention to business relationships and transactions with persons (including legal persons and other FIs) from or in countries that do not or insufficiently apply the FATF Recommendations including the high-risk and non-cooperative jurisdictions. As there is no evidence that Sint Maarten has applied counter-measures and there is no regulatory provision or instructions in this regard, it is not clear whether Sint Maarten would have the power to apply counter measures to countries that continue not to apply or insufficiently apply the FATF Recommendations.
22. With regard to the reporting of suspicious transactions, UTRs are submitted to the FIU (MOT) based on either objective or subjective indicators. The Examiners were of the view that the prescriptive nature of the indicators in general, and the burden of reporting subjective (rules based) indicators, could detract from the FIs reporting genuine suspicious transactions. There appears to be a reliance on the objective indicators specially the thresholds in reporting UTRs. In addition, the scope of UTR reporting may not be as extensive as some designated categories of predicate offenses for ML may not be covered.
23. In Sint Maarten, there are adequate internal controls, compliance functions and audit to test compliance for FIs as well as adequate AML/CFT provisions are also available and applicable to foreign branches and subsidiaries.
24. The Central Bank carries out its supervisory task independently, without any external influence. While no supervisory members of staff are resident in Sint Maarten, the Central Bank shuttles in inspection staff from Curacao as needed. The overall AML/CFT level of knowledge and expertise of the Central Bank's examiners are considered to be adequate. The Central Bank deems it imperative that its supervisory regime is conducive to the application of the RBA. The approach used is the *CAMEL* system. The supervision of the AML/CFT regime is incorporated in the Management and Organisation section of the *CAMEL*. The examination can take place in different forms; it can be a full-scope examination, a targeted examination, a quick scan or a special assignment. However the RBA is not specifically calibrated for ML/FT risks. The Central Bank issued order/directives to CI and MTC. In most instances, FIs comply with its instructions before sanctions are applied. A company (trust) service provider's licence was revoked by the Central Bank in 2010.
25. Money transfer companies (MTCs) operate pursuant to the legal provisions of the RFETCSM. Unlicensed MTCs continue to operate in Sint Maarten. The fact that these MTCs continue to operate without licenses calls into question the effectiveness.

### **Preventative Measures – Designated Non-Financial Businesses and Professions**

26. The Central Bank is entrusted with the supervision administrators of investment institutions, company trust service providers and has issued P&Gs for the specific sector. This P&Gs are considered OEM. The FIU (MOT) is entrusted with the supervision of lawyers, notaries, accountants, real estate brokers, dealers in precious metals and precious stones, tax advisers, administration offices and car dealers. However, the supervisory department is not operational and to date no P&Gs have yet been issued.
27. There is no comprehensive regulatory and supervisory AML/CFT regime in Sint Maarten for casinos; however the Examiners were advised that within the Government there has been discussion regarding the creation of a Gaming Control Board. There are no AML/CFT requirements for internet casinos. It is to be noted that threshold for casinos do not comply with the threshold set by FATF.
28. The majority of DNFBPs interviewed during the onsite did not seem to be aware that they are subject to AML/CFT obligations under the NOIS. The Authorities have also acknowledged that outside of the services supervised by the Central Bank knowledge of the ML and FT laws, obligations and related processes is limited. The Examiners were concerned with the low number of UTRs submitted by DNFBPs. In particular it is noted that only casinos and TSP have submitted UTRs and these numbers were very low.

### **Legal Persons and Arrangements & Non-Profit Organisations**

29. Sint Maarten has a system of central registration in place, which is regulated through the Commercial Register Act (CRA). The Commercial Registers are public registries containing only public records, which are available to the general public. The CRA reflects all legal persons established in the Sint Maarten must (mandatory) be registered with the Commercial Register at the Chamber of Commerce. However, there is no requirement for the registration of the details of UBOs. The Article 105, 3<sup>rd</sup> paragraph of CC reflects that bearer shares shall be transformed by the company into registered shares if this is requested by the holder of the bearer shares that this be done. This aspect of the CC must be amended.
30. In a (criminal) investigation information on the UBO and control of legal persons is needed (on short term) by the investigating officers or to obtain information and have full access to the client files of the company (trust) service providers upon receipt of a court order it can be obtained. However no specific examples were provided to the Team.
31. With regard to NPOs, a reassessment has not been conducted since 2008. In addition, it could not be assessed whether or not there are any NPOs that account for a significant portion of the financial resources under control of the sector or substantial share of the sector's international activities. No outreach has been made to the NPO sector with a view to protecting the sector from terrorist financing abuse. The PPO can initiate proceedings to dissolve the NPO when its activities are in violation. However, specifically, there are no different levels of sanctions for preventive measures to avoid the misuse of NPOs.

### **National and International Cooperation**

32. The CIWG was not installed by the Governor of Sint Maarten at the time when the on-site Mutual Evaluation took place<sup>2</sup>. The CIWG will be chaired by the Attorney-General and further

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<sup>2</sup> The Authorities have advised that establishment of the National Committee on Money Laundering (CIWG) occurred on June 8, 2012.

built up with representatives of the PPO, the Tax Office, the Justice Department, the Central Office for Legislation and Legal Affairs, the Office for Foreign Affairs, the Central Bank, the FIU and the private sector (banking and insurance sector). As the CIWG was not established, it was not possible to measure the effectiveness of the mechanism for cooperation at this national level.

33. Sint Maarten is participant to many treaties to combat crime and that as a small country a lot of emphasis is being put on international cooperation to effectively combat organised crime and terrorism. Dual criminality is a prerequisite for mutual legal assistance requiring the use of specific investigative measures by the Sint Maarten Authorities. However, it is not compulsory for less radical and non-compulsory measures. There is an internal PPO guideline on the execution of international requests for mutual legal assistance. Extradition is possible on the basis of a treaty and the principle of dual criminality. The extent of Mutual Legal Assistance that may be limited by the fact that TF is not criminalized in accordance with the FT Convention and in relation to matters which have not been confirmed as predicate offences.
34. With regard to international cooperation it appears that most competent authorities are able to cooperate with their foreign counterparts. However it was not clear that the Central Bank could undertake investigations on behalf of their foreign counterparts. In addition, Sint Maarten should maintain statistics on entities' spontaneous referrals of information as well as information supplied as a result of a request. This system can be used at a policy and operational level to adequately assess the country's international cooperation efforts for AML/CFT.

#### **Other Issues: Resources and Statistics**

35. The FIU (MOT) lacks staff to adequately perform its functions and the necessary analytical tools such as Analyst Notebook to assist in the analysis of UTRs. The staff of the FIU (MOT) and some of the law enforcement do not have adequate and relevant training for combating ML & TF. There is no allocation of financial resources for ML and TF. There is inadequate space for the Court of First Instance to properly execute its functions. In addition, no statistics relating to requests to overseas FIUs were available, nor for requests for additional information by the FIU (MOT) to reporting entities. The Authorities should ensure that comprehensive statistics are maintained in relation to the investigation, prosecution, and conviction of ML related cases

## MUTUAL EVALUATION REPORT

### 1. GENERAL

#### 1.1 General information on Sint Maarten

##### Economy

1. Sint Maarten's GDP amounted to US\$820 million in 2010, with a GDP per capita of US\$21,875. During the past five years, the economy grew by an average annual rate of 2.1%. Real GDP contracted by 0.9% in 2009 as a result of the global recession and remained flat in 2010. In the national accounts, trade has the largest share in gross value added of the private sector (22%), followed by real estate, renting & business activities (20%), transport, storage & communications (12%), construction (11%), financial intermediation (9%), and hotels & restaurants (8%). These shares confirm the dominance of tourism as Sint Maarten's main economic activity. The unemployment rate amounted to 12.2% in 2009, compared to 10.6% in 2007. The inflation rate reached 3.2% in 2010 and was also 3.2% in August 2011 (annualized). Sint Maarten suffered more from the global recession than Curaçao because of its less diversified economy.

##### System of Government

2. On October 10, 2010 (10-10-10) Sint Maarten became an autonomous country within the Kingdom of the Netherlands; prior, Sint Maarten was one of five island territories of the Netherlands Antilles. The Kingdom of the Netherlands consists now of four countries: the Netherlands, Aruba, Curaçao and Sint Maarten. For Sint Maarten, the new status means an increased autonomy in the fields of legislation, justice and executive power. The political system of Sint Maarten is a parliamentary democracy, and is based on underlying fundamental human rights.
3. Sint Maarten has full autonomy on most matters, except for those mentioned in Article 3 of the Charter for the Kingdom of the Netherlands. Paragraph 2 of the Charter regulates the conduct of Kingdom affairs and in paragraph 4 of the Charter the constitutional organization of the countries within the Kingdom of the Netherlands is regulated. The Constitution of Sint Maarten was ratified in September 2010, and entered into force on 10-10-10.
4. Her Majesty the Queen is the Queen of all the countries within the Kingdom of the Netherlands. The Governor of Sint Maarten acts as the representative of her Majesty the Queen for Sint Maarten. The Governor of Sint Maarten is appointed for a six-year term by her majesty the Queen. His role is dual: on a national level (Sint Maarten) the Governor does not carry political responsibility and primarily has a representative role. However, as Kingdom Government representative he can intervene if national legislation and decisions contravene Kingdom rules and legislation, and international treaties.
5. The government system is based on the *trias politica*, which means a clear division between powers of the executive, legislative and judicial system.
6. The Council of Ministers, containing the Prime Minister as a *primus inter pares*, forms, together with the Governor of Sint Maarten, the executive power of the Government of Sint Maarten. Other than the Governor, the Prime Minister and other ministers are appointed for a four-year term. Legislative power is shared by the Government and the Parliament. The Parliament comprises of one chamber, containing 15 members which are elected by direct, popular vote to serve four-year terms.
7. The judicial system of Sint Maarten has mainly been derived from the Dutch system, operates independently of the legislature and the executive powers. Jurisdiction, including appeal, lies

with the Joint Court of Justice of Curaçao, Aruba, Sint Maarten and of Bonaire, Sint Eustatius and Saba (“Joint Court of Justice”) and the Supreme Court of Justice in the Netherlands.

### **The Governor as an organ of the Kingdom**

8. The powers, obligations and responsibilities of the Governor as an organ of the Kingdom of the Netherlands are prescribed in the Regulations for the Governor (N.G. 2010, no. 57), which were issued based on the Charter of the Kingdom of the Netherlands (“Charter”). The Governor is authorized, within the limits of these regulations and the instruction of the Crown, to act on behalf of the Kingdom Government. This applies to the following Kingdom affairs (Article 3, paragraph 1, of the Charter):
  1. maintenance of the independence and the defence of the Kingdom (Commander of the Armed Forces);
  2. foreign relations;
  3. Netherlands nationality;
  4. regulation of the orders of knighthood, the flag and the coat of arms of the Kingdom; and;
  5. regulation of the nationality of vessels and laying down standards required with regard to the safety and navigation of seagoing vessels flying the flag of the Kingdom, with the exception of sailing ships;
  6. supervision of the general rules governing the admission and expulsion of Netherlands nationals;
  7. general conditions for the admission and expulsion of aliens;
  8. Extradition.
9. Other matters maybe declared to be Kingdom affairs by common accord (Article 3, paragraph 2, of the Charter). In addition, the Governor has the authority, for example in the event of disasters, to make parts of the Armed Forces available to the Government of Sint Maarten.

### **The Governor as an organ of the country Sint Maarten.**

10. According to the Constitution of Sint Maarten, the Governor, as a representative of her majesty the Queen, is the formal head of the Government of Sint Maarten. The Council of Ministers chaired by the Prime Minister exercises the executive power and is responsible to the Parliament of Sint Maarten. The Governor presents the draft national enactments to Parliament for approval and decrees them after this approval has been obtained. Subsequently, he sees to it that these national enactments are promulgated.

### **Legal system**

11. The legal system used in the Kingdom of the Netherlands is based on civil law. Sint Maarten is an integrated part of the Kingdom of the Netherlands, together with Aruba and Curaçao. The legal system of Sint Maarten knows different types of laws on different levels. On the level of the Kingdom there are The Charter (Statuut) and other legislation (“rijkswet- en regelgeving”) that have force of law within the whole Kingdom and are published in the various National Gazettes of the four countries within the Kingdom.
12. Next to it, on the national level (within Sint Maarten.) you have the Constitution, National Ordinances (NO), National Decrees (ND) and Ministerial Decrees (MD). The hierarchy of these laws is in order as is mentioned. They are all published in the National Gazette or “Landscourant”.
13. The legislation concerning combating of ML and FT is enacted in these kinds of laws..
14. Up until 10-10-10, the five islands of the Netherlands Antilles constituted one jurisdiction, with Netherlands Antilles law as the governing law. Upon its dissolution, Netherlands

Antillean law ceased to exist. Sint Maarten became a separate country within the Kingdom, with its own government and its own laws, which required adaptation of the legislation, public administration and financial supervision.

15. Although, most of the applicable laws did not change materially, some amendments were necessary due to the constitutional changes (e.g. replacing references to the Netherlands Antilles with references to Sint Maarten). To provide for the transition to go as smoothly as possible, the National Ordinance on transitional provisions for legislation and administration (NOTPLA) (The Landsverordening overgangsbepalingen van wetgeving en bestuur; AB 2010; GT nr. 30) was put in place. Through this NOTPLA, all legislation from the former Netherlands Antilles remained applicable as Sint Maarten laws, except for those laws which were put on a list, the so-called negative list. Next to these laws the NOTPLA also stipulates that the legislation,—provided for in the former island territory of Sint Maarten, remain applicable for the Country of Sint Maarten.
16. The NOTPLA also states that the new Government institutions of Sint Maarten should be read into existing legislation. All references to the (institutions from the) former Netherlands Antilles are thereby replaced with references to (the institutions from) Sint Maarten. The Government planned to use the first half of 2012 to provide an update concerning all existing laws to the new constitutional status.
17. With regard to the financial supervision, some National Ordinances have been replaced with new legislation for Curaçao and Sint Maarten jointly (the Central Bank Statute and the Regulations for Foreign Exchange Transactions and Sint Maarten (RFETCSM).
18. Regarding Conventions/Treaties which were in effect for the Netherlands Antilles before 10-10-10, Sint Maarten has been named one of the legal successors. Through this these process Conventions/Treaties remain in effect for Sint Maarten.

#### **(a) Transparency and good governance principles**

##### **Transparency policy of Sint Maarten**

19. Sint Maarten has different mechanisms in place to prevent the unlawful use of legal persons in relation to money laundering (ML) and terrorist financing (TF).
20. The introduction of the National Ordinance on Identification when rendering Services as lastly amended by N.G. 2009, no 66 (N.G. 2010 no. 40) (NOIS) assures that financial institutions and company (trust) service providers obtain and document the identity of their clients even in case the client is represented by a third party. Prior to this amendment of the NOIS the supervised entities were already subject to the obligations to identify and verify the beneficial owners of their clients based on the P&Gs.
21. The introduction of new legislation on legal persons (Civil Code Book 2) was also a significant step to diminish the use of bearer shares. The issuance of bearer shares is in principle not allowed. However a client can request the company to provide him with bearer shares certificates. For those cases the ordinance contains provisions for the company to comply with traceability conditions if so desired. The National Decree Custody Bearer Share Certificate (NDCBSC) (N.G. 2010 no.36) was furthermore enacted to secure that bearer shares are kept in custody in order to secure knowledge of the Beneficial Owner information.

#### **Good Governance**

##### **Respect of principles such as transparency and good governance**

22. The Corporate Governance Code of the Island Territory of Sint Maarten (CGC) is based on the Ordinance Corporate Governance as adopted on October 12, 2009 by the Island Council of the Island Territory of Curaçao (O.B. 2009 nr. 92). As of October 10, 2010 the Ordinance Corporate Governance is applicable to Sint Maarten, being the successor of the Island Territory of Sint Maarten that acquired a country status within the Kingdom of the Netherlands. The CGC is applicable to all corporations which have their statutory seat in Sint Maarten and of which the shares or the depositary receipts in evidence of shareholding, are held by the Government of Sint Maarten in whole or in part, and foundations or else the legal entities incepted by instruction and under responsibility of the of Sint Maarten.

**(b) Culture of AML/CFT compliance**

23. Sint Maarten is committed to the fight against ML and TF. It is member to both the Financial Action Task Force on Money Laundering (FATF) and the Caribbean Financial Action Task Force (CFATF). Sint Maarten has a framework to prevent and combat ML and TF. In addition, representatives of Sint Maarten regularly attend the CFATF meetings.
24. The main laws or executive decrees relating to ML and TF (where applicable as amended) are:
- a) The National Ordinance on the amendment of the Penal Code (penalization of terrorism, terrorist financing and money laundering) (N.G. 2008, no. 46); (replaced i.a.: The National Ordinance Penalization of Money Laundering (N.G. 1993, no. 52);
  - b) The National Ordinance on the Reporting of Unusual Transactions (N.G. 1996, no. 21) as lastly amended by N.G. 2009, no 65 (NORUT ) (N.G. 2010, no 41);
  - c) The National Decree containing general measures on the execution of articles 22a, paragraph 2, and 22b, paragraph 2, of the National Ordinance on the Reporting of Unusual Transactions (National Decree penalties and administrative fines for reporters of unusual transactions( N.G. 2010 no. 70));
  - d) The National Ordinance on Identification of Clients when rendering Services (N.G. 1996, no. 23) as lastly amended by N.G. 2009, no 66 (NOIS) (N.G. 2010 no. 40);
  - e) The National Decree containing general measures on the execution of articles 9, paragraph 2, and 9a, paragraph 2, of the National Ordinance on Identification of Clients when rendering Services. (National Decree containing general measures penalties and administrative fines for service providers) (N.G. 2010, no. 71);
  - f) Ministerial Decree with general operation of May 21, 2010, laying down the indicators, as mentioned in article 10 of the National Ordinance on the Reporting of Unusual Transactions (Decree Indicators Unusual Transactions) (N.G. 2010, no. 27);
  - g) Ministerial Decree with general operations of March 15, 2010, implementing the National Ordinance on the Reporting of Unusual Transactions (N.G. 2010, 10);
  - h) Ministerial Decree with general operations of March 15, 2010, implementing the National Ordinance on Identification of Clients when Rendering Services (N.G. 2010, no.11);
  - i) Sanctions National Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s. and locally designated terrorists (N.G. 2010, no. 93)
  - j) National Ordinance on the Obligation to report Cross-border Money Transportation (NOOCMT) (N.G. 2002, no. 74)

**(c) Measures to prevent and combat corruption**

25. The Penal Code contains provisions which penalize corruption, including bribery of civil servants and government officials. Several persons have been convicted in the past for corruption, including bribery, based on these provisions.
26. On 16 July 2010, the Netherlands Antilles acceded to the Group of States against Corruption (GRECO). The Civil Law Convention on Corruption of the Council of Europe applies to the



Netherlands Antilles since 1 April 2008. Sint Maarten is not yet a party to the UN Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Currently the Government of Sint Maarten is working on finalizing relevant legislation in a new Penal Code in which the essence of the scope of both treaties on the subject of corruption will be met.

**(d) Court system**

27. Sint Maarten's court system is part of a Joint Court of Justice shared by Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba. The Joint Court of Justice is responsible for the administration of justice both in first instance and in appeal for the Caribbean part of the Kingdom of the Netherlands. By October 10<sup>th</sup> 2010 the Joint Court of Justice has become a fully independent body within the countries involved. Its organization and legal basis can be found in the Consensus Kingdom Law on the Joint Court of Justice. The Joint Court of Justice consists of a presiding judge (President), vice-presidents in the countries Aruba, Curaçao and Sint Maarten, and the other members and their substitutes. The members of the Joint Court of Justice deal in first instance and in appeal with civil cases, criminal cases, and cases of administrative law (including tax law). Furthermore there is the Supreme Court (Hoge Raad der Nederlanden) in The Hague, The Netherlands, where in case of civil and criminal cases, application of the law and principles of law (and not factual aspects) can be disputed. For administrative cases only two instances exist.

**The Court in First Instance**

28. A case that is dealt with in court for the first time falls under the jurisdiction of the Court of First Instance on the island where the case has materialized. The Court of First Instance is an organizational part of the Joint Court of Justice. Cases in first instance are dealt with by one judge.

**Cases in Appeal**

29. The appeal court, as part of the Joint Court of Justice, handles cases in appeal that were dealt with and decided on by the Courts in First Instance. The appeal cases are always dealt with by three members of the Joint Court of Justice. A judge who handled a case in first instance cannot be a member of the appeal court of three judges who deal with that case on appeal. Against the verdicts in appeal, cassation at the Supreme Court in The Hague, The Netherlands, presided by three or five judges (raadsheren) is possible. The Supreme Court has the authority to overturn rulings by appellate courts (cassation) and therefore establishes case law, but only if the lower court applied the law incorrectly or the ruling is ill motivated or incomprehensible. The facts in a case are no longer subject to discussion. The Supreme Court may not rule on the constitutionality of laws passed by the legislature and treaties. Hence the Kingdom of the Netherlands does not have a constitutional court. Yet Sint Maarten, in its own Constitution (Staatsregeling), that became applicable by October 10<sup>th</sup> 2010, introduced its own Constitutional Court which is allowed to rule on the constitutionality of local laws in regards to the Constitution. Within the law system of the Kingdom of the Netherlands, this is unprecedented.

**Judicial Tribunals**

30. The members of the Joint Court of Justice also have seats in different judicial tribunals, such as the Arbitration Court for Civil Servants and the Arbitration Court of Tax Cases and their respective Boards of Appeal.
31. Judges in the Kingdom of the Netherlands are appointed for life by Her Majesty the Queen of The Netherlands, but have a retirement age of 65. Only under specific circumstances, as laid

down in the law, such as misconduct or criminal activities, can the Supreme Court dismiss judges.

**(e) High ethical and professional requirements for police officers, prosecutors, judges and measures and mechanisms to ensure these are observed.**

32. Sint Maarten's Police officers have to take the oath of office. There is also a professional code applicable which is laid down in a handbook. The elementary training for police officers addresses integrity in several modules. Furthermore, in 2009-2010 an integrity project was implemented by the Sint Maarten Government, of which the police formed part.
33. Integrity is an important aspect for the Public Prosecutor's Office (PPO). The integrity policy has recently been sharpened to be in line with the Kingdom Law PPO ("Consensus Rijkswet Openbare Ministeries" (N.G. 2010, no. 59)). This has been realized through the drafting of a code of conduct for the PPO. This code of conduct will govern the effective and efficient functioning of the organization and the behaviour of the PPO employees. The draft code of conduct has been approved by the PPO's Management team and by the Minister of Justice in 2011.
34. The Training Institute SRA Caribbean provided training on this code of conduct for the members of the PPO's office in May 2011. Integrity questions as well as client handling and matters of conduct and professional behaviour were discussed in referral to the code of conduct.

**(f) System for ensuring ethical and professional behaviour of professionals such as accountants and auditors, and lawyers.**

35. The accountants, lawyers, tax advisor and notaries are some of the professionals that fall within the scope of the AML/CFT system in Sint Maarten. All of these professions are subject to the NOIS and NORUT since May 2010. However the supervision of the compliance with these requirements by FIU (MOT) has not started yet.

**Accountants**

36. The accountants operating in Sint Maarten are associated in the Nederlands Antilliaanse Vereniging voor Accountants (the NAVA), the Netherlands Antillean Association for Auditors. The members of the NAVA are qualified accountants, members of: the Royal Dutch Institute of Registered Accountants, the Dutch Institute of Accountants, the American Institute of Certified Public Accountants and the National Institute of Accountants, which Institute is a member or associate member of the International Federation of Accountants.
37. The accountant is required to be a member of the Royal Dutch Institute of Registered Accountants. This is the Dutch institute for the chartered accountants. The Royal Dutch Institute of Registered Accountants has Regulation regarding the Code of conduct for all registered accountants (RA). The code of conduct is applicable to all accountants who are a member of the Royal Dutch Institute of Registered Accountants, no matter in what part of the world they are. The code is valid as from January 2007 and forms an important basis for the functioning of the accountant.
38. The code of conduct consists of five (5) principles: integrity, objectivity, expertise, secrecy and professional behaviour. The code of conduct also sets rules regarding the independence of the accountant, the engagement acceptance and fees.
39. There are legislations in order to ensure these principles are actually observed. The legislation includes: specialist and professional requirements, an external independent oversight on

accountants and accountant organizations that exercise statutory control, quality review by the Royal Dutch Institute of Registered Accountants and there are also requirements for permanent education for everybody that is a member of the Auditor register.

40. Any party, who believes that an accountant does not adhere to the accountant's laws and regulations (including the above-mentioned principles), can also file a complaint with the disciplinary board.
41. This board can apply for the accountants the following punishments, if a complaint is upheld: warning, reprimand, suspension or even removal from the register of accountants.

### **Lawyers**

42. A Bar of Association was established in 1977 for lawyers operating on Sint Maarten. The Bar works to improve the administration of justice, promotes programs that assist lawyers in their work, and works to build public understanding of the importance of the rule of law in a democratic society. Membership of the Bar is not yet mandatory for lawyers, but procedures have been initiated to implement a system with mandatory membership. Entry in the register of the Joint Court of Justice is mandatory to be able to practice this legal profession. Lawyers, whether a member of the Bar or not, are subject to disciplinary ruling which is administered by the Council of Supervision and in second instance by the Council of Appeal. The disciplinary rules are laid down in the National Ordinance on lawyers (N.G. 1985, no. 142).
43. The Council of Supervision for lawyers enables any party that has a complaint against a lawyer to address their complaint to the Council. If the Council considers the complaint founded the Council can proceed with the following penalties: single/simple warning, reprimand, suspension for up to one year and deletion of tableau.

### **Tax advisors**

44. The admission as a tax advisor is issued, until further notice, after a petition on this effect. If the petitioner, in the opinion of the Board of appeal of tax matters, is of good social behaviour and has passed the exam for tax advisers he is admitted as a tax advisor.
45. There is a disciplinary committee of tax advisors. Members and prospective members are subject to the disciplinary proceedings of the Association of Tax advisors. A complaint against a member or prospective member should at least contain the name and address of the complainant and the name and address of the defendant, and a clear description of the nature of the complaint.
46. The decision of the commission, instituted on a complaint or an own-initiative that has been considered well founded may lead to: warning, reprimand, suspension and/or disqualification as a member of the association.

### **Notaries**

47. The basis for exercising the profession of a Notary is set in the National Ordinance of January 28, 1994 containing new rules on the notary office. This national ordinance deals with all conditions for exercising the profession of a notary: powers of the notary, appointment and dismissal of a notary and supervision.
48. There is a Supervisory Board that supervises the notary and the candidate notary. Complaints against a notary or a candidate-notary must be made in writing to the Chairman of the Supervisory Board. The Chairman of the Board has the power to judge if the complaint is not

founded and then dismiss it with a reasoned decree. If the Chairman cannot resolve the issue he will inform the Board. The Board will treat the complaint further.

49. If a notary or candidate-notary neglects his duty, or acts in conflict with the care that he ought to exercise, than the Supervisory Board has the power to, either on its own motion or on the basis of a complaint, take several measures. The judgment must always be motivated.
50. The possible measures against the notary are: warning, reprimand, imposition of a fine of up to NAf.10,000; suspension for up to one year and nomination for his removal from office.
51. The possible measures against the candidate-notary are: a warning, a reprimand and withdrawal of the internship certificate for a period not exceeding two (2) years.

## **1.2 General Situation of Money Laundering and Financing of Terrorism**

### **Introduction**

52. Sint Maarten has a relatively small open island economy. Its main economic pillar is tourism. As a result hereof, tourism is the major contributor to the foreign exchange reserves of Sint Maarten. Another contributing factor is that the island offers good transportation facilities, both via air and sea. Its international airport offers an important regional function whereas its harbor offers infrastructural facilities for surrounding islands. Besides that, the island of Sint Maarten offers a wide range of activities, such as international financial services and regional retail activities as well as ship repair and ship supplies, which contribute to the economy. Sint Maarten's rapid economic growth over the last few decades and its favourable investment climate has drawn wealthy investors to the island. They invested their money in large scale real estate development (hotels and casinos) whereas in certain cases the source of the money was considered to be dubious. On top of that local government, control services and law enforcement agencies were unable to keep up with the pace of the economic growth and development. This created a climate that could be considered favourable for ML.
53. The international financial services sector is known for being supported by professional domestic banking, trust, legal, administrative and fiscal advisory services.
54. It should be noted that the aforementioned characteristics, such as geographical location, tourism, relative easy logistical accessibility, high mobility of goods and services, pose threats in terms of illegal activities like drug trafficking, human trafficking and -ML.
55. Sint Maarten as a new country is determined to make up for the fact that in the past two decades local government, control agencies and law enforcement have been trailing in regards to the growth of the economic development. Plans of approach on law enforcement (local Police, including immigration, Prison system and special investigation Unit) which are monitored by a special Kingdom committee are in place and are being executed. The realization of these plans should step up law enforcement but also the efforts of the Customs Office (which will be largely expanded).
56. It is in this context that Sint Maarten will increase its already existing vigilance in detecting and deterring criminals from engaging in any form of ML or TF.

### **Combating of money laundering and (related) illegal activities**

57. It is broadly known that although the amount of money related to ML is difficult to quantify, most of the ML activities are related to drug trafficking.
58. Historically the island of Sint Maarten has played a role in international drug trafficking and related crimes. One contributing factor is the island's geographical location on the route

between (certain) drug producing countries (South America) and drug consuming markets (North America and Europe) and its transportation facilities. Another factor of influence is the international economic climate.

59. The local investigating and prosecuting authorities have historically acted against drugs trafficking and its link to ML. Besides prosecution, pro-active actions have been taken at the airport. At the end of the nineties, during one of the peaks of the drug trafficking business, Sint Maarten Customs performed passenger and luggage checks based on specially introduced indicators on drugs smuggling methods, following the trend on the others Caribbean islands within the Kingdom. Sint Maarten was often used as an alternative route towards Europe or the US. Suspicious outgoing passengers were not allowed to travel, while suspicious incoming passengers were sent back. This team's activities were executed in cooperation with the Schiphol airport anti narcotics team in the Netherlands. By following the same routine checks as successfully used in Curaçao, Sint Maarten was able to prevent the island's airport becoming a major drugs smuggling hub for swallowers, packers and stashes.
60. Regarding combating of illegal activities at and via sea one should mention the presence of the Coast Guard. The Coast Guard operations are based on a cooperation agreement between the Netherlands, Sint Maarten, Curaçao and Aruba. It has been in force since the beginning of the nineties. It implies that Dutch Royal Navy and Coast Guard ships, in cooperation with local judicial authorities, patrol the territorial waters of Sint Maarten in search of illegal activities. Furthermore, the *US Forward Operating Location (FOL)* has a base on Curaçao for the purpose of host nation and interagency drug interdiction efforts through the source and transit zones. The FOL operations are based on an agreement with the Kingdom of the Netherlands, which was signed in March 2000 and ratified in October 2001. The FOL based aircraft can be supportive to law enforcement activities regarding vessels in or heading towards Sint Maarten territorial waters. The Dutch Royal Navy together with local Sint Maarten based Coast Guard ships operate within the so called JIATF-south (Joint Inter Agency Task Force) in order to jointly fight international organized drugs trafficking activities. In the past these activities have proven to be successful, either in Sint Maarten or in other countries with the help of the JIATF-south activities. Recently the Kingdom of the Netherlands initiated the ratification of the so called San José Treaty, which enables close cooperation between the navies and Coast Guards of the Treaty Nations, concerning their authority to board suspicious vessels in the Caribbean Sea. This treaty could enhance the cooperation between Dutch Sint Maarten/French Saint Martin authorities and takes away formal barriers.
61. The harbor of Sint Maarten is well known for its cruise terminal, one of the largest on the Caribbean islands. Furthermore the local container facility plays an important role in the region. Larger container ships dock their containers in Sint Maarten where they are picked up by regional feeders to supply the smaller islands surrounding Sint Maarten. As a "new country" Sint Maarten has not yet been able to purchase a container scan. Such a scan could be very helpful in preventing illegal goods coming into or leaving the island.
62. The Netherlands and Sint Maarten have joined their efforts on combating cross-border crime. For this matter the so called "Recherche Samenwerkings Team" (RST) unit was founded back in November 2001 as a result of a cooperation protocol signed by Aruba, the Netherlands and the former Netherlands Antilles. As a result of the cooperation some major cases were investigated and successfully prosecuted in court. The RST has a special field of interest which is combating organized crime. The main focus is on drugs related cross border crime, human trafficking and smuggling, ML and the fight against international terrorism. The Central Intelligence Unit of the RST, which is Curaçao based and strongly cooperates with local and all foreign law enforcement and intelligence offices, plays a major role in pin pointing the targets and criminal organizations that should be investigated, based on actual information. Much of this information is retrieved from own sources but also from foreign

investigations. International requests for assistance in large scale operations are usually being executed by RST.

63. The occurrence of ML has over the past years been more evidenced in the traditional banking sector than in the other financial sectors. However, as banks have aggressively taken measures to detect and deter ML and TF, non-bank financial institutions have become increasingly vulnerable to money launderers and terrorists as they seek to launder their funds derived from criminal activities and finance their terrorist activities.
64. An example of such a non-bank financial institution sector is the money remitters sector. In Sint Maarten two (2) licensed money remitting offices are present. Under one of these licenses there are two outlets active. Under the other license there is one outlet, one agent and one subagent active. A third MTC is currently in the process of licensing. They are under the supervision of the Central Bank of Curaçao and Sint Maarten. Next to the licensed offices a few unlicensed offices appear to be active as well. They are not under the Central Bank's supervision. Yet the Central Bank has made a first effort in enforcing the applicable law by submitting a substantiated report with the PPO in order to have this office investigated and prosecuted. This report is currently under investigation by local police.
65. The past three years two (2) out of the total of four (4) local trust-offices appear to have been involved in ML activities. Criminal investigations were launched against both offices and on one occasion both the trust-office itself and its directors were prosecuted and convicted. This case is now being appealed. The other office acknowledged not having complied with the regulations of the FIU but denied involvement in ML. The latter could not be substantiated.

#### **AML/CFT studies, assessment and initiatives**

##### **Threat Assessment report**

66. A threat assessment concerning terrorism, including facilitating terrorism through financing, has been performed by the National Coordinator on counter-terrorism. The outcome of this assessment has been presented to the Parliament of the former Netherlands Antilles (Nationaal Coördinator Terrorisme bestrijding, May 1, 2008)

##### **Progress report**

67. On November 30, 2001 the Council of Ministers of the Dutch Kingdom concluded in a joint statement agreement on the intensification of the cooperation between the countries within the Kingdom of the Netherlands for the combat of TF. Progress reports have in this respect been issued on a regular basis thereafter. The latest progress report (7th) was issued in 2008.
68. A Study of the SR VIII requirements and entities that can be used for the FT in the former Netherlands Antilles was done by Forensic Services Caribbean N.V.

##### **Criminaliteitsbeeldanalyse Sint Maarten 2011 (Crime pattern analysis 2011)**

69. This report contains an analysis of the criminal phenomena over the years 2008-2010 in order to obtain insight in the local crime situation. It should give local law enforcement authorities and the responsible Minister of Justice the possibility to prioritize types of investigations based on facts. It can also help in choosing the right methods and approach for fighting specific sorts of crime. The report was drafted in 2011 and published in January 2012.

##### **Terrorism and financing of terrorism**

70. A distinction can be made between the so called “Jihad related terrorism” and “non-Jihad related” terrorism. The former is defined as being linked to extremist religious activities, in general the Muslim religion, while non-Jihad related terrorism is defined as violent activities mainly being linked to different political beliefs and/or point of view. Jihad and /or the financing of Jihad related terrorism have not been observed in Sint Maarten.
71. The only mentioning of non-Jihad related activities has been potential links made to participation of the FARC in the drug trafficking via the island. Locally no concrete activities have been detected. (Source: Threat Assessment report NCTb, May 2008)

### Statistical data

72. Studies have shown that it is fairly difficult to determine the scale of the ML business. Still, it is possible to get a close enough indication by means of figures related to the prosecution of the latter. As mentioned earlier, ML activities are closely related to illegal drug trafficking and related crimes.

### 1.3 Overview of the Financial Sector and DNFBP

#### OVERVIEW OF THE FINANCIAL SECTOR

73. The financial system consists of wide variety types of financial institutions. The following chart shows the types and numbers of financial institutions (FIs) which are subject to the supervision of the Central Bank.

Type of financial institution	2006	2007	2008	2009	2010	2011
<b>Credit institutions</b>						
Local general banks	1	3	3	3	3	3
Subsidiaries of foreign banks	1	1	1	1	1	1
Branches of foreign banks	2	2	3	3	3	3
Credit unions	1	1	1	1	0	0
Specialized credit institutions	1	1	1	1	1	1
Non-consolidated international banks	1	1	1	1	1	1
Savings Bank	0	0	0	0	0	1
<b>Type of financial institution</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
<b>Money transfer companies</b>	1	1	2	2	2	2
<b>Institutional investors &amp; insurance brokers</b>						
<i>Life insurance companies</i>	4	5	5	5	5	5
<i>General insurance companies</i>	9	9	10	10	10	10
<i>Funeral insurance companies</i>	1	1	1	2	2	2
<i>Captive insurance companies</i>	0	0	0	0	0	0
<i>Professional reinsurance companies</i>	0	0	0	0	0	0
<i>Pension funds</i>	0	0	0	0	0	1
<i>Insurance brokers</i>	17	21	21	22	22	22
<i>General funds for sickness insurance</i>	0	0	0	0	0	0
<b>Investment institutions</b>						
<i>International investment institutions</i>	0	0	0	0	0	0
<i>Local investment institutions</i>	0	0	0	0	0	0
<b>Securities exchange</b>	0	0	0	0	0	0
<b>Central Bank</b>	1	1	1	1	1	1

### **Credit institutions**

74. At the end of 2011 there were three (3) local general banks operating in Sint Maarten with a total amount of deposits of NAf. 1,030 million and total assets of NAf. 1,159 million (as per November 30, 2011). Of these local general banks, two (2) are small branches with their head-offices located in Curaçao. The general banks together with the subsidiary and branches of foreign banks offer a wide variety of products and services including traditional banking services, insurance broker services and investment products. All domestic commercial banks are privately owned. In addition, one (1) international bank and one (1) specialized credit institution, operate in Sint Maarten. All credit institutions operating under the provisions of the National Ordinance on the Supervision of Banking and Credit Institutions 1994 (N.G. 1994, no. 4) (NOSBCI) and providing the services as described in the NOIS and NORUT should comply with the stipulations of these AML/CFT legislations.

### **Money Transfer Companies (MTC)**

75. At year-end 2011, there are two (2) MTC operating in Sint Maarten pursuant to the legal provisions of the RFETCSM. MTC also fall under the NOIS and the NORUT since the year 2000 (article 1, paragraph 1 under a sub 10° of the lastly amended NORUT and article 1, paragraph 1 under b sub 10° of the lastly amended NOIS).
76. The Central Bank issued AML/CFT P&G for MTC under the RFETCSM and also under the NOIS (article 11, paragraph 3) and NORUT (article 22h, paragraph 3). The Central Bank is charged with the supervision on the compliance of the money transfer companies with the NOIS (article 11, paragraph 1 under a), the NORUT (article 22h paragraph 1 under a) and the RFETCSM (article 21). Onsite inspections to verify the compliance with the NOIS and NORUT are done based on these articles, moreover article 78 of the RFETCSM.

### **Insurances Companies and insurance brokers**

77. As per December 2011, there were five (5) life and ten (10) general insurance companies, two (2) funeral insurance companies, 0 captives, 0 professional reinsurance companies, 1 pension fund and 0 general fund for sickness insurance operating in Sint Maarten. Regarding the life and the general insurance companies it should be mentioned that 4 of the 5 life insurance companies and 5 of the 10 general insurance companies are being operated as point of sales. A point of sale is considered a sales office of an insurance company (either incorporated or branch) in Curaçao. In addition, there were twenty two (22) insurance brokers registered. The insurance companies are governed by the National Ordinance on the Supervision of the Insurance Industry (N.G. 1990, no. 77) (NOSII), the pension funds by the National Ordinance on Corporate Pension Funds (N.G. 1985, no. 44) (NOCPF), and the insurance brokers by the National Ordinance Insurance Brokerage Business (N.G. 2003, no. 113) (NOIBB). The captives together with the professional reinsurers that are governed by the Special Insurance License Decree (N.G. 1992, no. 50) (SILD) constitute the international insurance industry. The locally operating life insurance companies and the insurance brokers are required to comply with the stipulations of the NORUT, NOIS and the AML/CFT legislation.
78. The Central Bank conducts consolidated supervision. This entails that all points of sale are being supervised by the Central Bank through their head office in Curaçao. No financial information on the local insurance sector (life and general) can be submitted since those figures are reported consolidated. The Central Bank does not have separate financial filings for the points of sale in Sint Maarten.

### **Securities Exchange**

79. There is no securities exchange operating on Sint Maarten.



## Central Bank

80. The Central Bank is governed by the Central Bank Statute (N.G. 2010, no. 101) and should also comply with the requirements of the NOIS and NORUT.
81. The following table shows which types of financial institutions in Sint Maarten are authorized to perform the types of financial activities that fall within the scope of the FATF Recommendations.

Type of financial activity (see the glossary of the <i>FATF Recommendations</i> )	Type of (financial) institution that performs this activity
Acceptance of deposits and other repayable funds from the public	Domestic commercial banks, international banks, credit unions, savings banks, savings and credit funds
Lending	Domestic commercial banks, international banks, credit unions, specialized credit institutions, savings and credit funds, life insurance companies, Central Bank
Financial leasing	Domestic commercial banks, international banks
Transfer of money or value	Domestic commercial banks, money transfer companies, Central Bank
Issuing and managing means of payment ( <i>e.g.</i> credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money)	Domestic commercial banks, international banks, credit unions, money transfer companies, Central Bank (regarding overdrafts by commercial banks or government)
Financial guarantees and commitments	Domestic commercial banks, international banks
Trading in money market instruments (cheques, bills, CDs, derivatives etc.)	Domestic commercial banks, international banks, international and local investment institutions, Central Bank
Trading in foreign exchange	Domestic commercial banks, international banks, international and local investment institutions, Central Bank
Trading in exchange, interest rate and index instruments	Domestic commercial banks, international banks, international and local investment institutions
Trading in transferable securities	Domestic commercial banks, international banks, international and local investment institutions
Trading in commodities	International and local investment institutions
Participation in securities issues and the provision of financial services related to such issues	Domestic commercial banks, international banks, securities exchange, Central Bank

Type of financial activity (see the glossary of the <i>FATF Recommendations</i> )	Type of (financial) institution that performs this activity
Individual and collective portfolio management	International and local investment institutions
Safekeeping and administration of cash or liquid securities on behalf of other persons	Administrators and all company (trust) service providers, Central Bank
Otherwise investing, administering or managing funds or money on behalf of other persons	International and local investment institutions, administrators and all company (trust) service providers
Underwriting and placement of life insurance and other investment related insurance	Life insurance companies and insurance brokers (not all insurance brokers are authorized by a life insurer to underwrite)
Money and currency changing	Domestic commercial banks, Central Bank

## DNFBP

### DNFBP supervised by the FIU (MOT)

82. As of May 15th, 2010, the amended NORUT and the NOIS came into effect. As of that date the following DNFBP have become designated subjects under AML/CFT supervision by the FIU (MOT). However the supervision of the compliance with these requirements by FIU (MOT) has not started yet in Sint Maarten.
83. The intention is that the below mentioned sectors will fall under the supervision of the FIU:
84. **Lawyers:** As of May 15th, 2010, there were twenty five (25) legal firms operating in Sint Maarten. Under the provisions of the National Ordinance regarding lawyers (N.G. 1985, no. 142) (NOL), lawyers have powers of attorney and provide legal advice. Services provided by lawyers include: writing contracts and performing tasks needed to prepare for the setting up, amending or finalizing of legal acts; credit recovery operations or claims or appeals against administrative or tax decisions; all acts resulting from citizens exercising their right to be accompanied by a lawyer in dealings with any authority.
85. In cases where the criminal process demands that the defendant be accompanied by someone acting in their defence, this task must, by law, be carried out by a lawyer. Apart from the acts considered to be specific to lawyers, as defined in the (NOL), lawyers may perform all kind of legal activities including financial activities on behalf of a client or on their client's own behalf: sale and purchase of real estate; management of funds, securities or other assets; opening and administration of bank accounts, saving accounts and securities account; and setting up and managing companies.

86. **Notaries:** There are five (5) notaries in Sint Maarten. They provide legal form and public faith to private acts and contracts: they are responsible for the wording of public instruments according to the will of the parties. The work of notaries include a variety of other situations where legal documents are involved and the wishes of the parties can only be carried out with the agreement of all concerned. As soon as the general agreement comes into effect, the function of the notary is to recognize and authenticate specific documents issued by the notary's office. In general notaries are i.a. authorized to:
87. Give explanations on the status and capacity of persons; issue the attestations vita; legalize signatures; take oaths; issue certificates of inheritance; incorporate/establish legal persons; and transfer legal ownership of real estate.
88. **Accountants:** There are sixteen (16) registered accountants operating in Sint Maarten and are qualified accountants.
89. The members are in the profession of public accountant, internal auditor, government auditor or accountant in business.
90. Typically the professional services provided by accountants are: assurance, accountant and advisory services.
91. The assurance services relate to the audit or review of financial statements or similar financial reporting, or agreed upon procedures on specific matters. The accounting services relate to book keeping and compilation of financial statements. The advisory services could cover a wide range of subject, for example on strategic matters, ICT, Human Resources, Internal organization and internal control systems.
92. Accountants are engaged to provide advisory services in connection with the purchase, sale or takeover of enterprises. In these cases the accountant is engaged either by the purchaser or the seller. Prior to accepting such engagement or for the matter any other engagement, the accountant is required by his Professional Code of Conduct, to perform adequate client and engagement acceptance due diligence procedures. Only if both the client and the engagement meet the criteria of acceptance, the accountant is permitted to provide his advisory services.
93. **Real Estate brokers:** There are three hundred and twenty seven (327) registered real Estate Brokers in Sint Maarten. The Real Estate broker deals with:
- the acquisition, possession, transfer, management and development of real estate and / or any right or interest in real estate, and participation in any other firm or company with a similar or related purpose;
  - the renting, leasing, mortgaging or in general concerns of property and any right or interest in property; and
  - acting as an intermediary in the conclusion of contracts on behalf of third parties.
94. **Dealers in precious metals and precious stones:** The dealers in precious metals and precious stones must meet the general terms and conditions of government in order to receive a licence to operate a jewellery store. These conditions include that the shares of the company cannot be bearer shares. The dealers in precious stones and precious metals are subject to AML/CFT legislations.
95. There are ninety-nine (99) registered jewellers in Sint Maarten. The business of a jewellery store is the exploitation, import trade of gold, silver, gems and jewellery, including specialty jewellery, diamonds, watches and accessories.
96. **Tax advisor.** There are three (3) tax advisors in Sint Maarten.

97. **Administration office.** There are sixty-nine (69) administration offices in Sint Maarten. The tasks of administration offices are: provide administration; provision of audit work; providing tax and business advice; and participate in, and work with, manage and administer other enterprises and companies with the same, similar or related target.
98. **Car dealer.** The purpose of a car dealer is importing and selling vehicles and parts of such vehicles. This is the case for dealers in both new and second hand vehicles. Furthermore, they provide service and repair vehicles. There are thirty-one (31) car dealers in Sint Maarten.

#### **DNFBP supervised by the Central Bank**

99. **Administrators and company (trust) service providers** Administrators and company (trust) service providers are governed by the National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137) (NOSIIA) and the National Ordinance on the Supervision of Trust service providers (N.G. 2003, no.114) (NOSTSP) respectively. The administrators have been subject to supervision by the Central Bank since the beginning of 2003. The Central Bank has been entrusted with the supervision of the trust sector since the beginning of 2004 and started licensing the trust service providers in 2005. This sector is governed by the NOSTSP. Investment institutions, administrators, and company (trust) service providers fall under the NORUT and NOIS.

<b>Type of DNFBP</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
<i>Administrators</i>	0	0	0	0	0	0
<b><i>Company (trust) service providers</i></b>						
<i>Licensed legal persons</i>	3	3	3	4	4	3
<i>Licensed natural persons</i>	0	0	0	0	0	0
<i>Legal persons with dispensation</i>	0	0	0	0	0	0
<i>Natural persons dispensation</i>	0	0	0	0	0	1

#### **Casinos**

100. **Casinos.** The Government of Sint Maarten is responsible for the supervision of the Casino's operating on the Dutch side of the Island. The responsibility for casinos was delegated to the government of the island where the casinos were located. The Government has 44 casino controllers in its employ who are responsible for the following:
- Checks the casino on compliance with the conditions on the hazard play and regulations concerning safety in the casino;
  - Ensures that visitors who do not meet the admission requirements does not have access to the casino;
  - Performs supervision over minors, drunk people, cheaters and watch misconduct in the casino;
  - Monitors compliance with the officially fixed hours for the opening and closing times of the casino and makes violations known to the head of the department head;
  - Make a daily report and or identifies any irregularities to the casino manager;
  - Ensures strict adherence to the provisions of the casino's, rules and conditions;
  - Provides information about the casino and its rules to casino visitors and hear their complaints;
  - Mediates between the visitor and the casino manager.
101. Currently there are no Internet casinos registered on the island. The government of Sint Maarten supports the establishment of a Gaming Control Board (GCB), but in order to realise this current legislation will need to be adjusted.

102. In the casinos the following games are offered amongst others: Slot machines, roulette, craps, bingo, sport book, different table games.
103. The legislation does not limit the amount of tokens bought. Disbursements shall be made in cash or by cheque, larger amounts only by cheque. An estimate of 85% of the visitors to the casinos is residents of Sint Maarten. The remaining 15% are guests or people who have a short stay on Sint Maarten. While in the territorial waters of Sint Maarten, cruise ships are not allowed to open or operate their casino.
104. Currently there are fifteen (15) casinos operating on the island (9 stand-alone casinos and 6 casinos associated with hotels and as such located on the hotel premises). In 2011 the casino policy was amended in order to clearly specify the conditions under which a casino license can be issued to a hotel operating on Sint Maarten. There is one casino license that is pending before actually being issued. This would bring the total amount of casinos registered on Sint Maarten to sixteen (16).

#### 1.4 Overview of commercial laws and mechanisms governing legal persons and arrangements

##### LEGAL ENTITIES

###### Introduction

105. The statutory regulations with regard to legal entities under private law are contained in Book 2 of the Civil Code (CC). The following legal entities are explicitly regulated in Book 2 of the CC:
  - limited liability company (*'naamloze vennootschap'*);
  - private limited liability company (*'besloten vennootschap'*);
  - foundation (*'stichting'*),
  - private foundation (*'stichting particulier fonds'*),
  - association (*'vereniging'*),
  - cooperation (*'coöperatie'*) and
  - mutual insurance association (*'onderlinge waarborgmaatschappij'*).
106. Other relevant laws in this regard are the Commercial Code (~~CC~~) ("Wetboek van Koophandel"), Commercial Register Act ("Handelsregisterverordening") (CRA), Business License Act ("Vestigingsregeling Bedrijven") (BLA) and several (financial) supervision ordinances.

###### The Limited Liability Company

107. A limited liability company (*'naamloze vennootschap'* or *'N.V.'*) is a company limited by shares. The N.V. can act as a public company and as a closely held private company.
108. **Incorporation.** The N.V. is incorporated by a notarial deed executed by one or more incorporators before a civil law notary. This notarial deed of incorporation constitutes the statutes and regulations governing the company and conduct of its affairs. Those statutes and regulations are generally referred to as the articles of association. There is a free choice of language for the deed of incorporation and for the currency of the capital. The choice for a name must be checked with the Chamber of Commerce for approval. No governmental approval or check is needed for the incorporation or the contents of the deed of incorporation setting forth the articles of association.
109. **Registration.** Once incorporated, the company must be registered with the Commercial Registry of the local Chamber of Commerce and Industry. Details to be filed include the

object of the company, its share capital (if any) and the identity of the managing directors, supervisory director (if any) and possible attorneys-in-fact acting under general powers of attorney (*‘procuratiehouders’*).

110. **Share capital.** From a company law perspective, there is no minimum share capital. Based on regulatory requirements, there are, however, minimum capital requirements for finance companies issuing publicly traded debt obligations, investment institutions, insurance companies and banks. The nominal value of the shares can be stated in any currency. However, shares do not need to have a nominal value. The shareholder should pay up at least the nominal value of the shares being purchased (if the shares have a nominal value) or the consideration as determined in the deed of incorporation or the deed of issue.
111. Contributions of capital in excess of the nominal capital (if the shares have a nominal value) are treated as share premium (*‘agio’*). A company can repurchase its own shares (on a limited basis).
112. **Shares.** Shares of a limited liability company can only be issued in registered form. If shares are in registered form a share certificate can be issued.
113. Registered shares can be converted into bearer shares provided the articles of association permit so (current business licence policy of the Ministry of Economic Development does not allow issuance of bearer shares in locally owned and operated companies; only for international companies).
114. For bearer shares share certificates must be issued. It is noted that as of June 16, 2010 the NDCBSC was enacted. This Decree is based on the NOSTSP and is the codification of the already long existing practice that Company (Trust) Service Providers in Sint Maarten require that bearer share certificates are kept in custody in order to know the ultimate beneficial owner of these bearer shares and thus the owner of the limited liability company.
115. If shares are in registered form, the managing directors are required to maintain a register of shareholders which is open for inspection by all shareholders (to the extent it concerns the shares held by such shareholder) and, if so determined in the articles of association, by such other persons as determined in the articles of association. Moreover, all institutions subject to the supervision of the Central Bank are obliged to disclose all of their shareholders to the Central Bank.
116. The articles of association determine the rights attached to the shares. Non-voting shares and shares with limited voting rights and shares with no or a limited right to distribution of profits are permitted.
117. **Management.** A Management Board consisting of one or more managing directors (*‘directeuren’*), who may be individuals as well as corporations, manages the N.V. The Board of managing directors represents the company, defines business policy and manages the company’s affairs. There are no restrictions on the nationality of managing directors;
118. The articles of association can determine that management duties are divided between a “general board” and an “executive board”. In such event, the executive board is entrusted with the daily management of the company.
119. If provided for in the articles of association a N.V. may have a board of supervisory directors (*‘Raad van Commissarissen’*) to oversee the management of the company and to advise and to supervise the board of managing directors. A board of supervisory directors can consist exclusively of natural persons. The N.V. can also opt for an “independent” board of supervisory directors. An independent supervisory director cannot be dismissed by the

shareholders' meeting without reason. It should be noted, however, that if there is such an independent board of supervisory directors in place that the requirements applicable for the so-called "large N.V." as to financial statements and the auditing and publication thereof will become applicable for such N.V.

120. A large company is a company that meets the following criteria:
  - there are at least twenty employees who jointly work at least twenty man-days in Sint Maarten at any time in the period between one month prior to and one month after the balance sheet date;
  - the value of the assets shown on the balance sheet exceeds NAf 5 million or the equivalent thereof in foreign currency;
  - the net turnover for the financial year shown in the annual accounts exceeds NAf 10 million or the equivalent thereof in the foreign currency.
121. Unless the articles of association determine otherwise, managing directors and supervisory directors are appointed by, and can be suspended or dismissed by, the general meeting of shareholders.
122. **Shareholders meeting.** The general meeting of shareholders of a limited liability company has all powers that are not conferred upon the management or other person, within the limits set by law and the articles of association, insofar the articles of association do not provide otherwise.
123. An annual general meeting of the shareholders should be held at least once a year, usually within eight months after the end of a company's financial year. At the annual general meeting the financial statements and a report of the managing board should be submitted for approval together with such other matters as may be set out in the notice convening the meeting.
124. Unless the articles of association determine otherwise, shareholders meetings must be held in Sint Maarten. Attendance by proxy is permitted. Unless the articles of association state otherwise, a simple majority of votes present and represented at meetings can validly adopt resolutions with no quorum requirements. Written resolutions can also be adopted outside of a meeting, provided that all persons that are entitled to vote with regard to the subject have cast their vote.
125. Extraordinary general meetings of shareholders may be convened from time to time to deal with matters that arise during the course of the year. Such extraordinary general meetings may also, in certain cases, be convened by the management or supervisory board at the request of shareholders controlling 10% or more of the issued voting shares.
126. **Profits and distributions.** The net profits of a limited liability company are at the disposal of the shareholders who can either declare a dividend or reserve the profits. If the articles of association so provide, interim dividends may be declared from current year profits by the shareholders meeting or such other corporate body as appointed thereto in the articles of association. Dividends and other capital distributions cannot be paid and made if the equity capital is or becomes negative as a result of such dividend or distribution. If the company has a nominal share capital that capital is considered the limit.
127. **Filing tax returns.** All limited liability companies are required to file annual profit tax returns together with the relevant financial statements.

## The Private Limited Liability Company

128. The private limited liability company (*'besloten vennootschap'* or *'BV'*) is a flexible form of company. The BV is a company similar to the limited liability company. The main differences with the N.V. are:
- The BV has registered shares only;
  - The articles of association can determine that the shareholders can be held liable for the debts of the private limited liability company;
  - There is no distinctive financial regime such as for the "large" N.V.;
  - Shareholders meetings for the private limited liability company can be convened on the initiative of an individual shareholder;
  - The possibility of an independent supervisory board does not exist for the BV,
  - The BV can be organized that it is "managed by shareholders": no distinction between shareholders and managing director as corporate bodies.
129. The option of a company "managed by shareholders" has been introduced for the BV. This form of the BV does not have a board of managing directors as a separate corporate body. The joint shareholders or the sole shareholder act as management, which simplifies the taking of corporate action and the management of this type of company in general. Since no managing directors have been appointed as such, there are no formalities of appointment, suspension, and dismissal of managing directors, nor is there a difference between shareholders' meetings and board meetings in this case. The shareholders may determine the details of the way in which they will manage the company and the division of tasks mutually agreed upon in a shareholders' agreement.
130. The management of a BV is under the obligation to keep a record of the company's shareholders. The shareholders register must contain (i) names and addresses of all holders of registered shares, (ii) the type of shares, (iii) the voting rights attached thereto, (iv) the amount paid up on each share, (v) obligation to make an additional payment (if required), (vi) the date on which the shares were acquired, (vii) the issuance of share certificates (if any) and (viii) the names and addresses of persons who have a right of usufruct or pledge in respect of such shares (if any).
131. The shareholders register must be regularly kept up to date. Every shareholder has the right to inspect the shareholders register. The articles of association may stipulate that others are entitled to inspect the shareholders register.
132. The BV are also required to file annual profit tax returns together with the relevant financial statements. For tax exempted companies, additional requirements apply (art. 1A Profit Tax Act).

### **The Foundation (*'Stichting'*)**

133. A foundation is a legal person. Its purpose is to use its capital for the realisation of its objects as laid down in its articles of association. It does not have members or shareholders, nor a capital divided into shares. The board of a foundation, which manages its affairs, is therefore not subject to the overall control of members or shareholders.
134. The initial Managing Board is appointed at the moment of incorporation. Thereafter, vacancies are filled at the sole discretion of the board in office or by another person or body especially nominated for that purpose. The foundation may be formed for either an unlimited duration or a certain period of time or until a specified event occurs. The foundation can be dissolved by resolution of the board, unless the articles of association provide for otherwise. For example, it is possible that the founder has the authority to dissolve the foundation. An interested party can also request the competent court to dissolve the foundation.



135. A foundation is established by a notarial deed executed before a civil law notary. The articles of association of a foundation must include (i) the name of the foundation, including the word 'Stichting' (foundation) or a translation thereof, (ii) its purpose, (iii) the first managing board, (iv) the manner how board members are appointed and dismissed, (v) where the foundation has its (statutory) seat, and the designation of the balance after liquidation in the event of dissolution of the foundation or the manner in which the designation shall be determined.
136. A foundation has no capital per se, since it has no shares or shareholders. The founder of a foundation can contribute to the foundation the initial assets at the time of establishment of the foundation or on any date afterwards.
137. A board ('bestuur'), consisting of one or more members manages a foundation. The powers of the board are set out in the articles of association of the foundation. A foundation may also have a supervisory board which supervises the board in accordance with the articles of association. The founder of a foundation and the members of the board and of the supervisory board cannot participate in the assets and/or profits of a foundation.

#### **The Private Foundation ('Stichting Particulier Fonds')**

138. The private foundation has been introduced as a variant of the long existing "common" foundation. The private foundation is comparable to the Anglo-Saxon trust. The Dutch name is 'Stichting Particulier Fonds', abbreviated 'SPF'. The private foundation is, like other foundations, a separate legal entity, with assets and liabilities in its own name. Furthermore, a private foundation neither has shareholders, members or the like. Beneficiaries do not have to be appointed if such appointment is not desired. While it is not possible that a common foundation makes distributions (except distributions of an idealistic or charitable nature) to the incorporators or to others out of its income or out of its assets, a private foundation is allowed to do so.
139. Therefore, the purpose of a private foundation may include the making of distributions to incorporators and or others, such as children or grandchildren of the founder, without serving a charitable or social purpose. Beneficiaries of such distributions can – but are not required to – be appointed/designated in the articles of association, and if such is done, either in very general or very specific terms. In most cases, the articles of association of private foundations do not provide for such designation and it is at the discretion of the board of directors of the private foundation to designate beneficiaries.
140. Another major difference between common and private foundations is that the private foundation's purpose may not be to conduct a business or enterprise for profit. Managing its assets (investments, equities etc), to act as a holding corporation, or to participate as a partner in a limited partnership, will however not be regarded as "conducting a business". Under the provisions of Book 2 of the CC, the foundation may invest its assets, and may do so actively. There are no limits on the type of investments.
141. The private foundation, however, is not allowed to include in the purpose clause of its articles of association: "to generate profits by running a business or enterprise for profit".
142. Like the common foundation, a private foundation is established as such by deed executed before a notary. As to the requirements on the contents of the articles of association we refer to the above where this is described for the common foundation.
143. As a general provision, all legal entities – including foundations and private foundations that are not carrying out an enterprise – must maintain a proper administration, and prepare an annual balance sheet and profit and loss account. In case a foundation carries out an enterprise, it is required to file an annual profit tax return.

### **The Association**

144. An association is a legal entity with members, formed by a multilateral legal act. An association can also be established by notarial deed. It may not distribute profit amongst its members.
145. An association of which the articles of association have not been recorded in a notarial deed cannot acquire registered property and cannot inherit estate. An association can have ordinary members and one or more other class members. Membership of an association shall be personal, unless the articles of association provide otherwise.
146. The management of the association shall be appointed from the members, unless the articles of association provide that non-members may also be appointed. The appointment shall be made by the general meeting, unless the articles of association provide for a different manner of appointment, provided each member is able to participate, directly or indirectly, in the voting on the appointment of the officers.
147. The articles of association may provide that the general meeting shall consist of delegates elected by and from the members. The manner of election and the number of delegates shall be regulated by the articles of association. Each member must be able to, directly or indirectly, participate in the election.
148. All powers of the association not conferred on other corporate bodies by law or the articles of association, shall vest in the general meeting.

### **The Cooperative Association and Mutual Insurance Association**

149. A cooperative association is a legal person with members, established by a notarial deed. The object of a cooperative association is to make profits for the benefit of its members or to provide for certain material needs under contracts, other than insurance contracts. A mutual insurance society is also a legal person with members, established by a notarial deed. Its objects must be to enter into insurance contracts with the members and keep the members insured.

### **Licenses**

150. Under local law, each legal entity that carries on an enterprise needs to have:
  - a license for the managing directors to act as such (director's license) except when the director is of Dutch Nationality and born in Sint Maarten;
  - a license to carry out business (business license).
151. These two licenses are issued by the government.
152. In addition, the Central Bank issues licences to credit institutions (banks), insurance companies, company (trust) service providers, investment institutions, and administrators of investment institutions.

### **Liquidation**

153. The voluntary liquidation of a legal entity starts with a resolution of the shareholders, members, an interested party, or the Court (as the case may be) to that effect.
154. The liquidator needs not be a resident of Sint Maarten and can be either an individual or a company. In the absence of the appointment of a liquidator, the board or the Chamber of Commerce (as the case may be) are to act as liquidators. Once a company is in liquidation, the

liquidator manages the affairs. The legal entity continues to remain in existence but only in so far as this is necessary for the liquidation and dissolution of its affairs. The liquidator converts the assets of the legal entity into cash, settles the relationships with third parties and pays the debts.

## Registration

155. All companies conducting business in Sint Maarten are required to be registered in the Trade registry held by the local Chamber of Commerce and Industry. This registration requirement also applies to branches of foreign companies, which branches are established and conduct business in Sint Maarten.
156. The information relating to the Company (name of the company, date of incorporation, place of business, articles of association and any amendments thereto) as well as the information of the managing director(s), supervisory director(s) (if any) and proxy holders (if any) need to be registered and this information is publicly available and may be reviewed by any person. Shareholders or ultimate beneficial owners are not publicly registered.
157. Also foundations, private foundations, associations, partnerships are required to be registered with the Chamber of Commerce. The registration comprises the same information as for companies.
158. As of January 1, 2010 there is only one register for all required registrations. The statistics are as follows

	2008		2009		2010	
	Reg	Total	Reg	Total	Reg	Total
Sole Proprietorship	250	7077	229	7306	123	7429
Private Foundation	16	119	9	128	4	132
Private limited Liability Company	17	140	13	153	20	173
Partnership	4	179	9	188	6	194
Limited Partnership	1	25	0	25	0	25
Limited Liability Company	327	10924	312	11236	314	11550
Foundation	78	968	73	1041	93	1134
Foreign Formed Company	3	71	3	74	2	76
Cooperative Society	1	4	0	4	0	4
Association	13	168	21	189	13	202

## Corporate record keeping requirements

159. The management of a legal entity is obligated to keep a record of the financial condition and of everything relating to the activities of the legal entity according to the requirements to which such activities give rise and it must keep the books, documents and other data carriers in respect thereof in such a manner that the rights and obligations of the legal entity can be ascertained there from at any time (article 15.1, Book 2, CC). If management fails to keep books and records and does not prepare financial statements, each management board member may personally be held liable in case of bankruptcy (article 16.2, Book 2, CC).
160. Furthermore, the management must prepare written annual accounts, comprising of at least a balance sheet and a statement of income and expenses (article 15.2 of Book 2 of the CC).

161. In the event the company concerns a large company, additional conditions have to be complied with when preparing the annual accounts. A large company is a company that meets the following criteria (article 119.2 of Book 2 of the CC):
- there are at least twenty employees who jointly work at least twenty man-days in Sint Maarten at any time in the period between one month prior to and one month after the balance sheet date;
  - the value of the assets shown on the balance sheet exceeds Naf 5 million or the equivalent thereof in foreign currency;
  - the net turnover for the financial year shown in the annual accounts exceeds Naf10 million or the equivalent thereof in the foreign currency.
162. In the event of a large company, an external expert is required to audit the annual accounts. An external expert can be a *register-accountant* as defined in the Dutch regulations, an administrative-accountant consultant as defined in the Dutch CC, a certified public accountant as defined in the US regulations and a person admitted as an expert by the Minister of Economic Development (article 121.6, of Book 2 of the CC).

## **PARTNERSHIPS**

### **Introduction**

163. Partnerships are contractual co-operations for purposes of professional practice or business operations; they are not legal entities. There are three forms of partnerships: A partnership (*maatschap*), general partnership (*vennootschap onder firma*) and limited partnership (*commanditaire vennootschap*). All partnerships are formed either by notarial deed or by a deed executed between parties.

### **The General/limited Partnership**

164. A general partnership ('*vennootschap onder firma*' or '*VOF*') acts under a joint name, conducts a business and has a separate capital. A general partnership is an agreement concluded between two or more (legal) persons that meets the formation requirements of professional partnerships.
165. In a general partnership ('*vennootschap onder firma*') the individual partners are jointly and severally liable for the debts resulting from the partnership.
166. In the limited partnership ('*commanditaire vennootschap*') a distinction is made between the limited partners and the general partners. The general partners are jointly and severally liable for the debts resulting from the partnership. The liability of the limited partners is, in principle, limited to the amount of their contribution to the partnership. This limitation is, however, forfeited in the event the limited partners are directly involved in the management of the partnership.

### **Partnership**

167. In a partnership ('*maatschap*') the partners are not jointly and severally liable for the debts resulting from the partnership. In principle, a creditor can hold each partner liable for an equal part of the debt (notwithstanding each partners' share in the partnership), unless when entering into the obligation which gave rise to the debt it was explicitly stated that each partners' portion of the debt would be in proportion to their share in the partnership.

### **Registration**

168. The general- (*vennootschap onder firma*) and limited partnership (*commanditaire vennootschap*) have to be registered in the Commercial Register, the registration of the partnership (*maatschap*) in the Commercial Register is optional.

## **Tax Filings**

169. As partnerships are fiscally transparent, they are not required to file profit tax returns. Instead, each partner must include its partnership income in its own profit- or income tax return.
170. In a partnership (*'maatschap'*) the partners are not jointly and severally liable for the debts resulting from the partnership. In principle, a creditor can hold each partner liable for an equal part of the debt (notwithstanding each partners' share in the partnership), unless when entering into the obligation which gave rise to the debt it was explicitly stated that each partners' portion of the debt would be in proportion to their share in the partnership.

## **1.5 Overview of strategy to prevent money laundering and terrorist financing**

### ***a. AML/CFT Strategies and Priorities***

171. Sint Maarten has adopted a multi-directional approach in its combat against ML and TF. With regard to the FIU (MOT) the government actively aims to maintain a high standard of professionalism within the FIU (MOT), in order to meet its objectives as stated in article 3 of the NORUT and in the NOIS. This in order to prevent and detect ML and TF activities and to disseminate after due analysis the suspicious transactions to the PPO.
172. FIU (MOT) has become operational after 10-10-10. The setup of the FIU Sint Maarten is in progress. There are two FIU employees to ensure that reporting of unusual transactions are taking place.
173. Pursuant to the NORUT, the FIU (MOT) is in frequent contact with the reporting entities to ensure that they are aware of the ML and TF risks that they can encounter in their work and how to deal with them.
174. The authorities identify the key elements of the overall strategy to combat money laundering and TF to be:
- a) Implementing international standards, in particular, the FATF Recommendations;
  - b) Maintaining a strong penal regime against drug trafficking, money laundering, terrorism financing and other crimes;
  - c) Having effective law enforcement that serves as a strong deterrent;
  - d) Hiring motivated and professional staff to develop and implement AML/CFT policies and measures;
  - e) Promoting a high level of coordination and cooperation among all relevant government agencies; and
  - f) Having frequent meetings with the private sector representatives' to inform them of recent policies, to get their input into restructuring AML/CFT frameworks.
175. With regard to the FIU (MOT), the effectiveness of its programs is measured, among other things, by the quantity and quality of reports received after providing training to the different sectors. An increase in reports based on subjective indicators, in certain sectors, was also the result hereof. The FIU (MOT) provides information upon request by the detective cooperation team and police.
176. The government has amended the NORUT and NOIS and has strengthened its AML/CFT regime by incorporating the DNFBP in the respective laws. The FIU (MOT) was assigned

with the task of supervising the DNFBP concerned, excluding the company (trust) services providers, administrators, internet gambling and casinos.

#### **b. The institutional framework for combating ML and TF**

##### **Ministries:**

##### **Ministry of Justice**

177. The minister of Justice in Sint Maarten is responsible for the AML/CFT. This is in accordance with the Organization Decree of the Justice Ministry (Ab. 2010 No. 11). This is in addition to the Minister of Justice's primary responsibility for the policy making with respect to judicial matters and the enacting of legislation relating to penal and penal procedures and legal persons and arrangements. With respect to AML/CFT matters, the Minister of Justice acts in consultation with the Minister of Finance.

##### **Ministry of Finance**

178. The Minister of Finance is, among other things, responsible for financial supervision legislation and tax legislation. It assesses the budgetary implications of newly proposed AML/CFT legislations. Based on the assessment, an advice is formulated and incorporated in the explanatory memorandum to the AML/CFT legislation that is enacted.

##### **Ministry of General Affairs**

179. The Department of Legal Affairs and Legislation, within the Ministry of General Affairs is responsible for reviewing the draft legislation of AML/CFT and in general, making sure that the quality of all the legislation on the national level is being maintained.

##### **Ministry of Foreign Affairs**

180. The Kingdom of the Netherlands comprises of the Netherlands, Curaçao, Sint Maarten, Aruba and the three BES islands (Bonaire, Sint Eustatius and Saba). The Minister of Foreign Affairs of the Kingdom of the Netherlands is responsible for the foreign policy of the Kingdom. The Foreign Relations Organization of Sint Maarten coordinates the foreign policy of Sint Maarten in cooperation with the Ministry of Foreign Affairs in The Hague. The Foreign Relations Organization of Sint Maarten coordinates, among other things, the ratification process of AML/CFT treaties and the participation in (sub-) regional and international organizations for Sint Maarten.

##### **The National Committee on Money Laundering (CIWG)**

181. Sint Maarten is on its way to create a CIWG<sup>3</sup> to advise the government on AML/CFT measures to be taken in order to be compliant with the FATF recommendations. It is expected that the CIWG comprises of representatives of the Office of the Attorney-General, Tax Office, Justice Department, the Legal Department, Foreign Relations Organization, the Central Bank of Curacao and Sint Maarten, Chamber of Commerce, and Judicial Affairs, and the private sector's representative bodies being the Sint Maarten Bankers Association (SBA)

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<sup>3</sup> The Authorities have advised that establishment of the National Committee on Money Laundering (CIWG) occurred on June 8, 2012

182. The CIWG will be expected to handle the consultation process concerning review of draft legislation, rules and regulations. As well, it is expected to monitor and co-ordinate the various agencies' efforts to achieve full compliance with the FATF Recommendations.

### **Criminal justice and operational agencies**

#### **The FIU (MOT)**

183. The tasks of the FIU (MOT) are set out in articles 3 and 1 under h and in article 22h of the NORUT. The Meldpunt Ongebruikelijke Transacties is the FIU (MOT).

#### **The Public Prosecutors Office (PPO)**

184. The PPO is responsible for the proper investigation of all crimes including the offences of money laundering and terrorist financing. Under the direction of the PPO the investigation of criminal offences is carried out by the Police. To combat ML and TF the Ministry of Justice is currently executing a business plan for the Police Force of Sint Maarten in order to supply the Force within a time frame of four years with: a special fraud and anti money laundering team.

185. Currently in place are:

- RST (Detective co-operation Team (RST), specially assigned to (i.a.) fight ML and international terrorism.
- I&O at Tax inspectorate (Information and Investigation section on tax evasion and ML through fiscal constructions)
- Special Investigation Unit (Investigation Service of the Government) dealing with possible corruption and subsequent ML;
- VDSM (Security Service of Sint Maarten).

#### **Police**

186. Since 10-10-10, with the disintegration of the Netherlands Antilles, the Sint Maarten Police could no longer depend on the financial services of the so called BFO (Bureau Financial Investigations) that was part of the Netherlands Antilles Police force. This BFO became an integral part of the new Curacao police force, leaving the Sint Maarten Police empty handed. For this reason the business plan was introduced in order to cope with the lack of specialized detectives the dissolving of the former Netherlands Antilles Police force brought for Sint Maarten.

187. Currently Police has three (3) trained financial detectives working on money-laundering and financial cases. Due to the above mentioned business plan, in total six (6) detectives will have to be deployed by local police before 2015.

#### **RST**

188. The RST was deployed from the Netherlands in the Dutch West Indies back in the late nineties of the former century to fight the international drugs trade from Latin America, through the Dutch Antilles towards the Netherlands. After a successful number of years and a steep decline of drugs trade through the Dutch Antilles, the focus of the team widened to money laundering and human trafficking and smuggling. Besides that, the fight against international terrorism is part of their assignment both on the Intel front as well as operationally, if called for. Financial criminal investigators are part of the RST. A specialized intelligence unit is Curaçao based but also works for Sint Maarten. The financial section of RST is especially charged with the combating of ML and the applicable cases of TF. Members of this financial unit are positioned on Sint Maarten but always can fall back on their colleagues in Curaçao. To keep abreast with the ever changing money laundering

characterizations, the members of RST, together with members of the local Police force and the PPO attend relevant courses, seminars and conventions, some of which are organized by RST itself.

### **Tax Inspectorate**

189. Within the tax inspectorate specially trained workers have the authorization to investigate on tax evasion. If in the line of their duties they encounter a case of money laundering they will report this to the PPO who can ask the Inspectorate to investigate (if necessary together with the Police) both on tax evasion (fraud) and subsequent ML activities.

### **Intelligence and security agencies**

190. The VDSM has the task bound by law to strive to achieve the objective, to foster the fundamental interests of Sint Maarten towards a continued existing democratic legal order, towards an incorruptible government, towards a sense of domestic safety and other vital interest of Sint Maarten and where necessary that of the Kingdom of the Netherlands. The VDSM can do this by safeguarding the interests mentioned in its objective, by determining the risks of those interests and by contributing in minimizing and controlling of those risks.
191. This means that the VDSM is not primarily focused on the combating of money laundering, unless the service has indications that it is meant to be used for terrorist financing purposes. The VDSM plays therefore a role in the fight against ML and TF when ML and terrorist financing have the tendency to bring down the existing democratic legal order, to corrupt the government, the integrity of the governmental administration, to threaten domestic safety or other vital interests of Sint Maarten (like the financial market) or interests of the Kingdom of the Netherlands.
192. The VDSM will accomplish this by collecting information concerning person(s) and organization(s) that are involved in TF, and of which serious suspicions exist that this could pose a danger to the aforementioned interests of Sint Maarten. To facilitate these tasks the VDSM collaborates on with (international) counterparts.
193. From a political point of view the minister of General Affairs is responsible for the VDSM. The Minister of General Affairs will be informed of its findings. If a criminal offence is “being” committed, the PPO will be notified in order to assess whether a criminal investigation can be started. Cooperation from all government organizations and government owned companies is imperative when it comes to gathering information for the safeguarding of the abovementioned interests of Sint Maarten. With the consent of the Minister of General Affairs (also the Prime Minister), international cooperation is also possible.
194. In addition, the VDSM conducts security screenings for positions which requires a security clearance within and outside the government. The focus point is reliability i.e. trustworthiness, further specified in honesty, independence, loyalty and integrity.

### **Customs**

195. The tasks of Customs include law enforcement with regard to the combating of ML and TF at the border. Customs is obliged to report both executed and intended unusual transactions to the FIU (MOT). The responsibilities of Customs with respect to cross border cash and /or bearer negotiable instruments are laid down in the NOOCMT.
196. According to the NOOCMT, the customs officials are required to send reports containing information on the cross border cash and /or bearer negotiable instruments as well as the funds



taken into custody to the FIU(MOT). It is expected that in 2012 Customs will have passive dogs trained and used to detect, among other things, banknotes.

**Financial sector bodies:**

197. The Central Bank is entrusted with the supervision of the compliance with AML/CFT legal framework by the financial institutions pursuant to article 1, paragraph 1, sub i in conjunction with article 11, paragraph 1, sub a of the NOIS, article 1, paragraph 1, sub h in conjunction with article 22h, paragraph 1, sub a of the NORUT and the various supervisory ordinances.
198. The Central Bank has issued Provisions and Guidelines on the Detection and Deterrence of ML and TF (P&Gs) for the financial institutions which are subject to the AML/CFT regime. Such in accordance with aforementioned laws moreover the respective supervision laws. The P&Gs (formerly Guidance Notes) were first issued in 1992 and have been updated continuously.
199. Articles 9 and 9a of the NOIS, authorize the Central Bank to impose penalties or fines in the event of non-compliance with AML/CFT legal requirements. Article 9d of said ordinance authorizes the Central Bank to publish details regarding imposed penalties or fines.
200. Article 20, paragraphs 3 and 4 of the NORUT regulate the information sharing between the Supervisor and the FIU (MOT). Articles 22a and 22b of same authorize the Central Bank to impose penalties or fines in the event of non-compliance with AML/CFT legal requirements. Article 22e of the said ordinance authorizes the Central Bank to publish details regarding imposed penalties or fines.
201. In accordance with article 8, paragraph 1 of the RFETCSM, the Central Bank is authorized to grant a license to persons or institutions empowering them to hold a bureau de change. However, it is the Central Bank's policy for more than two decades not to grant such licenses. Only domestic commercial banks operating under the provisions of the NOSBCI are permitted to provide the service of exchanging foreign currencies.
202. Money remittance businesses are subject to AML/CFT supervision from the Central Bank based on article 1, paragraph 1, sub i in conjunction with article 11, paragraph 1, sub a of the NOIS, based on article 1, paragraph 1, sub h in conjunction with article 22h, paragraph 1, sub a of the NORUT, and also on article 21 of the RFETCSM.
203. The Central Bank issued AML/CFT P&Gs for MTC under the RFETCSM and also under the NOIS (article 11, paragraph 3) and NORUT (article 22h, paragraph 3). Currently, a legislation process for a new legal framework for the supervision of MTC and/or their (sub) representatives is ongoing.
204. Being also a financial service provider, the Central Bank issued AML/CFT P&Gs for internal purposes.
205. In accordance with the RFETCSM the Central Bank is the entity authorized to grant foreign exchange licenses and exemptions. Said ordinance also authorizes the Central Bank to issue implementation decrees as part of the foreign exchange regulation. As such the Central Bank has issued General Administrative Regulation GAR 2009 (part 5), Integrity requirements when submitting an application for a foreign exchange license or an exemption. GAR 2009 (part 5) has been updated to include the latest amendments of the AML/CFT legislation. The updated version, GAR 2010 (part 5), has been published on the Central Bank's website. The integrity requirements dealt with in GAR 2010 (part 5) regard the identification of the natural person or legal entity to which a foreign exchange license or exemption is granted.

**Ministries or agencies responsible for licensing, registering or otherwise authorizing financial institutions.**

**Ministry of Economic Development**

206. All businesses, including FIs are required to apply for a business license in order to be permitted to conduct their business in Sint Maarten. The application for a business license should be submitted to the Ministry of Economic Development. For financial institutions the business license is a requirement in addition to the license or registration requirements as laid down in the respective supervisory legislations.

**Chamber of Commerce (KVK Sint Maarten)**

207. All businesses, including the FIs and DNFBPs, are required to register with the local Chamber of Commerce. More specifically, the Commercial Register Act (N.G. 2009, No. 51) state the following in article 2, paragraph 1, article 3, paragraph 1 and article 4, paragraph 1: There is a Registry of Companies in which companies and legal persons are registered according to the stipulations of this national ordinance. In the Registry of Companies also limited liability companies, private limited companies, co-operatives, mutual insurance companies, foundations, private foundations and associations with full legal capacity are registered.

**DNFBP and other matters**

**Supervisor for DNFBP**

208. DNFBP supervisory bodies:

**The FIU (MOT)**

209. The FIU (MOT) is entrusted with the supervision of the compliance with AML/CFT legal framework by lawyers, notaries, accountants, real estate agents, jewellers, car dealers, tax advisors and administrative offices pursuant to article 1, paragraph 1, sub i in conjunction with article 11, paragraph 1, sub d of the NOIS, article 1, paragraph 1, sub h in conjunction with article 22h, paragraph 1, sub d of the NORUT. However the supervision by FIU (MOT) has not started yet in Sint Maarten.

**The Central Bank**

210. The Central Bank is entrusted with the supervision of the compliance with AML/CFT legal framework by company (trust) service providers and administrators of investment institutions pursuant to article 1, paragraph 1, sub i in conjunction with article 11, paragraph 1, sub a of the NOIS, article 1, paragraph 1, sub h in conjunction with article 22h, paragraph 1, sub a of the NORUT and the various supervisory ordinances.
211. According to the third paragraph of above-mentioned articles, the Central Bank is authorized to issue P&Gs in order to advance compliance with the NOIS and the NORUT. As such, the Central Bank has issued the P&Gs for Administrators of Investment Institutions (AII) and Self-Administered Investment Institutions (SAII) and for Company (Trust) Service Providers (TSP).

**Any other agencies or bodies that may be relevant**

212. **The Sint Maarten Bankers Association (SBA):** The SBA is the association of the local banks established on Sint Maarten. The SBA represents and furthers the interest of its member

banks and serves as a forum for its members to discuss matters of common interest and acts as a conduit between the industry and the relevant authorities. In addition, the SBA promotes continuous upgrading of expertise among its members' employees.

213. **Insurance sector and the representative organization (SIBA):** SIBA is responsible for organizing AML/CFT trainings for the different companies, networking, representation of the insurance industry in relevant committees and the contact with the regulator.

*c. Overview of policies and procedures*

**Risk-based approach by the Central Bank**

214. The risk-based approach as it relates to AML/CFT forms an integral part of the Central Bank's regulatory approach. It is incorporated in the P&Gs issued by the Central Bank to all supervised sectors. Supervised institutions must conduct enhanced due diligence for all of their high risk clients. They must in that respect develop risk profiles for all of their customers comprising of minimally the following possible categories: low, medium and high risk. The supervised institutions must at least consider the following risk categories while determining the risk profile of a customer: (i) customer risk, which encompasses the type of customer and the nature and scope of the business activities of the customer, (ii) products/services risk, which encompasses the assessment of the existence of a legitimate business, economic, tax or legal reason for the customer to make use of the products/services offered by the supervised institution, (iii) country or geographic risk, which encompasses an evaluation of the vulnerabilities arising from high risk countries and territories, and (iv) delivery channels risk, which encompasses an assessment of the vulnerabilities posed by the distribution channels of the products and services offered by the supervised institution.
215. The Central Bank considers the following financial institutions to be very ML/FT low risk due to the nature of their businesses: credit unions, savings and credit funds, pension funds and funeral insurance companies. Life insurers are also considered ML/FT low risk. This particularly due to the nature of the activities they conduct and the type of transactions they perform.

*d. Progress since the last mutual evaluation*

216. The last assessment of the Netherlands Antilles' compliance with the FATF Recommendations was conducted by the IMF in 2002. The IMF report was issued in 2004 after the findings were actualized. In 1999 the FATF conducted an AML assessment of the Netherlands Antilles. The remarks and recommendations of the FATF examiners made during the last Mutual Evaluation have been addressed by the competent authorities. In an effort to enhance its legal and institutional AML/CFT framework the Netherlands Antilles has made significant changes to its legislative and regulatory regime. The supervision has been strengthened as well.
217. The following measures have been taken to address the remarks and recommendations made:

**The FIU (MOT)**

218. MOU's have been signed with FIU Grenada and FIU Sint Kitts and Nevis and is currently in discussion with 45 other financial intelligence units to reach an agreement to exchange information based on similar MOU's.

**AML/CFT provisions and guidelines.**

219. After the last Mutual Evaluation the Central Bank updated the respective AML/CFT P&Gs by including the recommendations addressed by the FATF examiners. Copies of the then new AML/CFT P&Gs were sent to all (financial) institutions under its supervision: P&Gs for Credit Institutions (CI), Money Transfer companies (MTC), Company (Trust) Service Providers (TSP) and Administrators of Investments Institutions (AII) and Self-Administrated Investment Institutions (SAII).
220. Aforementioned P&Gs have been amended several times since their introduction in order to comply with the latest FATF recommendations.

#### **Countries with less adequate anti-money laundering laws**

221. All supervised institutions that conduct foreign operations, either through a branch and or a subsidiary and or a representative office, should provide the Central Bank with a “Statement of Regulatory Compliance”. The Statement serves to update the Central Bank on the ongoing compliance by the supervised institution’s foreign operations entity with the laws and regulations of the relevant foreign jurisdiction(s) in which each operates. The Guidelines for the Statement of Regulatory Compliance entered into effect as of June 2007.

#### **Money Transfer Companies.**

222. Seven (7) MTC operate without the Central Bank’s authorization were denounced to the PPO in 2001, in 2006, and again in 2010. MTC are subject to the NOIS and the NORUT since 2000. There are AML/CFT P&Gs in place for this sector and training and information session are given frequently.

#### **Company (Trust) Service Providers.**

223. Company (trust) service providers are supervised by the Central Bank since 2004, as was advised by the IMF. Formerly, since 2002 the supervision of this sector was entrusted to the “Raad van Toezicht” by virtue of the National Ordinance on the Supervision of Fiduciary Businesses (N.G. 2001, no. 147). The Central Bank’s Investment Institutions & Trust Supervision department supervises this sector. This department periodically conducts onsite examination at the institutions in this sector. The basis for the supervision of this sector is anchored in the NOSTSP. There are AML/CFT P&Gs in place for this sector.
224. Training and information sessions are given periodically by the Central Bank.
225. The NDCBSC has been put in place securing custody of bearer shares issued by international companies. Local companies are not allowed to issue bearer shares.

#### **Customs Sint Maarten**

226. Since the last Mutual Evaluation the NOOCMT entered into effect. The customs department enforces the NOOCMT at the border.

#### **Ratified conventions**

227. The 1990 Council of Europe Convention has been ratified by the Netherlands Antilles in August of 1999.

## 2. LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

### Laws and Regulations

#### 2.1 Criminalisation of Money Laundering (R.1 & 2)

##### 2.1.1 Description and Analysis

228. Money laundering is punishable under the Penal Code, Title XXXA in articles 435a up to and including 435c. These articles deal with the various forms of ML, namely intentional, culpable and habitual. These articles were inserted in the National Ordinance on June 10, 2008 which amended the Penal Code of October 1997 (i.e. National Ordinance dated 10<sup>th</sup> June 2008, altering the Criminal Code of the Netherlands Antilles (penalization of terrorism, FT and ML) (N.G. 2008, no 46), effective as of June 21, 2008.

### Recommendation 1

229. **Article 435a (intentional money laundering).** Guilty of money laundering is:
- a) he who hides or conceals the true nature of, the origin, the site, the disposal or the transfer of the object, or hides or conceals which party is entitled to the object or possesses it, while he knows or understands that the object, directly or indirectly- derives from any crime.
  - b) he who acquires an object, possesses it, transfers or converts or uses it, while he knows or understands that the object- directly or indirectly- derives from any crime.
- He shall be liable to a prison sentence of not exceeding twelve years or of a fine not exceeding one million guilders  
The term 'objects' means all goods and all property rights.
230. **Article 435b (habitual money laundering).** He who habitually commits money laundering shall be liable to a prison sentence not exceeding sixteen years or a fine not exceeding one million and two hundred thousand guilders.
231. Article 435c of the Penal Code criminalizes the same kind of actions as referred to in articles 435a of the Penal Code, with the difference that no knowledge of the criminal origin is needed. Instead article 435c punishes the perpetrator who should have had reasonable suspicion of the criminal origin of the goods.
232. **Articles 435c (culpable money laundering).** Guilty is:
- a) he who hides or conceals the real nature of, the origin, the site, the disposal or the transfer of the object, or hides or conceals which party is entitled to the object or possesses it, while he should reasonably suspect that the object – directly or indirectly- derives of any crime.
  - b) he who acquires an object, possesses it, transfers or converts or uses it, while he should reasonably suspect that the object –directly or indirectly- derives of any crime.
- He shall be liable to a prison sentence not exceeding four years or to a fine not exceeding twenty-five thousand guilders.
233. Penal Code, Title XXXA Articles 435 (a) and (c) establish the offence of ML in accordance with the Vienna Convention article 3(1) (b)(i)(ii) and (c)(i)(iii) and (iv) and with the Palermo Convention article 6(a)(i),(ii) and (b)(i)(ii).
234. Article 435a of the Penal Code criminalizes ML. This article refers to all kinds of actions that may be related to ML. A requirement is that the perpetrator has some knowledge of the criminal origin of the goods. Accordingly participation and incitement (article 49), attempts

(article 47), aiding and abetting (article 50(1)), facilitating and counselling (article 50 (2)) have also been criminalized under the Penal Code.

235. Based on the article 435a of the Penal Code, it seems that ML extends to any type of property regardless of value that directly or indirectly represents the proceeds of crime. The Examiners were provided with case law (HR 7 October, 2008, NJ 2009, 94: judicial ground 3.7), in support of this interpretation of the law. Also when proving property is the proceeds of crime it is not necessary that a person be convicted of a predicate offence. The case law HR 28.09.2004, LJN: AP 2124 Judicial Ground 3.5 supports this interpretation of the law. The articles 435a up to and including 435c do not contain a comprehensive list of what kind of objects should be covered, however in these articles ‘objects’ mean all goods and all property rights, which are directly or indirectly derived of any crime.
236. Article 435a of the Penal Code is explained in such a way that is not necessary to prove that a valuable object is the proceeds of a specifically indicated crime. It also does not appear to be necessary to prove exactly by whom, how and when a specific crime was committed to establish or prove that the goods are proceeds of any crime. The examiners were provided with caselaw (judicial ground 3.5 HR 28-09-2004, LJN: AP2124) in support of this interpretation of the law. This caselaw also reflected that the Supreme Court stated that the exact origin of the laundered proceeds has not to be proven by the Public Prosecutor and that the general criminal origin as well as the knowledge of the perpetrator may be deduced from objective circumstances.
237. The examiners were provided with HR 2 October 2007, LJN BA 7898 and BA 7923 in support of the position that self-laundering is also covered. The case concerned self laundering, in which it was explicitly stated that money laundering coming from criminal activities perpetrated by the suspect himself, was possible.
238. The Examiners were informed that case law in support of this interpretation of the law existed and were provided with the caselaw which reflects that the Supreme Court decided the following in HR 7 October 2008, NJ 2009, 94: judicial ground 3.7. “The legislation does not set restrictions to the scope of the money laundering provisions and from the legislative history it can be deduced that the legislator has not intended to set other limitations concerning the predicate offence from which the object of the money laundering actions originates, then that it should concern an offence”.
239. In Sint Maarten ML is not limited to specific predicate offences. No distinction is made in articles 435a and 435c between the criminalization of the type of crime concerning the money laundering. It focuses on targeting the proceeds of any crime.

#### **Designated Category of Offences**

240. The authorities provided a list of offences which based on their laws would constitute predicate offences as is seen on the following table.

FATF 20 DESIGNATED CATEGORY OF OFFENCES	SINT MAARTEN’S EQUIVALENT LEGISLATION
Participation in an organized criminal group and racketeering	Article 146 of the Penal Code
Terrorism including Terrorist Financing	Articles 97 thru 102, 114, subsection 2, 123 subsection 2, 124a subsection 2, 129, 130, 163, sub 3°, 167c sub 2°, 172 sub 3°, 174sub 2°, 176 sub 3°, 180 subsection 2, 300 and 302 of the Penal Code.

	Articles 122a, 122b, 128a, 128b, 182a, 182b, 295b, 302a, 318a and 318b, as well as 430a and 430b of the Penal Code; Articles 146a, 295a, 298 subsection 3, of the Penal Code. Proposed Amendment to the Penal Code to independently criminalize terrorism financing was not passed on time to be assessed
Trafficking in human beings and migrant smuggling.	Human smuggling and Slave trade are criminalized in Articles 203a; 260, 287, 288, 289, 290 of the Penal Code.
Sexual exploitation including sexual exploitation of children	Article 259 of the Penal Code.
Illicit Trafficking in Narcotic Drugs and Psychotropic substances	Articles 3, 11, 11a, 11b, 11c, 11d of the State ordinance on Narcotic Substances and Ministerial Regulations that list Narcotic Substances.
Illicit Arms Trafficking	The Fire Arms State Ordinance
Illicit trafficking in stolen and other goods	Articles 431, 432, 432 ibis and 432ter of the Penal Code.
Corruption and Bribery	Articles 183, 184, 185, 378, 379 and 380 of the Penal Code.
Fraud	Articles 339, 339a, 340 and 341 of the Penal Code.
Counterfeiting currency	Articles 214 thru 221 of the Penal Code.
Counterfeiting and Piracy of products	Article 350 of the Penal Code.
Environmental crime	Articles 178, 179, 179a, 179b of the Penal Code.  The State Ordinance of the Protection of the Nature that implements the Convention on the International Trade of Endangered Species of Flora and Fauna. The State Ordinance on the Maritime Management.
Murder, Grievous bodily injury	Articles 300, 302, 313 thru 316 of the Penal Code.
Kidnapping, illegal restraint and hostage taking	Articles 295, 295a and 298 of the Penal Code.
Robbery or theft	Articles 323, 324, 324a and 325 of the Penal Code.
Smuggling	The State Ordinance on the Import, Export and Transit of Goods.
Extortion	Articles 330 and 331 of the Penal Code.
Forgery	Articles 230 thru 240 of the Penal Code.
Piracy	Articles 395 thru 399 of the Penal Code.
Insider trading, market manipulation	Article 9 of the National Ordinance on the Supervision of Securities Exchanges.

241. Based on the extracts of the Penal Code provided, it can be confirmed that most of the offences set out by the FATF have been criminalized in Sint Maarten by the articles in the Penal Code listed in the table above.

242. In relation to illicit arms trafficking, smuggling and insider trading, market manipulation, and some environmental crimes were not verified as the laws referenced in the table above were not provided.
243. In relation to the criminalization of TF, this is partially criminalized under the Penal Code by virtue of the extension of the offence of preparation to include TF. However this approach does not result in the criminalization of TF in accordance with the TF Convention.
244. In respect of the predicate offence of participation in criminal group, under the Penal Code participation in a criminal group appears to comply with Palermo Convention i.e. article 5(1)(a)(ii) which speaks to conduct amounting to participation in criminal activities of the criminal group or participation in other activities knowing this will further the criminal aim of the group.
245. In the case of counterfeiting currency it was noted that there are 2 sets of penalties that can be applicable to this offence, under articles 215 and 219 of the Penal Code. If a person is prosecuted pursuant to article 219 it would seem that based on the penalty that would be applicable (i.e. maximum imprisonment of three months or a maximum fine of three hundred Guilders) which means there is uncertainty as to whether an article 219 offence qualifies as a predicate offence under Sint Maarten's laws.
246. It is important to note that Sint Maarten does not have a threshold approach, as articles 435a-435c refer to objects directly or indirectly derived of any crime.
247. As indicated Articles 435a-435c stipulate that it should concern objects obtained directly or indirectly from any offence. In principle a crime committed in a foreign country can also be prosecuted in Sint Maarten. However, it should constitute a crime that is punishable in Sint Maarten had it occurred Sint Maarten. Hereby jurisdiction plays an important role, if Sint Maarten wants to prosecute the perpetrator/person/suspect for a specific criminal offence (article 2 up to and including 7). The articles dealing with the jurisdiction 4, 4a and 5 of the Penal Code offer the possibility to make terrorist crimes punishable without limitations. For the criminalization of money laundering there must be a treaty between the requesting State and Sint Maarten or the perpetrator must be a resident of Sint Maarten or he must have taken up residence in Sint Maarten after having committed the crime in the foreign country. It is noted that under article 4 of the Penal Code, the laws of Sint Maarten are applicable to anyone who outside of Sint Maarten is guilty of the crimes listed at article 4.
248. Accordingly, the Penal Code reflects the criminal statutes are applicable-
- a) To anyone who is guilty of any offence outside the Netherlands Antilles (NA)<sup>4</sup> while being on board a NA vessel or aircraft; (article 3)
    - a. To the captain and crew of a Netherlands or NA vessel or aircraft who commit the offences described in the article (i.e. article 7) outside the NA and on the high seas;
  - b) To anyone who outside of NA is guilty of the crimes listed at article 4. The list includes a number of terrorist and convention related offences but does not appear to include the offence of ML; FT or most of the non-terrorist related predicate offences. (Article 4)
  - c) To the resident of NA who, outside the NA is guilty of the offences listed in the article (i.e. article 5(1));

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<sup>4</sup>The Authorities have indicated that by virtue of the NOTPLA all legislation from the former Netherlands Antilles remains applicable to Sint Maarten unless expressly indicated otherwise. Additionally, the NOTPLA also stipulates that the laws applicable in the Sint Maarten regime remain applicable post 10-10-10. All references to Netherlands Antilles/NA in the laws should read Sint Maarten.



- d) To the resident of NA who, outside the NA is guilty of an offence which is punishable under the laws of the country where it has been committed and where the offence is also a crime in NA. 1. (article 5(2))
- e) A terrorist crime or one of the crimes defined paragraphs 230, 324(6)(1<sup>st</sup> paragraph), 324(6), 330(2<sup>nd</sup> paragraph) in conjunction with article 325(2)(2<sup>nd</sup> paragraph) subject to the restriction that capital punishment cannot be imposed in respect of an offence that is not punishable by capital punishment under the laws of the country where the offence has been committed.(article 5(3))
249. Legal action can also be instituted if the person became a resident of the NA after committing the offence. (article 5(2))
250. The Code also reflects that it is applicable –
- To anyone against whom a foreign state has brought criminal proceedings and has transferred this to the NA based on a treaty authorizing the NA to bring criminal proceedings. (article 4a)
  - To anyone whose extradition related to a terrorist crime or one of the crimes listed in the article (i.e. article 4(a)) has been declared inadmissible, rejected or declined;
251. The wording of articles 435(a) and (b) of the Penal Code speaks to intentional and habitual ML which according to the Authorities requires an explicit knowledge.
252. Participation and incitement (article 49), attempts (article 47), aiding and abetting (article 50(1)), facilitating and counselling (article 50(2)) have been criminalized under the Penal Code. For the purposes of the foregoing, the term “object” which is used in the Penal Code means all goods and all property rights. As indicated earlier the Penal Code does not expressly criminalize conspiracy.

### **Additional Element**

253. It is noted that under article 4 of the Penal Code, the laws of Sint Maarten are applicable to anyone who outside of Sint Maarten is guilty of the crimes listed at article 4. The list includes a number of terrorist and convention related offences but does not appear to include the offence of ML; TF or most of the non-terrorist related predicate offences. It is also noted that under article 5(1) of the Penal Code the laws of Sint Maarten are applicable to the resident of Sint Maarten who, outside the Sint Maarten is guilty of the offences listed in that article.
254. Additionally under the Penal Procedures Code dual criminality is a prerequisite for mutual legal assistance requiring the use of specific investigative measures by the Sint Maarten Authorities.
255. Furthermore for the criminalization of money laundering there must be a treaty between the requesting State and Sint Maarten or the perpetrator must be a resident of Sint Maarten or he must have taken up residence in Sint Maarten after having committed the crime in the foreign country.
256. The collective impact of the foregoing appears to be that where the proceeds of crime are derived from conduct that occurred in another country, which is not an offence in that other country but which would have constituted a predicate offence had it occurred domestically, this would not constitute a money laundering offence.

### **Recommendation 2**

257. ML as defined in the Penal Code addresses an intentional and habitual ML (article 435a and 435b). Furthermore, the Penal Code also provides for culpable ML (article 435c). Whereas the intentional and the habitual variations of ML require an explicit knowledge this is not the case for culpable money laundering. In the case of culpable ML the perpetrator should reasonably suspect that the object is directly or indirectly the proceeds of any offence. It is a matter of negligence if the perpetrator could have suspected based on the information about the object that was known to him, that the object was the proceeds of a criminal offence.
258. Article 53 of the Penal Code stipulates that criminal offences can be committed by natural and legal persons and that where this occurs such persons can be prosecuted and subject to the requisite penal sanctions and measures provided for in general ordinances. Article 53(2) also reflects that, in addition to legal persons, these penalties can also be jointly applied against those who gave orders for the offence to be committed, and those who directed the prohibited conduct. Based on article 53(2) the liability of a legal person for a criminal offence does not preclude the natural person from being held criminally liable for the said offence.
259. The classification “reasonable suspicion” of the culpable variation partly refers to objective factual circumstances. The proof of reasonable suspicion should emanate from the evidence, but could consist of objective assessments. Examples thereof (based on real case) are:
- The low asking price for the object;
  - Investigation lists of the stolen shares for the sale thereof are not available for consultation;
  - Receiving of large sums of money or expensive goods, whereas the person who is supplying the money or goods only has a simple job to generate his salary.
260. The Penal Code (article 435(c)) reflects that the offence of ML is committed when a person undertakes the activities described in relation to the object where he should reasonably suspect that the object is derived directly or indirectly from a crime. The Authorities have also provided summaries of decided cases.
261. The HR 27 September 2005, NJ 2006, 473:  
*R.O. 3.5 The Court ruled that the intention element was met based on the fact that the sum of money could not have originated in any other manner than by means of offences meant in article 420. This was clearly motivated, taking into account:*
- *The suspect and her travel companion were on their way to Spain without cargo baggage*
  - *They stood in separate lines during check in security screening*
  - *A sum of 25.000 Euros was confiscated from the suspect*
  - *The suspect transported the money in 500 50 Euro notes that were hidden in her jeans and toilet bag*
  - *The suspect gave up the money voluntarily*
  - *The suspect made differing and contradictory statements concerning the origins of the money and the purpose of her journey*
  - *That Schiphol airport is not an unknown port from which goods originating from criminal activities are transported*
262. HR 28 September 2004, NJ 2007, 278:  
*R.O. 3.5. Article 420bis is interpreted in such a manner that it is not necessary to prove that an item of value originated from a specifically indicated crime. It is not necessary to prove exactly who, how and when a specific crime was committed to prove that a good is the proceed of crime.*  
*R.O. 3.6.1. Based on proof the Court concluded that the suspect: Had packages of money notes, in total 24 000 Euros, hidden under his clothes. The suspect was not under the impression that the money originated from honest labour. The suspect believed the money came from robbery or drugs. The suspect was asked to transport the money, which came from*

*an initiator, the same initiator that provided the drugs which were found on the suspect. This initiator was also the person that asked the suspect to fly to Bonaire and provided the suspect with a ticket under the instruction that the suspect should hide the money and the drugs and that the suspect would be recognized, through means of his clothing, by a person waiting in Bonaire. Finally, the suspect was instructed not to say where he got the money if he was arrested.*

*R.O.3.6.2. The Court apparently deducted that the money in this case, under these circumstances, could not have originated from other sources than from criminal offences as described in Article 420bis, paragraph 1 under b, of the Penal Code.*

263. Article 53 of the Penal Code stipulates that criminal offences can be committed by natural and legal persons and that where this occurs such persons can be prosecuted and subject to the requisite penal sanctions and measures provided for in general ordinances. Given that ML is an offence under that Penal Code, the provision at article 53 means that legal persons are criminally liable for ML. The article reads as follows:
- 1) Criminal offences can be committed by natural persons and legal persons.
  - 2) If a criminal offence is committed by a legal person prosecution can be instituted and the penal sanctions and measures provided for in general ordinances, if eligible, can be pronounced:
    - a. against that legal person, or
    - b. against those who ordered the execution of the offence, as well as against those who actually lead the execution of the prohibited conduct, or
    - c. against those mentioned in section a and b jointly.
  - 3) For the application of paragraphs 1 and 2 the following are considered equivalent to the legal person: the unincorporated company, the partnership, any other association of persons and the allocated funds.
264. The Authorities have indicated that parallel criminal and civil proceedings are possible, however no actual reference in the law was indicated, no case law was cited, and no practical examples of the application of parallel procedures were provided to the team in support of this assertion by the Authorities. A criminal case does not exclude civil proceedings. Civil proceedings are possible (e.g. a request for the dissolution or prohibition of a legal person) just as administrative proceedings against a legal person are possible. However, punishment in the sense of imposing a fine can only take place in either criminal proceedings or administrative proceedings, not in both at the same time.
265. For example, in the case of an offender falling in the category of a service provider under the NOIS (article 9c) and NORUT (article 22d), the Supervisor's ability to impose administrative fines for breaches of the AML obligations under the NOIS and NORUT expires if criminal proceedings have been instituted against the violator; or the right to commence criminal proceedings has expired pursuant to section 76 of the Penal Code. The Authorities have also indicated that similar limitations apply in the case of tax offences and customs offences where the conditional dismissal processes (i.e. settlement of the matter is permitted with payment of the appropriate fines). (Article 219a Extract –Law on Imports Duties and Excise)
266. Legal persons can only be punished with a fine as a criminal sanction. In case of ML a maximum of one million guilders is applicable for intentional money laundering, a maximum of one million two hundred thousand guilders is applicable for habitual money laundering and a maximum of twenty five thousand guilders is applicable for culpable money laundering (articles 4235a – 435c of the Penal Code).
267. It should be pointed out that this does not exclude dispossession of unlawfully obtained benefit (article 38e of the Penal Code, see recommendation 3), which is also applicable to legal person.

268. With regard to the sanctions for natural person, please be referred to discussions earlier in at the beginning of section 2.1 of this report. The foregoing penalties (not including the fine applicable for culpable ML) appear to be generally dissuasive particularly given the level of penalties in place in other jurisdictions:

**Comparable penalties within the Kingdom**

269. Aruba<sup>5</sup> - AWR 100,000 or USD56000 and/or imprisonment for between 4 and 6 years for ML offences and the Netherlands<sup>6</sup> EUR76,000 and/or convictions for 4-6 years; Curacao – intentional ML – 8 years; habitual ML – 9 years and culpable ML – 4 years

**Comparable penalties outside the Kingdom**

270. Cayman Islands<sup>7</sup> - The penalty for offences at the summary level is a fine of \$5,000 or 2 years of imprisonment and on indictment, an unlimited fine and up to 14 years of imprisonment. Barbados<sup>8</sup>- A person, including a legal person, guilty of money laundering is liable (a) on summary conviction, to a maximum fine of \$200,000 or imprisonment for 5 years or both; and (b) on conviction on indictment, to a maximum fine of \$2,000,000 or imprisonment for 25 years or to both (MLFTA, section 20(3)). As regards attempts, aiding and abetting and other secondary offences, the penalties are (a) on summary conviction, a maximum fine of \$150,000 and/or a 3- year term of imprisonment; (b) on conviction on indictment, a maximum fine of \$1,500,000 and/or a 15-year prison term (MLFTA, section 20(4)).

**Comparable penalties in civil jurisdictions outside the Kingdom**

271. Guatemala<sup>9</sup>, the penalty on conviction in the case of a natural person is imprisonment between 6 – 20 years and/or imposition of a fine to the value of the property, instruments or proceeds of the offence. The penalty increases by one-third where the crime is committed by a public official. In the case of legal persons, the penalty on conviction for a money laundering offence is a fine of between \$6,000 - \$625,000, depending on the gravity of the offence and regardless of possible convictions for affiliated natural persons. Additionally, repeat offences can lead to the permanent revocation of juridical personality; - El Salvador<sup>10</sup> - Article 4 of the ML Law reflects that the penalty on conviction is imprisonment for a period of not less than 5 years and not more than 15 years and 52000 monthly wages. Ancillary money laundering offences carry penalty of imprisonment for between 8 and 12 years and a fine. Legal persons convicted for money laundering offences are also subject to declarations by the court of dissolution and immediate liquidation.
272. Effectiveness and proportionality is assessed from an objective standpoint of comparison with penalties applicable for the same or similar offences in other jurisdictions. Based on the penalty applicable in Sint Maarten for culpable ML, which should also be applicable to legal persons, having such a significant lower penalty for culpable ML raises the concern that the penalty is not sufficiently dissuasive.
273. The PPO indicated some ongoing ML concerns presented by the post 10-10-10 circumstances following the dissolution of the Netherland Antilles such as, the shortfall in critical expertise caused by the inadequacy of appropriately trained law enforcement personnel, FIU (MOT); RST and the local Police Force remaining with Sint Maarten; and the unavailability of suitable candidates from within Sint Maarten to fill vacant positions in the office of the Public Prosecutor.

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<sup>5</sup> October 2009 MER Aruba, paragraphs 143 -145 page 41

<sup>6</sup> February 2011 MER Netherlands, paragraphs 229 - 232 page 52

<sup>7</sup> November 2007 MER Cayman Islands paragraph 87 page 28

<sup>8</sup> June 2008 MER Barbados paragraph 117 page 30

<sup>9</sup> November 4, 2010 MER Guatemala –pages 33 and 34.

<sup>10</sup> September 2010 MER El Salvador – page 29

274. The Authorities also indicated further ML risks are posed by the extreme vulnerability presented by the open borders between Sint Maarten (Dutch and French) sides (2 different countries as the French side falls under the protection of France and is therefore subject to EU laws (not the case with the Dutch side) and the various points of entry to the country from the sea as well as the risks presented by certain businesses to the economy (particularly the casinos/gaming sector). The penalties reflected appear effective and dissuasive however if the concerns expressed by the Authorities are not addressed in the short term the work of the Authorities can be quickly undone. Additionally, the Authorities have indicated that the Penal Code is being revised and that one of the amendments to be effected will be the synchronization of the penalties in the Penal Code<sup>11</sup> with the penalties applicable for similar offences throughout the rest of the Dutch Kingdom.

**Recommendation 32 (money laundering investigation/prosecution data)**

	Conclusion	2007	2008	2009	2010	2011
ML	Number of prosecutions ML	2	2	0	5	1
ML	Number of acquittals	0	0	0	0	0
ML	Number of settlements ML (conditional dismissal of case)	0	0	0	0	0
ML	Number of transfers (to other department/abroad)	0	0	0	1	0
ML	Number of inadmissible	0	0	0	1	0
ML	Number of dismissed cases dismissal (no evidence or policy dismissal)					
TF	Number of of prosecutions	-	-	-	-	-
TF	Number of acquittals	-	-	-	-	-
TF	Number of settlements ML (conditional dismissal of case)	-	-	-	-	-
TF	Number of transfers (to other department/abroad)	-	-	-	-	-
TF	Number of dismissed cases dismissal (no evidence or policy dismissal)					
	Convictions	2007	2008	2009	2010	2011
	Number of convictions ML	2	2	0	5	0
	Number of convictions not-reported	0	0	0	0	0
	Number of convictions TF	-	-	-	-	-

Confiscated	
2007	\$ 8.333 (fine imposed)
2008	\$4.487.928 (forfeited by court ruling)
2009	-
2010	\$ 178.130 (forfeited by court ruling)
2011	\$ 14.250.000 \$ 90.000

275. The ML statistics relate to 5 cases as indicated in the Table above. ML convictions are mostly imposed in combination with other crimes. In case of a conviction for several offences in one case, one sanction will be imposed for the total of the proven offences. Consequently, a conviction in such circumstances does not provide insight as to how much punishment is imposed for the separate offences. The Team was further informed that in 2008 Sint Maarten established an electronic database with a unique filing number to capture the cases which have

<sup>11</sup> The Authorities had advised that the new Penal Code was adopted in the Parliament in June 2012. However this amendment did not occur within two months of the conclusion of the on-site evaluation and therefore cannot be included in this assessment.

been prosecuted. However this was not readily apparent from the statistics provided and no other supporting documentation evidencing this upgrade of data capture mechanisms was provided to the Team.

### **Additional Element**

276. From the table above it can be seen that some statistics are maintained by the Authorities and that there have been some convictions for ML. However, the sanctions applied in relation to the money laundering aspect of these cases could not be identified by the Authorities because the penalties in respect of the underlying offences and the ML offences were not segregated to allow for this type of data capture or analysis.

#### **2.1.2 Recommendations and Comments.**

##### **Recommendation 1**

277. The Authorities should ensure criminalization of the following predicate offenses: illicit arms trafficking, smuggling, insider trading and market manipulation.
278. The Penal Code should be amended to ensure that most of the non-terrorist related predicate offences for ML, ML and TF occurred in a foreign country can be prosecuted in Sint Maarten.

##### **Recommendation 2**

279. The penalty applicable for a person convicted for culpable ML should be revised to ensure it is effective, dissuasive and proportionate.
280. Amend the Penal Code to ensure that parallel criminal and civil proceedings are possible.

##### **Recommendation 32**

281. The Authorities should ensure that comprehensive statistics are maintained in relation to the investigation, prosecution, and conviction of ML related cases.

#### **2.1.3 Compliance with Recommendations 1 & 2**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.1</b>	<b>LC</b>	<ul style="list-style-type: none"><li>• No confirmation that illicit arms trafficking, smuggling, insider trading and market manipulation are criminalised as ML predicate offenses.</li><li>• The Penal Code is not applicable to anyone who outside of Sint Maarten committed the crimes of ML; TF and most of the non-terrorist related predicate offences.</li></ul>
<b>R.2</b>	<b>LC</b>	<ul style="list-style-type: none"><li>• No evidence that parallel civil and criminal proceedings are possible.</li><li>• The manner in which the data was captured did not allow for proper assessment of the effectiveness of ML prosecutorial efforts.</li><li>• Penalty applicable to culpable ML is not sufficiently dissuasive</li></ul>

## **2.2 Criminalisation of Terrorist Financing (SR.II)**

### **2.2.1 Description and Analysis**

#### **Special Recommendation II**

282. The Netherlands Antilles ratified the TF Convention on March 22, 2010 (and it is now also applicable to Sint Maarten). With the aim of full implementation of various provisions of this treaty a number of amendments were introduced in the legislation of Sint Maarten to arrange for complete coverage of the nature of the conducts in question and as well as the territorial jurisdictions (including articles 4, 4a, 48a, 84a, 84b, 122a and 146a)
283. Pursuant to Article 84a, the term terrorist offence is understood to mean:
1. Each of the crimes described in the articles 97 up to and including 102, 114, second paragraph, 123, second paragraph, 124a, second paragraph, 129, 130, 163, under 3°, 167c, under 2°, 172, under 3°, 174, under 2°, 176, under 3°, 180, second paragraph, 300 and 302, if the crime has been committed with a terrorist purpose;
  2. Each of the crimes carrying an imprisonment pursuant to articles 122a, 122b, 128a, 128b, 182a, 182b, 295b, 302a, 318a and 318b, as well as 430a and 430b;
  3. Each of the crimes described in the articles 146a, 295a, 298, third paragraph.
284. In relation to whether this definition of terrorist offence fully accords with offences outlined in the treaties listed in the annex to the TF Convention, from a reading of extracts of the Penal Code that were provided it is apparent that there is partial coverage of the Convention for the Suppression of Terrorist Bombings and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. (Refer articles 163, 172, 174, 182a)
285. There is no coverage of the Convention pertaining to the Unlawful Seizure of Aircraft, or the Convention on the Physical Protection of Nuclear Material. There is partial coverage for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (refer article 172, 176).
286. From a reading of articles 97, 98, 102, 114, 123, 124a, 128a, 172, 174, 180, 182a, 182b, 295, 295a, 295b, 298, 300, 302a, 318a, 318b, 430a and 430b it appears that crimes against Internationally Protected Persons, acts intended to cause death or serious bodily injury to a civilian or any other person not taking active part in hostilities in a situation of armed conflict, some aspects of the Convention Against the taking of Hostages, some acts against the safety of civil aviation, some acts against the safety of maritime navigation, and conspiracies to commit these crimes or take the actions described, have been criminalised in accordance with article 2(1) of the TF Convention.
287. Pursuant to Article 84b, the term terrorist purpose means the purpose to cause fear to the population or part of the population of a country, or unlawfully force a government or international organization to take action, not to take action or to tolerate, or to seriously disrupt or destroy the fundamentals of the political, constitutional, economic or social structures of a country or an international organization.
288. Pursuant to Article 48a:
1. Preparation of a crime that according to legal definitions carries an imprisonment of eight years or more is punishable when the perpetrator wilfully acquires, manufactures, imports, forwards, exports or possesses objects, materials, information carriers, spaces or vehicles intended to commit that crime.
  2. In case of terrorist offences, the acts of preparation shall also be understood to include the financing or the attempt at financing those offences.
  3. The maximum, of the principal sentences for the crime shall be reduced by half in case of preparation.
  4. Article 47, third and fourth paragraph apply equally.
  5. The term 'objects' means all goods and all property rights
289. This wording excludes the indirect or unlawful provision of funding for the commission of a terrorism offence as set out in article 2(a) of the TF Convention.

290. Pursuant to Article 146:
1. Participation in an organization aiming at committing crimes is punishable with an imprisonment not exceeding five years.
  2. Participation in another organization prohibited by general ordinance is punishable with an imprisonment not exceeding six months or a fine not exceeding three hundred guilders.
  3. With regard to the founders or directors these punishments can be increased by one third.
291. Pursuant to Article 146a:
1. Participation in an organization aiming at committing terrorist offences carries an imprisonment not exceeding eighteen years.
  2. Founders, leaders or directors of an organization referred to in the first paragraph will be punished with life imprisonment or a temporary imprisonment not exceeding twenty-four years.
  3. With the term participation as described in the first paragraph is also meant the rendering of financial or other material support as well as the acquisition of funds or persons in favor of the organization described in the first paragraph.
292. As earlier indicated, TF (to some extent) and the attempt thereto are criminalized in article 48a second paragraph of the Penal Code: the preparation of a terrorist offence. According to the first paragraph of article 48a of the Penal Code, criminalization is limited to the preparation of a crime carrying an imprisonment of eight years or more. The concept of the preparation offers a broad criminal liability. Preparation precedes the proper attempt to commit a crime and consists, among other things, of the acquisition, manufacturing, importing, forwarding, exporting and the possession of goods intended to commit a crime. What matters when preparing a crime is the behaviour preceding the conduct as described in the offence. Punishable preparation consists of completely different acts from those of an accomplished criminal offence. The available goods should be intended for the preparation of the specific offences the suspect intended to commit.
293. The Authorities have expressed the view that pursuant to article 48a of the Penal Code financing of terrorist offences extends to any person who wilfully provides or collects funds by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part to carry out a terrorist offence. However, as earlier indicated article 48a excludes reference to the indirect or unlawful provision of funding for the commission of a terrorism offence as set out in article 2(a) of the Terrorist Financing Convention. The wilful element is in the provision or collection of funds “intended to commit a terrorist offence”. The wilful element has both a subjective part and an objective part. (HR February 20, 2007, LJN: AZ0213). The criminal intent can be concluded from the nature of the goods and/or the facts surrounding the conduct, including the objective of the perpetrator. This means that the wilful element can also be concluded from the objective circumstances.
294. Terrorist organization has been criminalized in article 146a. In addition to article 48a of the Penal Code article 146a of the Penal Code is also applicable.
295. Authorities have expressed the view that the financing of terrorist offences extends to organizations as well as individuals in view of articles 48a of the Penal Code. However, from a reading of article 48a, the wilful provision of funds etc. to individual terrorists does not appear to be covered by the approach to terrorist financing in the Penal Code.
296. Article 48a of the Penal Code refers to “objects” which is defined as meaning all goods and all property rights. Article 146a refers to the “rendering of financial or other material support”, neither provision limits the reference terms to refer to illegitimate sources. It appears therefore



that under the Penal Code it could be argued that the TF offence includes funds whether from a legitimate or illegitimate source.

297. The concept of preparation does not require: a) that the actual offence must have been committed. The Authorities provided case law to support this interpretation of the Code (HR 20 February 2007, LJN: AZ0213) and b) that the funds be linked to a specific offence (in the sense that the real purpose must have been determined), the spot or the moment for committing the offence (HR 29 February 2007, LJN: AZ0213).
298. It also does not appear that that an attempt to commit TF is required. Note that under article 48a preparation occurs when a person acquires etc. objects, materials etc., intended to commit that crime. Case law was provided in support of this position HR 20 February, 2007, LJN: AZ0213. It was further noted that article 146a of the Penal Code criminalizes participation in an organization aimed at committing terrorist offences and participation includes the rendering of financial or other material support as well as the acquisition of funds or persons in favour of the terrorist organization.
299. Neither article 48a nor article 146a requires that an offence be actually committed or attempted. Article 48a also criminalizes attempts at financing the intended crime referred to in paragraph 1 of article 48a.
300. The Authorities have indicated that the concept of preparation does not require that the funds be linked to a specific offence case law was provided in support of this position HR 20 February, 2007, LJN: AZ0213.
301. Articles 47 of the Penal Code must be read in conjunction with article 48a of the Penal Code. Article 47 states that:
  - 1) An attempt to commit a crime is punishable when the perpetrator's intent has been revealed by a start of the execution.
  - 2) The maximum, of the principal sentences attached to the crime shall be reduced by one third in case of an attempt.
  - 3) If it is an offence carrying a lifelong sentence then a prison sentence shall be imposed not exceeding twenty-four years.
  - 4) An attempt shall carry the same additional penalties as a completed offence.
302. It would appear that participation in a terrorist organization (at article 146a) could be interpreted as one aspect of financing of terrorism at article 48a of the Code. From the foregoing it is not clear whether II.1 (a)(iii) (wilful provision of funds etc. to individual terrorists) of the TF Convention is covered by the approach to terrorist financing in the Penal Code.
303. The predicate offence regime for ML covers all serious crimes and extends to the widest range of predicate offences (HR 7 October 2008, NJ 2009, no 94). The legislation does not set restrictions to the scope of the ML provisions and from the legislative history it can be deduced that the legislator has not intended to set other limitations concerning the predicate offence from which the object of the ML actions originate, then that it should concern an offence.
304. Article 48a of the Penal Code does not require that the offence that was prepared should have occurred in Sint Maarten or in the Kingdom of the Netherlands (HR 10 February 2009, LJN: BG1648. In this case a person was prosecuted for the preparation of a serious offence that would have taken place in Germany)

305. Article 4 of the Penal Code also reflects the criminal statutes are applicable in certain circumstances where offences are committed outside of Sint Maarten, however TF is not included in the list of offences described in this aspect of the Code.
306. From our reading of articles 4(a) and 5(1) of the Penal Code it is possible that articles 4(a) and 5(1) of the Penal Code could be also applicable to criterion ECII.3.
307. Sint Maarten sees to it that criteria 2.2. to 2.5 (in R.2) are also applicable with regard to TF.
308. The Authorities have provided summaries of decided cases in which, (re: HR 27 September 2005, NJ 2006) the judgment reflected that the intention element of the offence of ML was met based on the fact that the funds involved in the case could not have originated in any other manner than by means of the offences as described in the relevant article; (re: HR 28 September 2004, NJ 2007) the Court deduced that the funds in that case, under the circumstances, could not have originated from sources other than from criminal offences described in the relevant article. There is no decided case regarding the offence of TF as yet, however it appears that if a prosecution for the offence of TF takes place, then once the relevant facts of the case are established there would be basis for a court to consider and determine that the intentional element of the crime has been met based on the facts established and /or deduced from objective circumstances as indicated below.
309. The intentional element of TF can be deduced from objective circumstances. In article 48a of the Penal Code the financing of terrorist offences extends to any person who wilfully provides or collects funds by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part to carry out a terrorist offence. The wilful element is in the provision or collection of funds “intended to commit a terrorist offence”. The Authorities have also provided summaries of decided cases which confirm that the wilful element has both a subjective part and an objective part (HR 20 February 2007, LJN: AZ0213). The criminal intent can be concluded from the nature of the goods and/or the offences surrounding the conduct, inclusive the objective of the perpetrator. This means that the wilful element can also be concluded from the objective circumstances.
310. As indicated, Article 53 of the Penal Code stipulates that criminal offences can be committed by natural and legal persons. Given that some Terrorism activities and some elements of TF are offences under the Penal Code, the provision at article 53 means that legal persons are criminally liable for ML, and, in so far as the Penal Code covers this, Terrorism and TF.
311. As indicated earlier in this Section, the Authorities have indicated that parallel criminal and civil proceedings are possible however no actual reference in the law was indicated, no case law was cited, and no practical examples of the application of parallel procedures were provided to the team in support of this assertion by the Authorities.
312. From a reading of article 48a no specific penalty is indicated for the offence of TF. Under article 146a participation (including rendering financial or material support) in an organization aimed at committing terrorist offences carries an offence of imprisonment for a term not exceeding 18 years; or 24 years to life imprisonment in the case of founders, leaders or directors of such an organization. This article does not specify a penalty for the legal person which participates in such an organization.

***Recommendation 32 (terrorist financing investigation/prosecution data)***

313. In Sint Maarten so far there have been no investigations into terrorist financing since no information was received or obtained that such activities were or are taking place on Sint Maarten. A Threat Assessment report on terrorism for the Netherlands Antilles and Aruba was conducted by the Dutch National Coordinator on counter-terrorism in 2008. This assessment

concerning terrorism, including facilitating terrorism through financing, was presented to the Parliament of the former Netherlands Antilles. (Nationaal Coördinator Terrorisme bestrijding, May 1, 2008).

## 2.2.2 Recommendations and Comments

314. Article 48a of the Penal Code should be revised to expressly criminalise the indirect or unlawful provision of funding for the commission of a terrorism offence as set out in article 2(a) of the Terrorist Financing Convention.
315. Article 48a of the Penal Code should be revised to expressly criminalize the wilful provision of funds etc. to individual terrorists.
316. Penal Code should be revised to independently criminalize Terrorism Financing.
317. Penal Code should be amended to incorporate specific penalties for the offence of TF.
318. Article 146a of the Penal Code (which extends to participating in a terrorist organization) should be revised to specify a penalty for the legal person who participates in such an organization.
319. The Authorities should amend the Penal Code to criminalize all the offences referenced in the Conventions and Protocols referenced at Annex 1 to the TF Convention.

## 2.2.3 Compliance with Special Recommendation II

	Rating	Summary of factors underlying rating
SR.II	NC	<ul style="list-style-type: none"> <li>• No specific penalty is reflected in the Penal Code for the offence of TF.</li> <li>• The indirect or unlawful provision of funding for the commission of a terrorism offence is not criminalized.</li> <li>• The wilful provision of funds etc. to individual terrorists is not criminalized.</li> <li>• TF is not independently criminalized and therefore there is no comprehensive treatment of terrorist financing in the Penal Code as required by the TF Convention.</li> <li>• The Penal Code does not specify a penalty for the legal person which participates in an organization aimed at committing terrorist offences.</li> <li>• Not all terrorism offences referenced in Annex 1 to the TF Convention are criminalized as required.</li> </ul>

## 2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)

### 2.3.1 Description and Analysis

#### **Recommendation 3**

320. Confiscation of property is regulated in article 35 of the Penal Code. The Authorities have indicated that 'confiscation' means the permanent deprivation of funds or other assets by order of a court whereby the ownership is transferred to the government. It is an additional punishment imposed by the court and is linked to a criminal conviction.
321. Article 35 of the Penal Code allows the confiscation of objects (which under this aspect of the code means all goods and all property rights). Susceptible to confiscation are:

- a) objects belonging to the convicted person or which he can totally or partially use for his own purposes and which for the most part have been obtained by means of a criminal offence (article 35(1)(a));
  - b) objects related to the crime committed; (article 35(1)(a));
  - c) objects instrumental in committing or preparing the offence (article 35(1)(b));
  - d) objects instrumental in obstructing the tracing of the offence (article 35(1)(d); (i.e. Computers or any other object used to obstruct the tracing of an asset)
  - e) objects that were manufactured or were intended to commit the offence (article 35(1)(e);
  - f) real rights on or personal rights concerning the objects referred to in the a) up to and including e) above'. (article 35(1)(e)).
322. Objects at b) – e) or rights at f) which do not belong to the convicted person can also be confiscated if the person to whom they belong –
- i. knew they were acquired by means of a criminal offence or designated for use in the commission of an offence or to be used for such purpose; or
  - ii. knew the purpose of such objects.
323. Objects at b) – e) which do not belong to the convicted person can also be confiscated if it is not possible to identify the owner of such objects. (see article 35 (2) and (3))
324. Article 35 requires that the object which is subject to confiscation be, among other things, objects which for the most part have been obtained by means of a criminal offence. Under article 35, 'objects' means all goods and all property rights).
325. In addition, to Confiscation referred in article 35, the Penal Code also provides for the withdrawal from circulation and dispossession of unlawfully obtained benefit are regulated in articles 38a-38e of the Penal Code.
326. “Withdrawal from circulation (articles 38b-d) is a measure imposed by the court which implies the permanent deprivation of seized objects with the objective to destroy the objects where these comprise drugs or weapons. This measure can also be imposed without a conviction since the possession of the object in itself is illegal. The dispossession of unlawfully obtained benefits (article 38e) is a measure imposed by the court in a separate court decision at the request of the Public Prosecutor, which obligates the convicted person of a punishable offence to pay a sum of money to the government with the objective to take away the benefits obtained by means of or from proceeds of crime.
327. The dispossession provision of article 38e of the Penal Code comprises a system that is based on a so-called 'balance of probabilities' (i.e. civil forfeiture). In case of confiscation there is a shift in the burden of proof, instead of the reversal of the burden of proof. Dispossession can be imposed on:
- comparable or serious crimes in case of sufficient indications the accused has committed a similar criminal offence (article 38e paragraph 2 of the Penal Code);
  - other criminal offence, based on a special financial criminal investigation, that it is likely that these crimes have resulted in unlawful profit in another way (article 38e paragraph 3 of the Penal Code).
328. The judge shall determine the amount, based on the estimation of the unlawfully obtained benefit. Benefit includes the savings on the costs. The value of the objects considered by the judge to form part of the unlawfully obtained benefit is estimated on the benefit obtained by the person against whom the action was brought and hereby the concrete circumstances are taken into consideration. The judge can determine a lower amount than the estimated benefit. The Authorities have advised that such a determination can be made in circumstances such as where post conviction the actual assets available for confiscation are less than before the

conviction then the Prosecution has the option of requesting the benefit estimated at the beginning of the trial to be lowered.

329. The Authorities have also indicated that when determining the amount on which the unlawfully obtained benefit is calculated the legally awarded claims to the third party are deducted.
330. The previous decision with regard to the imposed obligations for the payment of a sum of money for the dispossession of unlawfully obtained benefit shall be taken into account when imposing a measure.
331. As for unlawfully acquired benefits, there are roughly three ways to assess the value of these benefits (based on case law):
- Transaction based calculation (in case of a single criminal offence);
  - Calculation based on cash statements (in case more than one offence has been committed) or;
  - Asset comparison.
332. The Authorities also indicated that confiscation of property or property rights derived from (culpable) money laundering or terrorist activities intended for the use thereof or that will be used therefore possible based on article 35, a, b, c, d and f of the Penal Code. Withdrawal from circulation shall take place in conformity with article 38a up to and including d of the Penal Code. Seizure of criminal proceeds and instruments is possible for principal proceeds.
333. Article 35(2)-(3) reflects that confiscation is available against objects as well as the real rights on or personal rights regarding objects even where such objects or rights are owned by persons other than the convicted person as indicated above. Confiscation of property of a third party is not possible, if the latter could not reasonably have suspected that the proceeds of the objects originated from a criminal offence. The moment the third party could have suspected that the proceeds of the objects were derived from a criminal offence he can also be suspected of a criminal offence and can be penalized. Based on case law the costs made for the acquisition of the proceeds of the accused can also be included in the estimation of the amount of the criminal proceeds. Costs incurred by the PPO Public Prosecutor in the seizure, confiscation, withdrawal from circulation procedure, and dispossession of unlawfully obtained benefits are not payable by the accused. Costs are only recovered by the State if seizure or confiscation verdicts are obtained and the objects (i.e. assets) sold and proceeds realized.
334. The grounds for seizure are set out in articles 119 and 119a of the Penal Procedures Code. Article 119 states that:
- 1) Susceptible to seizure are all objects and claims that can serve to reveal the truth or to prove unlawfully obtained benefit as referred to in article 38e of the Penal Code.
  - 2) Susceptible to seizure are furthermore all objects and claims, whose confiscation or withdrawal from circulation can be ordered.
335. Article 119a states that:
- 1) In case of suspicion of an offence carrying according to legal definition an imprisonment of maximum four years or more years, or of an offence on which a monetary benefit of some importance can be gained objects can be seized in order to secure the right of recourse relating to a fine to be imposed in respect of that offence.
  - 2) In case of suspicion of or conviction for a crime carrying according to legal definition, an imprisonment of maximum four years or more years, or of an offence on which a monetary benefit of some importance can be gained objects can be seized in order to secure the right of recourse in respect of the obligation to be imposed in connection with that offence to pay a sum of money to the country for the dispossession of unlawfully

- obtained benefit, as referred to in article 38e of the Penal Code;
- 3) The term ‘objects’ means all goods and all property rights.
336. The Authorities have indicated that ‘seizure’ prohibits the transfer, conversion, disposition or movement of funds or other assets on the basis of an action initiated by a competent authority or court, allowing the competent authority or court to take control of specified funds or other assets. This includes the possibility to freeze funds and other assets.
337. Both the criminal investigation (article 119 of the Penal Procedures Code) and the provisional measures in order to ensure the execution of a future (value based) dispossession order or payment of a fine (article 119a of the Penal Procedures Code) can serve as grounds for seizure. In the first case, only the suspicion of a criminal offence is required. In the latter case the seizure order may be issued by an examining magistrate (article 129a of the Penal Procedures Code), or in the case of a special financial criminal investigation already authorized by an examining magistrate, by the Public Prosecutor. The seizure order may cover goods and property rights (article 119a3) that may be subject to confiscation or withdrawal from circulation, if the criminal offence is punishable with a maximum penalty of four years imprisonment or is related to a felony based on which a monetary benefit of some importance can be gained. Financial aspects of a criminal offence can be examined in the main criminal investigation. (Article 38e 3).
338. For the dispossession of unlawfully obtained benefits (article 38e of the Penal Code) a notice of service (prior notice) addressed to the person in question is required, this in conformity with article 503a, et seq of the Penal Procedures Code. The Authorities have indicated that for a provisional confiscation at the request of a foreign State article 597a–d of the Penal Procedures Code is applicable and that; for this no prior notice addressed to the person in question is needed. The seizure of a property shall be initiated by the Public Prosecutor, sometimes after the authorization by the examining magistrate. The application is ex-parte, without prior warning.
339. In the Penal Procedures Code, powers to identify and trace assets are based on the provisions of search and seizure and mandatory handover of documents and records. Article 119 reflects that matters subject to seizure are all objects and claims that can serve to reveal the truth or to prove unlawfully obtained benefit as referred to in article 38e of the Penal Code.
340. The mandatory handover of documents and records is also possible under article 127 which states that “In case the Perpetrator is caught while committing the offence, the Public Prosecutor may in the event of urgent necessity, and pending the decision of the examining judge, demand that the packages, letters, documents and other records entrusted to the postal services, the telegraph service or to another institution, shall be surrendered for seizure, against receipt; on condition that such articles are evidently intended for and originate from the suspect.”
341. Article 127 also states that “Any person who, for transportation purposes, has or obtains custody of such objects, shall on demand of the Public Prosecutor or of the acting Public Prosecutor, provide the desired information about such objects.” Article 123 is applicable in relation to certain criminal offences (at articles 97 -102, 103a -104c, and 245, 256, 258, 260, 265 or 447 of the Penal Code). It stipulates that investigating officers shall at all times have the authority, for the purpose of conducting a seizure, to demand the surrender of all objects that are susceptible to seizure.
342. Articles 125 and 126 reflect in case of persons having the right to refuse to give evidence under article 252 of the Code, that searches cannot proceed unless this can be undertaken without breaching clerical, official and professional secrecy; and in case of residences nothing shall be seized unless the occupants have refused to voluntarily surrender the objects for

confiscation and the seizure is urgently necessary in the interests of the investigation. The occupants must be given the opportunity to give an explanation of the seizable goods found in the premises if this is not contrary to the interests of the investigation.

343. Article 130 states that the examining judge has the authority to seize all objects that are susceptible to seizure subject to article 125. Article 131 states that the examining judge can give orders that a person who, by reasonable assumption may be suspected to be the holder of any specified object which is susceptible to seizure, shall surrender said object to the examining judge in order to be seized or to convey such object to the office of the Court of First Instance within the period and manner stipulated in the Order.
344. Articles 136, 137, 139 and 140 of the Code also permit the search of any location in order to impose a seizure subject to article 125. The power to search and seize extends to the inspection of the contents of packages, letters, documents and other records that are seized which were entrusted to the postal and telegraph services, or to another institution, in case they are destined for the suspect or originate from him.
345. Article 177a–g of the Penal Procedures Code allows the Authorities to pursue a criminal financial investigation in relation to-
- a) a criminal offence which is punishable by imprisonment for a term not exceeding four years or more, or
  - b) an offence by which a benefit of some significance capable of being expressed in money, is acquired.
346. Article 177a states that a criminal financial investigation shall aimed in determining the benefit illicitly gained with the purpose of confiscation such benefit.
347. Article 177b refers to powers to demand the production of statement or handing over of records or data pertaining to the financial position of the persons who are the subject of a criminal financial investigation. Article 177c refers to the authority of the PPO, during the criminal financial investigation, without any further judicial authorization, to order that objects shall be seized by virtue of article 119a. Additionally, this Article also provides that the PPO, when necessary in the interest of the criminal financial investigation, can demand that the examining judge carry out a search of the premises or exercise powers such as carry out a search of premises for the purpose of seizing all objects that may be used to prove any illicit gains acquire by the persons who are the subject of a criminal financial investigation.
348. Article 177d establishes that in case of urgent necessity, the PPO, for purposes of seizure, could carry out a search of the premises in any location where documents and data are presumably kept, or where assets can be found which represent a benefit within the meaning of Article 38e of the Penal Code. Article 177f provides that the court of first instance shall guard against needless delay of the criminal financial investigation. In addition, at the request of the person under investigation, the Court may demand that the documents relating to the investigation shall be submitted to it and order that the investigation shall be stopped immediately or as soon as possible
349. The Authorities have indicated that these powers may be used both for basic investigative purposes and in support of potential confiscation. In general, these powers are available if there is a suspicion that a criminal offence has been committed. Although not very often practiced, it is tried in major criminal investigations, and certainly those involving large criminal proceeds, to conduct systematic specific investigations aimed at identifying, tracing and freezing the proceeds of crime. Seizure under article 119a of the Penal Procedures Code is an option whenever there is the suspicion of criminal activity carrying the penalty of four or more years of imprisonment. This applies to all criminal provisions relating to money laundering. Assets may be seized with a view to a fine and/or prison sentence to be imposed at

a later date. Their scope covers authority for searching by the Public Prosecutor of dwellings, offices and other places, and means of transportation. In the framework of the Criminal Financial Investigation, some powers to search are simplified. Article 119a Penal Procedures Code gives the investigating officers the power to enforce surrender of documents. Article 120 of the Penal Procedures Code provides the powers to seize documents and goods. This can include the sequestering of incriminating information or other information held by financial institutions. Relating to this article 130 Penal Procedures Code states that the examining magistrate may seize and search goods e.g. computer systems.

350. Article 177<sup>e</sup> of the Penal Procedures Code refers to articles 125 and 126 of the Penal Procedures Code with the provisions that the right to refuse to give evidence and the rights of inviolability of bona fide third parties must be respected. Article 86 of the Book 3 of the CC grants civil law protection to bona fide third parties.
351. Article 35, (2) (3) of the Penal Code protects the rights of bona fide parties by setting out specific conditions under which third party goods may be confiscated, basically requiring knowledge of the third party with regards to their criminal provenance, use or destination. Third parties can challenge the seizure of their goods by using the procedure of article 150 of the Penal Procedures Code. The same applies for creditors of these third parties
352. Regarding the possibility of voiding contracts aimed at frustrating seizure, confiscation or confiscation orders, a contract of which a person knows or should know that it will prejudice authorities in a recovery, is unenforceable under laws of Sint Maarten. Article 40 of Book 3 of the CC declares legal actions (such as contracts) performed in breach of a mandatory legal provision or public order to be null and void. This would apply, for example, if entering into the contract constituted a criminal offence or if the contract was concluded to hinder the ability of the state to recover a financial claim. In addition, pursuant to article 119d section 2 of the Penal Procedures Code, the Public Prosecutor may declare null and void fraudulent conveyances, which include legal acts, performed by an accused or convicted person in the year preceding the commencement of an investigation of the person. Furthermore, article 204 of the Penal Code criminalizes the withdrawal of seized goods, imposing a maximum penalty of four years imprisonment

### ***Effectiveness issues***

353. As indicated in section 2.1 there is no confirmation that the offenses of illicit trafficking in arms, smuggling, insider trading and market manipulation are criminalised as ML predicate offenses by Sint Maarten. In this absence, it is not possible to conclude that confiscation and provisional measures would apply to those predicate offenses as required.
354. In addition in section 2.2, it was concluded that TF was not properly criminalize in accordance with the TF Convention. The inadequacy of the criminalization of TF is limiting the effective applicability of Sint Maarten's confiscation mechanisms to TF offences as required.

### **Additional Element**

355. Any property owned by organizations can be seized. Proceeds of offences other than the offence for which there has been a conviction can be the subject to withdrawal from circulation when it is 'likely' that those offences have been committed (article 38b, paragraph 1, section b and c of the Penal Code).
356. The dispossession system of article 38e of the Penal Code is based on a 'balance of probabilities', which leads to a shift of the burden of proof, rather than a reversal of the burden of proof. Dispossession may be imposed for:



- Offences (similar to the one for which the person has been convicted) or offences from which monetary benefit of some importance can be gained (including corruption) in case there are sufficient indications that the accused has committed any such offence (article 38e, paragraph 2 of the Penal Code);
- Other offences in case it has become plausible, based on a special financial criminal investigation, that these offences led in any way to illicit earnings (article 38e, paragraph 3 of the Penal Code).
- The judge estimates the amount to be confiscated based on legal proof (article 503 of the Penal Procedures Code).

### *Statistics*

357. As reflected in the Table presented in section 2.1 some statistics were presented for confiscation. However, the statistics were not segregated as to whether the amounts confiscated relate to either a predicate offense or to ML. Also there is no indication on the number of cases where confiscation has been applied. In this regard, assessment of the true effectiveness of the confiscation and preventive regime was not possible based on how the data was captured and presented in the statistics.

#### 2.3.2 Recommendations and Comments

358. The Penal Code should ensure the effective applicability of Sint Maarten's confiscation mechanisms to Terrorist Financing offences according to the TF Convention and all the designated categories of predicate offenses (refer to paragraph 280).
359. The confiscation measures under the Penal Code should be revised to allow for the pre-conviction and post-conviction measures to be imposed without notice.
360. The Authorities should ensure that comprehensive statistics are maintained in relation to the investigation, prosecution, and conviction of ML related cases.

#### 2.3.3 Compliance with Recommendations 3

	Rating	Summary of factors underlying rating
<b>R.3</b>	<b>PC</b>	<b>Effectiveness issues</b> <ul style="list-style-type: none"> <li>• <b>The powers to confiscate or take provisional measures in relation to terrorist financing or some predicate offences for ML are limited (please see ratings R1 and SR.II)</b></li> <li>• <b>Confiscation measures (under both pre-conviction and post-conviction circumstances) in the Penal Code do not allow for the measures to be imposed without notice.</b></li> <li>• <b>Based on the insufficient statistics effectiveness of the confiscation regime could not be confirmed.</b></li> </ul>

## 2.4 Freezing of funds used for terrorist financing (SR.III)

### 2.4.1 Description and Analysis

#### **Special Recommendation III**

361. In Sint Maarten the legal system for seizure also covers freezing of funds and other assets. Besides the criminal procedure of confiscation there is also the administrative procedure.

362. The Sanctions National Ordinance (SNO) was introduced in 1997 to impose instructions in accordance with international decisions, recommendations, resolutions and agreements “with regard to maintenance or restoration of international peace and security or promotion of international system”. On the recommendation of the Minister or the Ministers the rules described in the SNO can be adopted, by National Decree providing for general provisions (SNO, Article 2). The referred rules “may be cover the “traffic of goods, services and payments, shipping, air traffic, road traffic, post and telecommunications, with regard to states or territories to be designated in a sanctions national decree to be issued (SNO, Article 3.1)
363. The Authorities are of the view that the broad language of the SNO allows them to issue Sanction National Decrees (SND) regarding the implementation of measures to freeze terrorist funds pursuant to the United Nations Security Council Resolutions. Additionally the Authorities have indicated that the Department of Legal Affairs will ensure the legality of the provisions. The Examiners were able to confirm that the following SND had been issued
- Sanctions National Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s. and locally designated terrorists( N.G. 2010, no. 93) (SNDATO);
  - Sanctions National Decree Democratic People’s Republic of Korea (N.G. 2010. No. 9)
  - Sanctions National Decree Islamic Republic of Iran (N.G. 2010. No. 92)
364. The Sanctions National Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s. and locally designated terrorists ( N.G. 2010, no. 93) (SNDATO); 1267, 1333, 1363, 1368, 1373, 1390 and 1526
365. The SNDATO determines that everyone is forbidden to perform, directly or indirectly, any act of management or act of dispositions concerning funds or assets, whether or not the proceeds of or generated from funds or assets that are kept with natural persons, credit institutions or other enterprises or institutions established in Sint Maarten and belonging, directly or indirectly, in full or in part, to, or at the disposal of, or are managed, directly or indirectly by:
- Al-Qaida, the Taliban of Afghanistan, Osama bin Laden and also representatives of the aforementioned together with the natural persons, enterprises or organizations such as designated by the Al-Qaida and Taliban Sanctions Commission of the United Nations. (Article 1.1)
  - either or not locally designated terrorists, or those who finance terrorism, either or not locally designated terrorist organizations together with the representatives of the aforementioned, as designated by the Ministers of Finance and Justice. (Article 1.2)
366. In addition the SNDATO prescribes that everyone is forbidden, directly or indirectly, from making payments in any way whatsoever (article 2), or placing funds or other financial means at the disposal of (article 3)
- Al –Qaida, the Taliban of Afghanistan, Osama bin Laden as well as to the natural persons, enterprises and institutions as designated by the Al-Qaida and Taliban Sanctions Commission of the United Nations wherever established, directly or indirectly owned or managed the aforementioned as well as by their representatives.
  - terrorists whether or not designated locally, or to those who finance terrorism, or to terrorist organizations whether or not designated locally, as well as to representatives of the aforementioned, as designated by the Ministers of Finance and Justice.
367. It is also forbidden to the natural persons as well as to their relatives, referred to in paragraph 1 of Resolution 1526 of January 30, 2004 of the United Nations Security Council to travel to Sint Maarten or travel via Sint Maarten (Article 4.1). The natural persons referred to in the first paragraph do not include the residents of Sint Maarten, as well as other natural persons to whom the National Ordinance on Admission and expulsion is not applicable (article 4.2). Everyone is forbidden in any way, directly or indirectly, to give cooperation to actions described above as forbidden (Article 5).

Procedures to freeze terrorist funds in accordance to Res 1267 and its successors

368. Based on the SNDATO, Sint Maarten has issued the “Protocol concerning the procedures to be followed when freezing terrorist funds appearing on the list of the U.N.” (Protocol UN-lists). According to the Protocol UN-lists:
369. Upon being adopted, the UN Resolutions with regard to terrorism will be presented by the Directorate of Foreign Relations for further distribution to the following supervisors: the Central Bank, the FIU (MOT) and the Gaming Control Boards of the island territories (Not established in Sint Maarten). These supervisors will subsequently distribute the UN Resolutions among (financial) institutions supervised by them. The terrorist lists that form part of the UN Resolutions (hereinafter to be referred to as UN lists) should also be presented to the CIWG (Not established in Sint Maarten), the Directorate of Legislation and Legal Matters, the Directorate of Judicial Matters, the Directorate of Finance and the PPO.
370. In the reports on terrorism (coordinated by the Directorate of Judicial Matters) reference back, among other things, is made to these resolutions, and the Kingdom reports to the PPO on the measures executed as a result. The PPO acts as the contact with the “United National Al-Qaida and Taliban Sanctions Committee”.
371. The steps to be taken in case of a match on the basis of the Protocol UN-lists are as follows:
- If any (financial) institution should establish that the identity of a client/relation agrees with a (legal) person or entity on the UN lists, such institution will report it to the Central Bank and the FIU (MOT) without delay. With the report the institution will also submit the data of the identity of such client/relation to the supervisor.
  - The financial institution will freeze the assets of the client/relation involved without delay on the ground of Sanctions National Decrees referred to above.
  - The Central Bank will pass on this information to the VDSM.
  - The VDSM will investigate if the person reported is identical to the person on the UN lists.
  - In case of a hit the VDSM will inform the PPO of the fact, so that criminal proceedings can start.
  - The results of the investigation of the VDSM will also be reported to the Central Bank.
  - The Central Bank will report the results to the (financial) institution involved.
  - In case of a match the (financial) institution will terminate the service to the relation. The assets will remain frozen.
  - In case there is no match, the (financial) institution will release the assets within reasonable period of time.
  - The (financial) assets of persons or institutions that have a name comparable to that of a person or institution appearing on the UN lists whose assets have been frozen, and freezing is due to an error, will have to be released after due verification.
  - The names of persons or institutions which, upon due investigation, show no similarity with those on the UN lists, should be cleared.
  - If the names of persons and institutions are eliminated from the UN list (“delisting”), the assets will be released to the parties involved (“unfreezing”), whether or not at the request of the parties involved, after verification by the VDSM
372. Given the above indicated process meaning of the term ‘without delay’ is not defined. Authorities and some obligated institutions advised the Examiners that ‘without delay’ means immediately. However the Authorities should consider defining the term to ensure appropriate compliance by all obligated institutions.

373. Interviews with participants in the insurance sector revealed an understanding that freezing may not necessarily be automatically applied in relation to the Protocol UN-lists. The explanations provided were that the morality of risk element in insurance policies would result in a policy being discontinued by default if a case of TF was identified. Additionally the ability to freeze claim disbursements would be informed by advice of the FIU (MOT), terms in the policy that would allow for claims not to be honoured and in-house legal advice and proceeding would occur on a case by case basis.
374. Additionally, the Authorities have advised that under article 7 of the SNO, in urgent cases, freezing orders can be issued by the Prime Minister, and the Minister(s) to whom it concerns jointly without delay and without prior notice to the persons by Ministerial Decree. A recent example cited was the issuance of the Libya freezing order to all institutions supervised by the Central Bank. The Ministerial Decree must within ten months be replaced by a National Decree containing general measures (Article 8, paragraph 2, of the Sanctions National Ordinance).
375. As indicated earlier, the SNDATO implements Resolutions 1267, 1333, 1363, 1368, 1373, 1390 and 1526. However the other successor Resolutions such as 1455 and 1452 are not implemented by the SNDATO.
376. The Examiners are concerned with what appears to be a limitation in the ability of Sint Maarten to implement freezing orders in accordance with subsequent terrorist related Resolutions without having to issue subsequent Sanctions National Decrees, as in Sint Maarten it is necessary to issue SNDs in order to implement UN Security Council Resolutions. This could have implications for responding to such matters without delay as contemplated by the 1267 related freezing mandates.

*Procedures to freeze in accordance to Res 1373*

377. Based on the SNDATO, Sint Maarten has issued the “Protocol concerning the procedures to be followed when freezing funds of locally designated terrorists” (Protocol local terrorists or otherwise) pursuant to UN SEC Resolution 1373 (2001).
378. Based on the Protocol local terrorist or otherwise, the VDSM will keep a data bank of local persons, enterprises or institutions that are possibly involved in terrorism, terrorist financing and/or terrorist acts in and from Sint Maarten and are not mentioned on the UN lists.
379. Steps to be taken in case of a hit on the ground of lists of the VDSM are fairly similar to the ones laid out in the Protocol UN-lists:
- The VDSM will establish and investigate the suspicious activities of the aforementioned persons, enterprises or institutions.
  - In case the VDSM has reasonable suspicion that a person, enterprise or institutions is or was guilty, in or from Sint Maarten, of terrorism, financing of terrorism and/or terrorist acts, the VDSM will inform the PPO of such fact, so that criminal proceedings can start.
  - The findings of the VDSM will be passed on to the Central Bank and FIU(MOT)
  - The Central Bank and FIU (MOT) will report the findings of the VDSM to the (financial) institution supervised by them which has a relation with the hit.
  - The (financial) institution which has a relation with the hit will freeze the assets of the relation without delay.
  - If, after the criminal investigation of the PPO, the designation of the VDSM proves to be incorrect, the PPO will inform the Central Bank and the FIU (MOT) of such findings in writing, and the (financial) institution which proceeded to freeze assets at the request of

the Central Bank or the FIU (MOT), will release such assets within a reasonable period of time.

- If the hit has indeed committed a punishable act, the (financial) institution involved will terminate the relation at the request of the Central Bank or FIU (MOT).
- The assets will remain frozen.
- The names of persons, enterprises or institutions which, upon due investigation, are not pointed out by the VDSM, should be cleared.
- Upon the names of persons, enterprises and institutions being cleared, the assets will be released to the parties involved (“unfreezing”), whether or not at the request of the parties involved.
- Upon termination of the criminal investigation, the PPO will report its findings in writing to the Minister of Justice and the Minister of Finance.

380. The SNO does not specifically refer to giving effect to freezing actions initiated by other countries pursuant to UN Resolution 1373. In the case of actions initiated by other countries regarding UN Lists, Sint Maarten would operate based on those same lists. In the cases of a person who has been designated a terrorist in another country, the action taken by Sint Maarten would depend on the level of the mutual legal assistance provided according to Sint Maarten’s regime.

Apart from the existence of a treaty with the requesting foreign state (article 558 Penal Procedures Code), assistance can also be provided based on the existence of dual criminality, i.e. the offence the person is suspected of committing in the foreign State must also be an offence in NA (see articles 555 – 558 and 579a Penal Procedures Code).

381. The Authorities have indicated that freezing actions by the authorized bodies of Sint Maarten are based on the relevant national legislation, as required in Criteria III.1 – III.3
382. The Sanctions National Decree does not expressly refer to assets jointly owned or controlled with designated persons, terrorists or terrorist organizations. Article 1 of the Decree states viz. *“it will be prohibited for all persons to perform...any act of management or disposition with regard to funds or assets, ...and belonging, directly or indirectly, **in full or in part**, to or at the disposal of or are managed directly or indirectly by ....Al-Qaida... and also representatives of the aforementioned entities, and also natural persons, enterprises or institutions designated by the Al Qaida Committees.”* Similar wording applies to same prohibitions regarding assets of terrorists etc. and persons designated by the Ministers of Finance and Justice (i.e. locally designated persons). The Authorities have argued that the Decree fully meets the requirements of SRIII.
383. One element of the terminology for assessing compliance with SRIII is the prevention of funds or other assets being made available directly or indirectly, **wholly or jointly**, for the benefit of designated persons etc. Jointly refers to those assets held jointly between or among designated persons, terrorists, those who finance terrorism ...etc. on the one hand, and a third party or parties on the other hand. The issues for the examiners were whether (1) whether property “held jointly” has the same legal consequences in Sint Maarten as property “held in part” (i.e. the interest in the property is divisible other than equally (and usually cannot be dealt with other than jointly) or the interest in the property is divisible to the extent that the interest can be subject to different obligations and transactions such that a finding that the property should be subject to freezing could only be legally imposed on the divisible interest (or part) known to be held by the terrorist or designated person. In this regard the issue in short is the wording of the Decree raises issues of enforceability of sanctions against the entire asset which is held “in part” by a designated person, terrorist or terrorist organization; and (2) whether assets held by designated persons, terrorists or terrorist organizations with third parties or parties on the other hand, as contemplated by SRIII are covered by this Decree.

These questions could not be answered from a reading of the Decree or the response of the Authorities.

384. The aforementioned Protocols reflect that where the (financial) institution has found a match in its clients or relations with a name on the lists it must immediately report this finding to the Central Bank and the FIU (MOT) in addition to freezing the account. The Central Bank will then pass this information on to the VDSM which will investigate the matter. If the investigation reveals that the client or relation is indeed the person included on the list, this finding is reported to the PPO for the commencement of criminal proceedings. The results of the investigation of the VDSM will be communicated to the Central Bank/ FIU(MOT) which will pass this information on to the reporting .
385. However the Sanctions National Decrees, FATT Protocols and P&Gs issued by the Central Bank do not appear to require or address the matter of the communication of actions taken under the freezing mechanisms in relation to the general financial sector. The Authorities however have indicated that the Central Bank communicates the sanctions to the whole sector and that the sanctions are also published on the Central Bank's website.
386. The Central Bank has a designated contact person for the private sector. Mostly the questions, directed to the Central Bank, are related to the obligations of the financial organizations under the financial preventive measures in connection with the supervision and the enforcement by the Central Bank and about the interpretation of the rules.
387. The SNO, the SND and the Protocols provide clear mandates to FIs and other persons or entities that may be holding targeted funds and other assets with regard to their obligations to take actions in case of seizure measures. The financial institutions regulated by the Central Bank and which were interviewed appeared to be generally knowledgeable about their obligations in relation to these mandates. This was not the case with the majority of DNFBPs. Some DNFBPs that were interviewed did not seem to be aware that they are themselves subject to freezing obligations under the Sanctions National Decrees.
388. Additionally, the P&Gs institutions regulated by the Central Bank contain provisions on the obligation of the supervised institutions with regard to their obligations in taking action under freezing mechanisms. There are no P&Gs in place for institutions not regulated by the Central Bank (i.e. DNFBPs and other persons or entities).
389. In case of a no-match on the UN-lists or lists of locally designated persons or in case the freezing of the goods is due to an error, the (financial) institution must release the assets within a reasonable period of time according to the FATT Protocol UN lists and the FATT Protocol local terrorists or otherwise.
390. Article 9 of the SNO regulates the authority of the Minister or Ministers concerning the exemption or dispensations- granted under the SNO. The Minister or Ministers can grant complete or partial exemption or grant a dispensation of the rules, as described in article 3 of the SNO, after having received a request for that purpose. Based on this it is determined in the Sanctions Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s., and the locally designated terrorists that the Minister of Finance can grant exemption on the bans as laid down in articles 1 up to and including 3 and 5 of the relevant national decree. An exemption can be altered or revoked and a dispensation can be refused, altered or revoked. A decision to grant an exemption as well as a decision to alter or revoke it is published in the National Gazette. An exemption or disposition can be subject to certain regulations. The Minister or the Ministers can revoke an exemption when at the moment of the application the submitted data turned out to be incorrect or incomplete in such a way that a different decision would have been taken if at the time of its assessment the correct circumstances had been known. The revocation shall be informed in writing to the party concerned stating the reasons

of the revocation. The Ministers can simultaneously and jointly revoke the exemptions belonging to the group designated by them, if according to them there are serious reasons to do so. A decision stating the above regulation is announced in the National Gazette.

391. The foregoing process seems to be a separate function from the de-listing or un-freezing processes addressed under the FATT Protocols. As indicated earlier the financial institutions regulated by the Central Bank and which were interviewed by the Team appeared to be knowledgeable about their obligations in relation to the freezing mandates. This was not the case with the majority of DNFBPs (Attorneys and Auditors excepted) which were interviewed by the Team. The Authorities have also acknowledged that outside of the financial services regulated by the Central Bank knowledge of the ML and CFT laws, obligations and related processes is quite limited. Public forums on the ML and CFT laws and obligations hosted by the FIU (MOT) have recently commenced (i.e. between January and March 2012) in relation to the services not regulated by the Central Bank.
392. Although the SNO and SND do not expressly refer to S/RES1452 (2002, the combination of the SNO and the sanctions decrees offer the opportunity to the nationally competent authorities to grant exemptions of the measures in the ministerial decisions or to release the frozen assets, equally to the international norms as S/RES/1267 (1999) (See above).The Government can use these competencies both at the request of an interested party (the designated person or entity, but also third parties with a directly linked interest) and based on its own administration. These procedures correspond with S/RES/1452 (2002).
393. The Authorities indicated that if a person or entity is not content with a particular decision taken by the Government this person or entity can seek judgment with an administrative court, as this national ordinance is administrative by nature. The administrative court will handle the matter in a court case with one or a maximum of three judges. The PPO confirmed that seizures and confiscations by the PPO cannot proceed solely on the basis of the Sanctions National Decree regarding UN lists as that is an administrative process which does not involve the Prosecutorial and other law enforcement processes. The PPO also confirmed that written confirmation of findings from the VDSM along with the Sanctions National Decree would be sufficient grounds to commence prosecutorial proceedings.
394. The Authorities and persons interviewed in the financial sector and non-financial sector have indicated that no FT findings or reports have been made. Accordingly, no specific examples of challenges to the administrative procedure exist; it is therefore not possible to assess the effectiveness of this aspect of the regime.
395. Provisional measures and confiscation of property are treated in section 2.3 of this Report.
396. Article 35, sections 2 and 3 of the Penal Code protects the rights of bona fide parties by setting out specific conditions under which third party goods may be confiscated, basically requiring knowledge of the third party with regards to their criminal provenance, use or destination. Third parties can challenge the seizure of their goods by using the procedure of article 150 of the Penal Procedures Code. The same applies for creditors of these third parties.
397. Article 144 of the Penal Procedures Code mandates the return of seized objects to the person from which they were seized, as soon as they are no longer of significance to the prosecution
398. Article 177<sup>e</sup> of the Penal Procedures Code refers to articles 125 and 126 of the Penal Procedures Code with the provisions that the right to refuse to give evidence and the rights of bona fide third parties must be respected. Article 86 of the Book 3 of the Civil Code CC grants civil law protection to bona fide third parties.

399. There is no wording in the Protocols which indicate that breaches of the Protocols can be sanctioned. The Authorities and regulated sector (financial institution and some DNFBPs regulated by the Central Bank) however appeared to have the understanding that the Protocols are binding and that compliance is mandatory.
400. The SNO contains the penal provisions that are applicable in case of failure to comply with the regulations of or pursuant to said ordinance:
401. Article 20 states that:
- a) Each action contrary to the provisions pursuant to articles 2 or 7, or article 14 is punished, in so far as this has been performed intentionally, with an imprisonment of a maximum of one year, or a fine of a maximum of ten thousand guilders, or with both punishments.
  - b) Each action contrary to the provisions pursuant to articles 2 or 7, or article 14 is punished, in so far as this has not been performed intentionally, with an imprisonment not exceeding four months, or with a fine not exceeding three thousand guilders, or with both punishments.
  - c) The facts, criminalized in the first paragraph, are considered an offence. The facts, criminalized in the second paragraph are considered a misdemeanor.
402. The SNO also indicates the persons who have to supervise the observance of the law. The officials or persons are appointed by National Decree. The decree is published in the Sint Maarten Gazette or **Landscourant**. The National Decree of February 4, 2011 on the appointment of supervisors of the Sanctions National Ordinance designates the Central Bank as the supervisor of compliance with mentioned ordinance for the financial institutions under its supervision. The Central Bank has the legal power to effectively monitor the compliance with the relevant legislation, rules or regulations governing the obligations under SR III. Supervision of compliance with these regulations by financial institutions form part of the ongoing supervision by the Central Bank and is included in the Provisions & Guidelines.
403. According to articles 11-17 of the SNO the designated persons are authorized, exclusively in so far as this is reasonably necessary for the execution of their tasks to:
- a) Ask for all information;
  - b) Demand access to all books, records and other information bearers and have a copy made or to temporarily take them with them;
  - c) Survey and investigate goods, take them with them temporarily for this purpose;
  - d) Enter all places, with the exception of dwellings without the explicit permission of the occupants, accompanied by persons designated by them;
  - e) Inspect vessels, stationary vehicles and their cargo; and
  - f) Enter dwellings or parts of vessels used as dwellings without the explicit permission of the occupant.
404. If needed access to a site is gained with the help of the police. To enter a dwelling or parts of vessels used as dwellings as referred to in the second paragraph, sub f, Title X of the Third Book of the Penal Procedures Code applies equally, with the exception of articles 155, fourth paragraph, 156, second paragraph, 157, second and third paragraph, 158, first paragraph, last phrase, and 160, first paragraph, provided that the powers are granted by the Attorney General. By National Decree, providing for general measures, rules can be laid down concerning the way the duties are performed by the designated persons.
405. Charged with the investigation of the criminalized offences by the Sanctions National Ordinance, apart from the persons referred to in article 184 of the Penal Procedures Code are the designated officials or persons. Such a designation is announced in the Sint Maarten Gazette. By National Decree, providing for general measures, rules can be laid down



concerning the requirements the designated persons or officials pursuant to paragraph one should meet.

406. Under article 18 of the SNO, each person has the obligation to provide the cooperation which can be reasonably demanded by the supervisors and the investigating officials for the execution of their powers.

#### **Additional Elements**

407. The Authorities' position is that the combination of the Sanctions National Ordinance and the Sanctions National Decrees offer the opportunity to the nationally competent authorities to grant exemptions of the measures in the ministerial decisions or to release the frozen assets, equally to the international norms.

#### ***Recommendation 32 (terrorist financing data)***

408. No property has been frozen in relation to suspicions of terrorist financing.

#### **2.4.2 Recommendations and Comments**

409. The substantive freezing mechanism for persons listed pursuant to UN Resolution 1267 (1999) should be reviewed and appropriate adjustments made to ensure that the requirement of acting 'without delay' will be met in relation to subsequent freezing obligations that arise pursuant to terrorist related UN Resolutions that are issued.
410. The Sanctions National Decree should also expressly refer to assets jointly owned or controlled by designated persons, terrorists or terrorist organizations with third parties, and should incorporate wording to clearly communicate the enforceability of sanctions against the entire asset which is held "in part" by a designated person, terrorist or terrorist organization.
411. Sint Maarten should provide guidance to all persons and entities with regard to obligations in taking action under the freezing mechanism
412. The FATT Protocols should incorporate wording to clearly reflect that compliance with these Protocols is mandatory and that breaches of the Protocols can be sanctioned by the Central Bank.

#### **2.4.3 Compliance with Special Recommendation III**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>SR.III</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• <b>The framework does not support an ability to invoke freezing mechanisms in response to a requesting foreign State's freezing requirement.</b></li> <li>• <b>The substantive freezing mechanism for persons listed pursuant to UN Resolution 1267 (1999) would not meet the 'without delay' requirement based on the intervening legislative process between listing by the UN and issue of the requisite Sanctions National Decree which compels the freezing.</b></li> <li>• <b>There is no clear guidance specially to other persons and entities concerning their obligations in taking action under the freezing mechanism</b></li> <li>• <b>The Sanctions National Decree does not expressly refer to assets jointly held by designated persons, terrorists or terrorist organizations with third parties. The wording of the Decree also raises issues of</b></li> </ul>

		<p><b>enforceability of sanctions against the entire asset which is held “in part” by designated persons, terrorists or terrorist organizations.</b></p> <ul style="list-style-type: none"> <li>• <b>There is no wording in the FATT Protocols which indicate compliance with these Protocols is mandatory or that breaches of the Protocols can be sanctioned by the Central Bank.</b></li> </ul>
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## 2.5 The Financial Intelligence Unit and its functions (R.26)

### 2.5.1 Description and Analysis

#### **Recommendation 26**

##### Establishment of Unusual Transactions Reporting Office (MOT)

413. The Sint Maarten FIU, Meldpunt Ongebruikelijke Transacties (MOT), commenced in 2011 after the dismantling of the Netherland Antilles on 10-10-10.
414. The NOIS and the NORUT respectively and their related subsidiary pieces of legislation provide the legal framework for the operations and roles and responsibilities of the FIU (MOT). Article 2 of the NORUT establishes that there is a central national agency known as the Unusual Transactions Reporting Office which falls within the Ministry of Finance. Several of the authorities advised that in actual fact, the FIU (MOT) falls within the Ministry of Justice. The authorities provided the Organisational Decree (Resolution), 2010, No. 11 which relates to the composition of the Ministry of Justice. Article 4 recognises the existence of the Centre for Reporting Unusual Transactions (FIU-MOT) as a part of the Ministry of Justice. However, the NORUT which is a National Ordinance, which sits on a higher tier on the legislative hierarchy than the Decree (Resolution), refers to the fact that the Ministry of Finance is the parent Ministry for the FIU (MOT).
415. The authorities explained that the NORUT, was the status under the Netherlands Antilles and that there will be amendments to the legislation. Notwithstanding the foregoing, the examiners have questioned the legal basis and establishment of the FIU (MOT) as there appears to be a lack of uniformity between the text of the legislation and the actual circumstances.
416. Article 3 of NORUT outlines the tasks of the MOT. The tasks are:
- a. collecting, registering, processing and analyzing the data that it obtains in order to consider whether these data could be of any relevance for preventing and tracing money laundering or the financing of terrorism and the underlying criminal offenses;
  - b. providing data in accordance with the provisions laid down by or pursuant to this Act;
  - c. informing the person who, in accordance with article 11, has reported in view of the correct compliance with the obligation to report, regarding the conclusion of the reporting. In that case, it is only notified whether the provision has taken place in accordance with subparagraph b;
  - d. conducting investigations into developments in the field of money laundering or the financing of terrorism and into improving the methods to prevent or trace money laundering or financing terrorism;
  - e. giving recommendations, after consultation with the Supervisors or professional organizations in question, for the relevant business sectors regarding the introduction of fitting procedures for internal control and communication and other measures to be taken for preventing the use of relevant business sectors for money laundering or financing terrorism;
  - f. giving information to the business sectors and professional groups, the persons and

institutions that are entrusted with the supervision of the compliance with these Acts, the Public Prosecutions Department, the civil servants in charge of tracing offenses and to the public regarding the manifestations and the prevention of money laundering or the financing of terrorism;

g. maintaining contacts with foreign police and non-police agencies, as stipulated by the authorities, that have a task that is comparable to that of the Reporting Office;

h. maintaining contacts with and participating in meetings of international and intergovernmental agencies in the field of combating both money laundering and the financing of terrorism;

i. presenting annually a report of its activities and of its intentions for the coming year to the Minister of Finance, and bringing this report to the notice of the Minister of Justice

417. Additionally, pursuant to Article 11 of the NOIS, the FIU (MOT) has supervisory responsibilities over certain DNFBPs.

418. The FIU (MOT) is an administrative FIU (MOT). After due analysis of the received unusual transactions, and in case of suspicion of ML/TF, these transactions are disseminated to the PPO and law enforcement agencies.

The mission and vision of the FIU (MOT)

419. The mission of the FIU (MOT) is to:

- maintain the integrity of the financial system;
- contribute both nationally and internationally to prevent and combat money laundering and financing of terrorism;
- promote the reporting of unusual transactions;
- build up a widespread network of information exchange with foreign reporting centers with regard to methods, technological applications and analysis techniques, in order to combat money laundering and the criminal activities that are at the root thereof; and make recommendations for improving and developing methods and techniques to combat money laundering and terrorism financing.

420. The vision of the FIU (MOT) is:

- to provide professional support to the judiciary system through analyzing legally gathered information for the prevention, detection, control and prosecution of money laundering-(ers) and to recognize and take advantage of the creative synergy that this creates;
- to build up a widespread network of information exchange with foreign reporting centers with regard to methods, technological applications and analysis techniques, in order to combat money laundering and the criminal activities that are at the root thereof; and
- assist other Financial Intelligence Units in the Caribbean and Central America with trainings and organizing their unit

421. In accordance with the NORUT, all financial institutions and DNFBPs are required to report to the FIU (MOT) all executed and intended unusual transactions. Financial institutions include local banks, credit unions, life insurance companies, trust companies, international banks and money transfer companies. DNFBPs include casinos, company service providers, car dealerships, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals, accountants and administrators.

422. Article 6 of the NORUT provides the definition of unusual transactions. In Ministerial Decree of the Unusual Indicators Transactions Decree of 2010, there is a list of transactions for financial institutions or DNFBPs to ascertain whether a transaction is unusual or not. The

objective indicators are wide-ranging and include transactions in excess of 250,000.00 and transactions by non-account holders in excess NAF 20,000.00 destined for abroad. UTRs submitted based on objective indicators may be considered akin to large cash transactions and electronic fund transfer reports as in other countries. These transactions are reported whether or not there is a suspicion for ML/TF, or there are reasonable grounds to suspect that the funds are proceeds from criminal activity. UTRs submitted as a result of subjective indicators may be considered as STRs. The abovementioned Ministerial Decree lists a number of subjective indicators. This list provides guidance for the reporting entities that suspect or have reasonable grounds to suspect that funds are the proceeds of criminal activity and/or related to ML/TF. The list of subjective indicators is not as detailed as that for objective indicators. In this manner, the guidance for reporting entities appears limited in this nature. During the onsite mission, the examiners queried the reporting authorities with respect to their capacity to execute their obligations with the objective and subjective indicators system. Some entities were of the view that the subjective indicators list could be increased, others stated that they were not restricted in executing their obligations. It appears that this is the case particularly for the local banks as they refer to the general subjective indicator that states “transactions where there is a cause to presume that they may relate to money laundering or terrorist financing.”

423. The examiners were provided Annual Reports for NA FIU for 2008 to 2010 during which time the Sint Maarten financial institutions and DNFBPs reported to that FIU which was based in Curacao. For the NA, some information on Sint Maarten is provided in these documents. Based on the statistics contained in the Annual Reports, local banks are the largest sender of unusual transactions reports (UTRs) with 5766, 6606 and 4948 respectively for the years 2008 to 2010. The next sector is MTC with 2,216, 487 and 1106 UTRs. Casinos submitted 25 and 12 UTRs for 2008 to 2009 and none for 2010. Trust companies submitted 37, 2 and 1 UTRs for the relevant years. Life insurance companies submitted 27 UTRs in 2009 and 7 in 2010. The NA FIU received 347,625 and 258 suspicious transaction reports (STRs) respectively for the period 2008 to 2010 for Sint Maarten. For 2011, the FIU (MOT) Sint Maarten informed 810 subjective reports and 6479 objective reports received. No Annual Reports have been prepared by autonomous FIU (MOT) in Sint Maarten.
424. The examiners have noticed however that the number of UTRs, contained in the NA FIU Annual Reports for 2008 to 2010 and the statistics provided to the Team from the FIU (MOT) Sint Maarten database, for the same time period, do not correlate. Additionally the number of subjective reports received by the NA FIU for 2008 to 2010 does not correlate with the number of the same reports contained in the FIU(MOT) Sint Maarten's database for the same period.
425. In relation to the analysis of matters, that is UTRs the analysis is conducted by the two Analysts. The FIU authorities reported that the FIU had not acquired Analyst Notebook as yet but conducts analysis using the Internet, World Check and the UN terrorist lists. Based on the trend of statistics presented for 2008 to 2010, the staff complement does not appear adequate to handle the number of reports of objective and subjective indicators received for Country Sint Maarten.
426. In conducting analysis, pursuant to Article 5 of the NORUT the FIU (MOT) has access to all databases and other registers of the law enforcement agencies. The FIU may simply request information in writing from these agencies. However, the authorities have advised that it is an FIU (MOT) policy, rather informal, to request the law enforcement agencies and reporting entities to provide the requested information to the MOT within a five-day period after the receipt of the request. Article 12 refers to the obligation of reporting entities to respond to the requests of the FIU(MOT). No timeframe for response is mentioned here, simply that the responses may also be given orally (not just in writing) in urgent cases. As the NORUT is silent on the response time by both law enforcement agencies and reporting entities to the

requests of the MOT, the authorities should amend the legislation to include a relevant time frame.

427. Additionally, Article 11 states that the reporting entities are required to report an intended transaction or performed transaction immediately. However, for reports based on objective indicators, the FIU (MOT) requires reporting entities to forward their reports forty-eight (48) hours after the transaction or intended transaction. This period may be extended to five (5) days in individual circumstances. For reports based on subjective indicators, the reporting entity is required to complete its research in ten (10) working days where there is a suspicion of money laundering or terrorist financing. Thereafter, it is required that the report to the FIU is made forty-eight hours on completion of the research.
428. Currently, there are five (5) positions at the MOT: A Head, a Policy Adviser, 2 Analysts and an Office Manager. In reality, only three (3) posts are occupied: namely two Analysts and the Office Manager. The Secretary-General of the Ministry of Justice serves as the Acting Head of the MOT<sup>12</sup>. However, the Secretary-General is only physically present in the FIU office one or two days per week as this official is attending to her substantive duties under the Ministry of Justice. There are also plans that the MOT will serve as the Secretariat to the CIWG.
429. The FIU (MOT) informs that since its commencement the FIU (MOT) has held approximately 10-15 informative sessions whether informally when the reporting entities visit the FIU or when the FIU visits the reporting entities or with the Central Bank and other institutions that operate in the field of compliance, regarding their reporting obligations, the manner of reporting, the reporting form, and the work in general of the FIU (MOT). The sessions have been either held on its own initiative or via requests from reporting entities. Informative sessions with the non-traditional sectors such as DNFBPs will shortly be fully underway. Prior to the establishment of the MOT Sint Maarten and prior to 10-10-10, the Netherlands Antilles MOT based in Curacao held the informative sessions with the reporting sectors.
430. The FIU (MOT) has also given informative sessions to law enforcement agencies including Customs and the Police with regard to the work of the FIU (MOT) and the cooperation with the respective agencies.
431. Notwithstanding the above information, at the onsite meetings with several stakeholders, particularly the DNFBPs, many stated that they did not have a relationship with the local FIU (MOT) and were not clear as to who was the Head of the FIU (MOT). One entity stated that they were not aware until the present time that there was an FIU (MOT) in existence in Sint Maarten. In fact several reporting entities stated that they still have forwarded reports to the FIU based on Curacao, since 10-10-10 and have directed queries there.
432. The provision of guidance has occurred largely on a case by case basis that is with the individual reporting entity as opposed to with the various sectors. A review of the statistics has shown that some sectors do not report at all and others have reduced the number of reports sent to the FIU (MOT). Therefore, in reviewing the effectiveness of the FIU (MOT)'s responsibility to provide guidance to reporting entities, the FIU (MOT) should review the strategy employed to execute this mandate to ensure that it fully reaches its target audience in a timely, effective and continuous manner.

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<sup>12</sup> The Authorities had advised that Secretary-General of the Ministry of Justice was appointed on September 22, 2012 as Head of FIU (MOT) permanently. However this occurred outside of the assessment period for this Mutual Evaluation.

433. Pursuant to Article 5 of the NORUT, the FIU (MOT) has the authority to obtain access to information in the database and other registers of the law enforcement agencies. The law enforcement agencies are obliged by law to give the requested information to the FIU (MOT). The authorities advise that the information is obtained within a period of five days. However this time requirement appears to be informal in nature as it is not a mandatory written requirement. In analysing the timeframe itself, for requested information, the timeframe of five days appears adequate as the FIU (MOT) does not have direct access to the databases of the law enforcement. However, the FIU (MOT) should consider developing mechanisms, such as MOUs, to have access to the databases of law enforcement agencies.
434. Pursuant to Article 12 of the NORUT, the FIU (MOT) has the authority to request further data or information from the reporting entity, and also from a third entity that been involved in the transaction reported. The authorities advise that the information is obtained within a period of five days that could be extended up to ten days. Also, the FIU (MOT) could request information in urgent cases, setting a specific timeframe for this purpose.
435. The FIU (MOT) receives relevant information from the Civil Registry, (with regard to correct names of subjects, correct address, inhabitants of a certain address, etc.) the Vehicle Registry, (with regard to the registered owner of a vehicle), the Land Registry (with regard to the registered owner of real estate), the Chamber of Commerce database, (managing directors of a company) in order to assist in the fight against ML/TF.
436. Pursuant to Article 12 of the NORUT the FIU (MOT) is authorized to request additional information from all reporting entities. This additional information can be requested from the entity filing the report as well as a third reporting entity mentioned in the report. The additional information can also relate to information received in an international request for assistance.
437. The reporting entity is obliged by law to respond within the time period set by the FIU (MOT). The information is submitted in writing and if required, also verbally in urgent cases. Additional information may be required where there are omissions in the reports or when information is required for ongoing investigations. The examiners are however not able to assess effectiveness of this Recommendation as it is not clear from the Annual Reports whether any statistics and if so, how many, relate to additional information from reporting entities for Sint Maarten. This point is further buttressed by the fact that several entities have not filed either subjective or objective-indicator UTRs with the FIU (MOT).
438. Pursuant to Article 6, paragraph 1 NORUT the FIU (MOT) has the obligation to disseminate information to the law enforcement agencies when after due analysis there is a suspicion of ML/TF.
439. According to Article 7, paragraph 1 of the NORUT the FIU (MOT) can disseminate information to the law enforcement agencies or any other agencies with similar competency as further specified in the National Decree for the implementation of article 7 paragraph 1 of the NORUT (N.G. 2001 no. 69).
440. With respect to the effectiveness of the requirement that the FIU (MOT) disseminates information domestically, the examiners have been advised that the FIU (MOT) disseminated 7 investigative reports to the PPO in 2012. 69 UTRs based on subjective indicators and 1 UTR based on objective indicators were also disseminated to the PPO. The PPO advised that one dissemination to the PPO developed into an investigation. The examiners have not been provided dissemination statistics for 2011. For 2010, 78 disseminations were made by the NA FIU to the PPO Sint Maarten., 548 in 2009 and 417 in 2008. Considering the number of UTRs for subjective and objective indicators received by the FIU (MOT), the number of disseminations to the PPO appears low. The FIU (MOT) should therefore reassess the internal

process that would lead to the dissemination of reports to the PPO. Additionally, there is no evidence to support that the FIU (MOT) has provided feedback to the reporting entities on the reports that have been disseminated to the PPO as a result of a suspicion for ML or TF.

441. Article 2 of the NORUT establishes that there is a central national agency known as the Unusual Transactions Reporting Office which falls within the Ministry of Finance. Article 4 states that the Minister of Finance is the Manager of the FIU (MOT) database and that the Minister of Finance may draft regulations with regard to the database and is responsible for the proper functioning of the same. The Head of the FIU is entrusted with the actual management of the database in the name and under the responsibility of the Minister of Finance. The Minister of Finance can delegate his powers to the Head of the FIU. Previously in this Recommendation, concern was expressed with respect to the legal establishment and operational independence of the FIU (MOT) with respect to the management of its database.
442. The concern surrounding the operational independence and autonomy of the FIU (MOT) with the fact that the Minister of Justice manages the database is particularly heightened as the FIU does not have a permanent Head that is physically present at the FIU (MOT) on a daily basis. The examiners are of the view that Article 4 creates a potential situation of undue influence and interference as its literal interpretation provides the Minister with wide powers over the internal affairs of the FIU (MOT)'s database. The authorities advise that the Minister of Justice has never meddled in the operations of the FIU (MOT). However, the Minister of Justice informed that he signs the letters and agreements of the FIU (MOT) such as MOUs with other FIUs.
443. As Article 2 of the NORUT states that the FIU (MOT) is under the management of a Head, logically therefore, it would be the Head that would determine whether an UTR is classified as an STR. In the Sint Maarten context, the authorities advise that the responsibility to decide whether an UTR is classified as an STR and sent to the law enforcement agencies and the PPO is entrusted with the Secretary General of the Ministry of Justice as Acting Head of the FIU (MOT). However, this individual is not present at the FIU on a daily basis. The Secretary General visits the FIU (MOT) once per week and in the interim the FIU (MOT) staff liaises with this individual regularly via telephone or by office visits to the Ministry of Justice. The fact that the Acting Head of the FIU (MOT) is also the Secretary-General of the Ministry of Justice and directly reports to the Minister of Justice, it may also be argued that a situation that could lead to undue influence or interference is presented and could easily facilitate the process where the Minister manages the database of the FIU and determines the matters that may be disseminated to the PPO.
444. Article 8 NORUT provides for the appointment of the Head of FIU (MOT) and the other employees at the FIU (MOT). Appointment, suspension and dismissal of the Head and other personnel of the FIU (MOT) takes place after hearing the Monitoring Commission on the recommendation of the Minister of Finance in joint consultation with the Minister of Justice. The Head of the FIU (MOT) is appointed for five years. This period can be prolonged each time at the end of the term by another five years. At the time of the on-site the existence of this Monitoring Commission was unclear. The FIU (MOT) informed that it only was aware of the existence of the national anti-money laundering committee, CIWG. In light of the foregoing, it appears that there is an inconsistency between the content of the legislation and present realities. The Authorities advised that the legislation will be amended to reflect the existence of the CIWG and not the Monitoring Commission.
445. The Team was informed that presently plans exist for the CIWG to vet and "short-list" the prospective applicants for the post of Head, FIU (MOT) Sint Maarten. The examiners are however concerned with this declaration in light of the current composition of the CIWG that includes financial reporting entities, namely representatives from the Bankers' Association. The Examiners are of the view that it is untenable and a potential conflict of interest for these

reporting entities to contribute to the decision as to the employment of the one who will assist in supervising their compliance with the NORUT and the NOIS.

446. Article 16 states that the Committee is chaired by the Minister of Finance but in reality, as it will be the CIWG, the Chair will be the Attorney-General or his duly appointed representative. Article 16 states that the Minister of Finance, supervisory authorities, law enforcement, PPO and representatives from the private sector are members of this Committee. In reality, the members of the CIWG include a broad variety of authorities and the Minister of Finance will have observer status. Article 18 states that the tasks of the Committee are guiding the FIU(MOT) in its mode of operating; making its knowledge and expertise available to the FIU; advising the Minister of Finance and the Minister of Justice on the manner in which the FIU performs its tasks, establishes indicators pursuant to Article 10 and on the effectiveness of the obligation to report. As currently stands the Commission in the NORUT, the Examiners are concerned that a potential undue influence or interference is created as government entities and the private sector have the power to vet and interview prospective applicants for the post of the Head, FIU (MOT), and influence and/or interfere with the operations of the FIU(MOT). As CIWG will take the role of the Monitoring Commission, the concerns of the Examiners prevail, especially knowing that the CIWG includes a greater representation of practitioners from the government and/or private sector.
447. Additionally, in accordance with Article 8, it appears that the Head of the FIU (MOT) does not possess the relevant powers or authority to, at the very least, contribute in the appointment, suspension or dismissal of his or her staff. The evaluation team is of the view that this section undermines the operational independence of the FIU (MOT). The legislation should be amended to encourage operational autonomy
448. With regard to the budget of the FIU (MOT), since October 10, 2010 the FIU (MOT) sends a proposal of a budget to the Minister of Justice. The Minister then sends this proposal for advice to the Ministry of Finance. If the Ministry of Justice has any questions with regard to an item, it contacts the FIU (MOT). In all cases the views of the FIU (MOT) is taken into account. The authorities advise that the amount of the budget is always such that the FIU (MOT) can perform its tasks without any problems or bottlenecks. If during the year it appears that a certain item was not budgeted enough, then the FIU (MOT) sends a substantiated request to the Minister of Justice to increase the relevant item. In practice the FIU (MOT) can make use of the budget for all of its core functions. FIU (MOT) has an allocated petty cash amount of NAF. 1500,00. The governmental procedure needs to be followed, which includes indicating which budget item is being accessed and also to request the category from which creditors will be paid. The FIU (MOT) is free to choose the best offer; best not being always the cheapest. If the FIU (MOT) decides on an offer which is not the cheapest, then the FIU (MOT) will inform the Ministry of Justice of this fact and will have to complete the relevant forms for approval.
449. Under the regime of the NA, prior to 10-10-10, the budget was forwarded to the Minister of Finance who forwarded the information to the Ministry of Justice. The authorities should ensure that the legislation accords with the actual circumstances. The authorities advised that it is the intention to amend the legislation to reflect the Sint Maarten situation. Presently, the information is forwarded to the Minister of Justice for-approval and thereafter to the Minister of Finance for final approval.
450. The FIU (MOT) has regular internal financial reviews, conducted by the Financial Controller Justice. The FIU (MOT) is also contacted at least twice a year by its the Financial Controller at the Ministry of Justice, with regard to its expenditures in relation to the budget. With respect to the budget, the authorities advised that the FIU staff informs the Secretary-General as Acting Head, FIU (MOT) of the needs of the department. The budget is prepared for review by the Minister of Justice and onward submission to the Minister of Finance for approval.



451. Pursuant to the Article 20 of the NORUT, it is prohibited for anyone who, pursuant to the application of the law or of decisions taken pursuant to the law, performs or has performed any duties to make use thereof further or otherwise, or to give publicity to such further or otherwise than for performing his duties or as required by the law. Pursuant to Article 23 of the NORUT, violation of this article can be deemed a criminal offence or minor offence and can be punished with a prison sentence of a maximum of four years, a financial penalty or detention for a maximum of a year.
452. Article 22 of NORUT states that the Manager of the database, the Minister of Finance (the Minister of Justice in the Sint Maarten context), delegates authority to the Head of FIU (MOT) who may inform an individual about the personal data contained on himself or herself in the database. The examiners raise a query as to the steps implemented to ensure that the information is protected and not tampered with in this scenario.
453. Pursuant to article 4, paragraph 1 of the NORUT, the Minister of Justice is the legal manager of the registers including the database of the FIU (MOT). The Minister of Justice is responsible for the proper functioning of the database. The factual management of the database is, however, entrusted to the Head of the FIU (MOT) (article 4, paragraph 2 of the NORUT). Article 4 raises concerns about the security of the information in the database in the literal application of this provision. The database of the FIU (MOT) cannot be accessed by any law enforcement agency or other third parties.
454. The FIU (MOT)'s registry system is stored on the local database and access to internet can be obtained solely through individual laptops. Each laptop accesses internet separately and isolated by making use of a wireless access point. This is to avoid 'infection' of the system through the wireless LAN.
455. Access to the LAN is password protected to restrict access to the network only to employees. UTR information is entered and maintained on a purpose built LOTUS NOTES database. All reported transactions are currently uploaded in the FIU database by means of, a system using an USB stick<sup>13</sup> (MOT vor Melders). To ensure that the USB sticks from the reporting entities are not harmful to the MOT's hardware, the computers have built-in up-to date antivirus software that automatically scans the USB sticks on entry to the USB drive. Until, the reporting entities collect the USB sticks, they are housed in a fireproof cabinet. The information is deleted off each USB before the reporting institution returns to collect the USB stick and bring a new USB stick with new UTRs. There are still some reporting entities that report manually. To this end, the FIU (MOT) should ensure that the paper/files are stored in fireproof cabinets and not merely in boxes. The FIU should also ensure that it is outfitted with smoke detectors and fire extinguishers and it implements a system of offsite electronic data storage in a secure area. These measures will further protect the FIU's electronic data, premises and employees.
456. With regard to the physical security of the information, the servers of the FIU (MOT) are stored in a room that is accessible through the use of magnetic swipe cards. This room has no windows. With regard to the hard copy database (containing files regarding UTRs which have been reported in hard copies, requests for information, Customs reports) are stored in the same room as the server.
457. Employees of the FIU (MOT) can access the office through the use of a magnetic strip swipe card. Employees are only allowed in the office during working hours. Whenever an employee

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<sup>13</sup> The authorities advised that they were testing the pilot phase of the SERT, the online reporting tool and that it was going to be launched later in 2012.

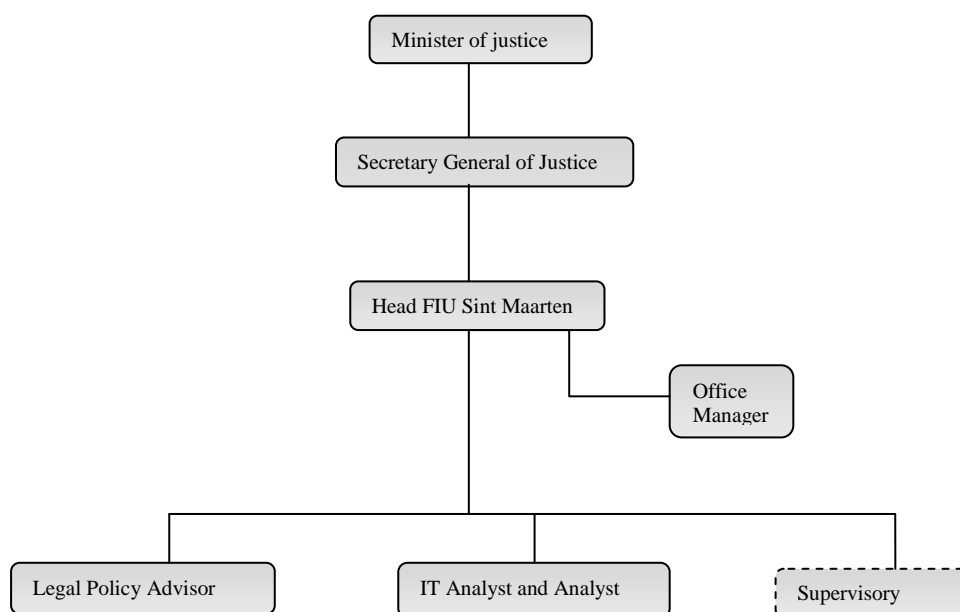
needs to access the office outside working hours, the Secretary General of the Justice Department grants authorization.

458. There are security cameras in the building as one boards the elevator to ascend to the floor that houses the MOT. On exiting the elevator, there are also security cameras before proceeding to the entrance to the MOT. There is no visible sign downstairs or directly by the entrance of the MOT indicating its presence in the building. There are additional security cameras in the interior of the MOT. A roller shutter has been installed on the exterior of a very wide glass door. This shutter is activated at the close of day. A special dark tint has been installed to the exterior of the door allowing persons to see out but preventing persons in nearby residences and businesses from seeing in. There is a security system installed at the MOT. The examiners are not aware however whether the FIU (MOT) controls the security cameras and the security system installed leading to and within the FIU's office. The FIU does control the password activated entrance to the FIU (MOT).
459. Prior to 10-10-10, Annual Reports were prepared by the MOT Netherlands Antilles. Since the establishment of the MOT Sint Maarten, the MOT officials have been concerned with the physical, technical and operational establishment of the FIU. The Annual Report for 2011 is currently outstanding. The Annual Reports for 2008, 2009 and 2010 were published by FIU (MOT) Netherlands Antilles and contain statistics and some relevant information related to Sint Maarten. These previous reports were forwarded to the Minister of Justice.—The website of the FIU (MOT) is [www.fiu-sxm.net/](http://www.fiu-sxm.net/). Although not officially launched, it is operational and contains pertinent information for the reporting sectors. The Annual Reports are however not on the website. In reviewing the 2008 to 2010 Annual Reports, the information is limited for Sint Maarten in terms of trends and typologies. There is some information on the number of UTRs and STRs and the values for Sint Maarten but there is not typology information in relation to Sint Maarten specifically.
460. The FIU (MOT) is in the process of applying for membership of the Egmont Group. The authorities advise that contact has been made with the Egmont Secretariat and an official onsite visit is due on the completion, discussion and adoption of the CFATF Mutual Evaluation Report.
461. Article 7 of the NORUT facilitates the efficient exchange of information with other FIUs by including a clause stating that for information exchange with Egmont FIUs, no MOU would be required, unless the laws of the other FIU require an MOU. This clause is however not relevant to the Sint Maarten context as the Sint Maarten FIU is not a member of the Egmont Group. This provision applied to the Netherlands Antilles context. The MOT has forwarded letters of interest in signing MOUs to over 40 countries in the event that the countries require MOUs. MOUs have already been signed with Grenada and St. Kitts-Nevis. The Sint Maarten authorities advise that the MOT is currently in discussions with FIUs regarding the signing of an MOU.

### **Recommendation 30**

#### *Resources-FIU only*

462. The Structure of the FIU (MOT):



463. The FIU (MOT) serves as a central national agency responsible for, among other things, collecting, registering, processing and analyzing the data obtained and transmitting disclosures on suspicious transactions regarding money laundering and/or financing of terrorism to the competent authorities. The tasks of the FIU (MOT) are laid down in article 3 and article 22h, first paragraph, under d, of the NORUT. The core functions of the FIU (MOT) have been already discussed in Recommendation 26. The Head of the FIU(MOT) is responsible for the management of the FIU.
464. As discussed in Recommendation 26, the Acting Head, the Secretary General of the Ministry of Justice is not physically present at the FIU on a daily basis. The examiners are concerned with the current structure of the FIU (MOT) as appears that even if there was a permanent Head in place, queries arise with respect to the operational autonomy of the FIU if decisions are made by the Secretary General and ultimately the Minister of Justice. The previous discussions under Recommendation 26 with respect to the management of the FIU database support this view.
465. The FIU (MOT) has a simple structure that currently consists of the Administrative and Support Services, the Legal/Policy section, the Analyst and IT/Security department and the Supervision department (yet not implemented).
466. The Analyst and IT/Security department is the department that is in charge of analyzing unusual transactions, conducting investigations into money laundering and terrorism financing and that manages the database. The IT analysts in this department execute the IT /Security functions and are thus in charge of the maintenance of the IT infrastructure. Separately, the FIU(MOT) may relay on the IT expertise of IT Specialists attached to law enforcement agencies.

#### **Funding:**

467. The FIU (MOT) receives its funds from the Government. According to Article 9 of the NORUT, the Minister of Finance, in agreement with the Minister of Justice, having heard the Monitoring Commission, referred to in Article 16 of the NORUT determines the budget and formation of the FIU (MOT). The yearly budget is drawn up by the FIU (MOT). At the drawing up of the budget all the plans that the FIU (MOT) has for the coming year are taken

into account. The draft budget must be sent to the Financial Controller of the Ministry of Justice for approval after which it is approved by the Parliament. It should hereby be noted that the head of the FIU (MOT) has the authority to use the budget after it has been approved by the Government. In order to use the money of the budget, the FIU (MOT) has to follow certain administrative procedures. These procedures can be very simple or elaborate, depending on the amount that the FIU (MOT) has to spend. The authorities advise that the FIU staff informs the Secretary-General as Acting Head, FIU (MOT) of the needs of the department. The budget is prepared for review by the Minister of Justice and onward submission to the Minister of Finance for approval. In comparing Article 9 and the present realities as advised by the Sint Maarten authorities regarding the budget approval process, it certainly appears that there is an inconsistency.

**Staffing:**

468. The FIU (MOT) has currently a formation of three (3) positions which consist of one Analyst one IT Analyst and an Office Manager. The authorities advise that the current structure contemplates five positions namely, the Head, the Legal/Policy Adviser, 2 Analysts and Office Manager. The authorities advised that there were plans to double the number of analysts and to recruit three (3) additional persons with respect to the supervisory functions regarding the DNFBPs. The increase in staff is necessary in considering the additional fact that apart from the FIU (MOT)'s technical responsibilities with respect to the analysis of financial intelligence and the supervision of non-financial entities, the local FIU (MOT) is to be the Secretariat of the CIWG. Considering the size of Sint Maarten's financial sector including the DNFBPs, the current staff complement is inadequate to effectively handle the demands of the department.
469. With respect to the eligibility of candidates for employment, before being appointed, a strict screening process is executed. The authorities informed that the VDSM executes a strict screening process for candidates for senior public officials' posts. The VDSM will execute an "A status" screening for the post of the Head of FIU (MOT). The Examiners were also advised that the candidates are screened against several databases including that of the Attorney-General's department and the Criminal Investigation Department of the Police. The Head of the FIU (MOT) is appointed for a period of 5 years, which can be extended for another 5 years.
470. The FIU (MOT) requires a minimum standard of education/training at HBO level (Higher vocational level) when recruiting members of the staff. It has expertise in a wide range of fields, namely legal, ICT, financial, law enforcement, Organisational and IT & Security Auditing.

**Sufficient technical and other resources:**

471. The FIU (MOT) has an independent IT system that enables the control over access to information. It uses a computerized database and analytical software tools and the data that the FIU (MOT) receives is stored electronically. The computer system is up to date and has more than sufficient storage capacity. The staff is well trained in the use of analytical tools. The FIU (MOT) advised of their intention and desire to secure i2 Analyst Notebook software. In addition the FIU (MOT) has launched its website.
472. The FIU (MOT) has a separate and secure database in place, which is not accessible to all personnel of the FIU (MOT). The IT-security policy includes restricted access to database among other things. The database is constantly backed up. The separation of the FIU (MOT)'s database from the outer electronic world is an important element in maintaining the security and confidentiality of the information.

473. While FIU(MOT) has implemented certain electronic security systems to securely protect the information held by the FIU (MOT), as previously discussed in Recommendation 26, the erection of fire extinguishers, smoke detectors and the commencement of the off-site storage regime of the “backed up” data in a fireproof electronic data safe will be helpful in further protecting the FIU(MOT)’s information and its premises and employees. Additionally, in fulfilling its mandate to increase the staff complement in the supervision and analysis departments, the physical space does not appear adequate to accommodate these numbers.

**Operational independence and autonomy:**

474. According to Article 8 of the NORUT, the Minister of Finance in joint consultation with the Minister of Justice, having heard the Monitoring Commission (Article 16) is authorized to appoint, suspend and remove the Head and the other personnel of the FIU (MOT). The Head of the FIU (MOT) does not possess the relevant powers or authority to, at the very least, contribute to the appointment, suspension or dismissal of the staff. The Team is of the view that this section undermines the operational independence of the FIU (MOT). The legislation should be amended to encourage operational autonomy. As discussed in Recommendation 26, other operational autonomy concerns relate to the Monitoring Commission (CIWG in the future) the approval of the budget and the management of the FIU database.

**Undue influence or interference:**

475. Discussion of undue influence and interference occurred under Recommendation above.

**Confidentiality:**

476. According to Article 20 of the NORUT, anyone who performs or has performed any task for the application of this national ordinance or of resolutions adopted pursuant to this national ordinance, is prohibited from making further or other use of data or information furnished or received in pursuance of this national ordinance, or from making the same known further or otherwise than for the discharge of his task or as required by this national ordinance. Whenever individuals from other institutions perform work, duties or any other activities for the FIU (MOT), they are required to sign a secrecy statement. According to the Ministerial Decree in which the Regulations for the Register of the FIU (MOT) were laid down, access to the database of the FIU (MOT) is given by the head of the FIU (MOT). This authorization is only given to a limited number of staff members who are reminded regularly of their secrecy obligation. As noted previously in Recommendation 26, integrity of the personnel is a priority as the proposed candidates for FIU posts and actual employees are screened. In order to secure employment at the MOT, all staff must be vetted for criminal checks and other background checks locally and in the Netherlands.

**Appropriately skilled:**

477. The FIU (MOT) requires a minimum standard of education/training at Higher Vocational Education-level when recruiting members of the staff. It has expertise in a wide range of fields, namely legal, ICT, financial, law enforcement, organisational and security auditing. The level of expertise of the different fields is high. Knowledge on ML and FT prevention is updated periodically through participating in national and international courses and programs on this matter.

**Adequate and relevant training:**

478. The Authorities advised that since the establishment of the FIU(MOT), the staff attended a training session in El Salvador in 2010 in relation to the FATF Recommendations. In March 2011, staff attended a Kingdom’s Seminar, “Koninkrijks Seminar” in Aruba and the

“Financeel Opsporen”, Financial Trace in Curacao. Further, MOT personnel accompanied the Minister of Justice to the CFATF May Plenary in Honduras and the August Special Ministerial Meeting in Miami, USA. The authorities should ensure that adequate financial resources are reserved for the training of the FIU personnel.

**Recommendation 32(FIU)**

*Statistics*

479. Prior to October 10, 2010, information relating to Sint Maarten and its AML/CFT efforts were contained in the Annual Reports for the Netherlands Antilles and prepared by the Netherlands Antilles FIU(MOT). Pursuant to Article 11 of the NORUT, all reporting entities are required to report both executed and intended unusual transactions to the FIU (MOT.)
480. The Netherlands Antilles FIU received 347,625 and 258 suspicious transaction reports (STRs) respectively for the period 2008 to 2010 for Sint Maarten. However, the number of subjective reports received by the NA FIU for 2008 to 2010 does not correlate with the number of the same reports contained in the FIU (MOT) Sint Maarten’s database for the same period.
481. For 2011, 810 subjective and 6479 objective, reports were received by FIU (MOT) Sint Maarten. No Annual Reports have been prepared by autonomous FIU (MOT) in Sint Maarten.
482. The figures in the table below reflect the unusual transactions per sector reported to FIU (MOT) Sint Maarten for the years 2008 to 2010 for Sint Maarten as contained in the NA FIU’s Annual Reports.

	2008	2009	2010
Sector	SXM	SXM	SXM
Local Banks	5766	6606	4948
Casinos	25	12	
Credit card companies			
International Banks			
(Life) Insurance companies	12	27	7
Money remitters	2216	487	1106
Savings banks			
Trust companies	37	2	1
Customs	349	344	262
Others			

483. As indicated the number of UTRs as contained in the NA FIU Annual Reports and the statistics sent by FIU (MOT) Sint Maarten database do not correlate. In addition, it appears that not all entities are reporting to the FIU (MOT.) The FIU should host training sessions on ML and TF for reporting entities to ensure that they report as required.

484. Reports filed by Customs on cross border transportation of currency of NAF 20,000 or more, must be reported to the FIU (MOT). The following table indicates the number of reports filed on the abovementioned transportation of currency.

Amount of cross border cash movement reports [2008-2010]			
Custom	2008	2009	2010
UTRs received	349	344	262
Value (ANG)	265,724,809	334,363,013	210,095,363

485. The below table relates to information requested of the FIU(MOT.) The agencies are both local and overseas entities

Institutions	2010	2011	2012
Detective Cooperation Team (RST)		1	2
Police Department (KPSM)		1	2
Tax Department			1
FIU St. Kitts			1
FIU Grenada		1	
FIU Anguilla			1

486. There does not appear to be available statistics with respect to the additional information requested by the FIU (MOT) of the reporting entities. The examiners have not been informed as to the number of STRs that relate to ML and the number that relate to TF. Additionally, the examiners do not possess statistics with respect to requests made by the FIU (MOT) to overseas counterparts.

### Additional Elements

487. The PPO informed the Team that one dissemination from the FIU (MOT) resulted in an active investigation. The authorities are however not aware as to whether this dissemination was an objective or subjective indicator, the outcome of this investigation and whether it related to ML, TF or an underlying predicate offence.

#### 2.5.2 Recommendations and Comments

##### ***Recommendation 26***

488. The authorities should ensure that the legal underpinnings for the establishment of the FIU (MOT) are sound. It should be clear in the law as to the Ministry under which it falls.
489. The authorities should move swiftly to appoint an FIU Head.
490. The FIU (MOT) should seek to clarify the manner and procedures for reporting, improve the relationship between itself and its stakeholders and provide guidance on the manner and procedures for reporting. The FIU (MOT) should increase awareness within its stakeholders of the existence of the MOT

- 491. Articles 4, 8, 16 and 22 of NORUT should be amended in order to ensure operational autonomy of the FIU and avoid opportunities for undue interference and influence.
- 492. As the number of investigative reports forwarded by the FIU (MOT) is low compared to the number of UTRs recovered, the FIU (MOT) should reassess its internal process to ensure an adequate number of investigative reports are forwarded to the PPO.
- 493. The FIU should implement measures to improve the physical security of manual files, electronic data, premises and the employees of the FIU (MOT).
- 494. The MOT should produce and publish Annual Reports and ensure that it includes full information on ML and TF trends and typologies.

Recommendation 30

- 495. The authorities should increase the staff complement of the FIU (MOT.)
- 496. The authorities should acquire additional tools such as Analyst Notebook to assist in the analysis of UTRs.
- 497. Sufficient financial resources should be reserved that in order that the staff may be adequately trained for ML and TF.
- 498. The FIU should obtain the relevant resources eg. Offsite electronic data fireproof safe, fire extinguishers, etc to further protect its information, premises and employees.

Recommendation 32

- 499. The authorities should ensure that relevant statistics are maintained for Sint Maarten with respect to requests for additional information by the FIU (MOT).
- 500. The FIU should host training sessions on ML and TF for the reporting entities to ensure that the financial entities report as required.
- 501. The FIU should also maintain statistics regarding the number of requests made to foreign FIUs.

2.5.3 Compliance with Recommendation 26

	Rating	Summary of factors relevant to s.2.5 underlying overall rating
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R.26	NC	<ul style="list-style-type: none"> <li>• The legal basis for the establishment of the FIU (MOT) is not clear.</li> <li>• There is an absence of a permanent FIU Head physically present in the FIU on a daily basis.</li> <li>• Not all reporting entities are aware of the existence of the FIU (MOT) in Sint Maarten. Inadequate training and guidance sessions for reporting entities.</li> <li>• Articles 4, 8, 16 and 22 of NORUT present a risk to the operational autonomy of the FIU and create opportunities for undue interference and influence.</li> <li>• There is a low number of investigative reports forwarded by the FIU(MOT) to the PPO.</li> <li>• The security of the FIU(MOT) information, the premises and employees requires improvement.</li> <li>• The authorities should produce and publish the outstanding Annual Report for 2011 and ensure that it contains information relating to the typologies and trends for ML and TF for Sint Maarten.</li> <li>• Effectiveness of the FIU (MOT) could not be confirmed</li> </ul>
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**2.6 Law enforcement, prosecution and other competent authorities – the framework for the investigation and prosecution of offences, and for confiscation and freezing (R.27 & 28)**

**2.6.1 Description and Analysis**

**Recommendation 27**

502. Sint Maarten Crime Pattern Analysis (CBA) provides an overview of the crime situation in Sint Maarten between 2008 and 2010. The CBA Sint Maarten is the result of agreements made by the Tripartite Justice Consultations aimed at providing areas of focus for strategy development to prevent and repress crime. The information provided discusses several offences including drugs, migrant smuggling and money laundering.
503. According to the CBA, cocaine and marijuana are major concerns for Sint Maarten. Principally, Sint Maarten serves as a transit point as the destination for the illegal drugs is either Europe or North America. Sint Maarten's geographical location is an asset for the criminal in this regard. Sint Maarten also possesses many bays and inlets "with little or no oversight and a busy seaport and airport which local law enforcement and investigation authorities do not have the capacity to protect against drug smuggling." The report states that while there have been successful interdictions by the Coast Guard, due to small numbers of human and material resources Sint Marten cannot keep drugs from being smuggled. Notwithstanding the circumstances, the Authorities advised that the law enforcement agencies under the direction of the PPO strive to combat all crimes, including those related to illegal drugs.
504. Human smuggling is also a major concern. The CBA states that as a result of limited economic development, modest prosperity, political instability and natural disasters, Sint Maarten has faced a "continual stream of economic refugees." The law enforcement authorities appear challenged in responding to this crime as it is believed that it does not have the capacity or expertise to stop the scourge. Economic refugees regularly travel to Sint Maarten by boats or by plane on a daily basis.
505. With respect to money laundering, the CBA states that the country provides structured opportunities for laundering funds. The tax laws are outdated and not enforced and little control is exercised over money flows. Other structured opportunities for money laundering

due to lack of oversight include casinos, legal and illegal money remitters and trust offices. Between 2008 and 2010, cash and bank transactions exceeded 0.6 billion guilders were deemed unusual transactions. This figure resulted in 51 million guilders as suspicious transactions in 2008 and 2009. The Report surmises that this money could not be seized due to insufficient resources and financial expertise at the investigative services. The FIU, the Tax Office and Customs experience severe personnel shortages. The report states that Customs is not equipped to control illegal money flows to and from the island. The Crime Pattern Analysis finally states, "There is reason to believe that money laundering takes place on a major scale, but there is no hard evidence of it making the scope and severity of the money laundering problem difficult to determine."

506. The PPO is responsible for the proper investigation of all crimes including the offences of ML and TF. In interviews with several of the authorities, Sint Maarten confirmed that the PPO distributes ML and financial crimes to law enforcement for investigation. Matters are generally forwarded to either the KPSM (the local Police) or the RST (The Kingdom Detective Team). PPO can also rely on the services of:
- Landsrecherche (Special Investigation Unit). The PPO may utilise this Unit if as an official employed by the Government is a suspected of ML and/or TF
  - VDSM. If large scale ML can pose a threat to the national security or stability or can jeopardize essential national economic interests, the VDSM may investigate and, if crimes are committed, inform the PPO of these findings in order to have a criminal investigation started.
  - Customs, Coast Guard and Immigration Department which is currently a part of the local Police and Tax Office, by gathering information on money laundering or terrorist financing by either seizing cash money when imported or exported or during Tax Department Controls
507. The investigation of criminal offences generally is carried out by the Police (Korps Politie Sint Maarten or KPSM) under the direction of the PPO. Article 12 of the Organisation Resolution of the Ministry of Justice states "The general objective of the Department (service) is: alert and professional intervention at (imminent) criminal offences, disturbances, pollution and emergencies, by an upright method based on proximity, availability and predictability. As well as supporting the equity of citizens and society to prevent security problems in their own environment and to keep such problems manageable. Thus promoting confidence in the rule of law and the feelings of the people, so they live in a society that strives for Justice and where it is normal to follow the rules.
508. To achieve its objective the service is responsible for the following tasks:
- a. Ensuring the implementation of the National Crime Policy;
  - b. Maintaining public order and the public legal order;
  - c. Detection of criminal offences;
  - d. Assistance in emergency situations;
  - e. Identifying and advising on security or unsafe situations;
  - f. Maintaining traffic and transport regulations.
509. The investigation of certain ML and TF resides in the Kingdom Detective Team (Recherche Samenwerkingsteam or RST). This is an organized group of specially trained detectives from the Netherlands and Sint Maarten to combat cross-border crimes. The 2001 RST Protocol regarding specialised research cooperation among the nations of the Kingdom relating to combating terrorism and other serious cross-border and organised crime states that the task of the RST Team is:
- a. research into crimes within the Kingdom which, given the gravity or frequency or organized association in which they are committed, are a serious breach of legal order

and for which the use of special investigative capacities in terms of both quality and quantity is required;

b. to undertake research to implement interregional and international petitions for legal assistance to the extent that such legal assistance relates to crimes which, given the gravity or frequency or organized association in which they are committed, are a serious breach of legal order and for which the use of special investigative capacities in terms of both quality and quantity is required; and

c. from time to time support regular research in undertaking research into other crimes that seriously disrupt the local legal order in cases in which local services lack sufficient resources due to special situations

510. Article 38e of Penal Procedures Code also provides for the possibility of a separate financial criminal investigation aimed at determining the amount of illegal proceeds in order to have these forfeited, Police have the obligation in large scale criminal investigations into predicate crimes to assess the amount of these illegal proceeds and aim for their forfeiture by a court ruling. In distinguishing the roles of the KPSM and the RST, the competent authorities advised that while RST investigated cross-border crime including money laundering, the KPSM investigated local crimes including those related to money laundering and terrorist financing.
511. Several authorities expressed that there were human resource challenges in the local police department KPSM in that there was a staff shortage. As the employment pool appears small from which police may be recruited in Sint Maarten, the Sint Maarten officials seek to recruit officers from Netherlands to work for a period of time in Sint Maarten. After the relevant period of time, the officials return to the Netherlands. Additionally, there are not many persons who possess the relevant knowledge or technical skills to investigate money laundering or terrorist financing matters. For this reason, such ML and TF matters are likely to be disseminated to the RST. No information was supplied with respect to the local Police Force or RST's knowledge or training in TF matters.
512. Article 9 of the Public Prosecution Departments of Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba Kingdom Act states that the PPO is particularly in charge of:
- Criminal law enforcement
  - The prosecution of criminal offences
  - The execution of verdicts and court rulings in criminal cases
  - The supervision of the observance of judicial decisions in disciplinary cases.
513. The Public Prosecution Service at the Court of First Instance is exercised by the Public Prosecutor. The Chief Public Prosecutor is in charge of the PPO and is appointed by the Queen. He can be assisted by one or more Public Prosecutors, deputy Public Prosecutors and temporary substitute Public Prosecutors. In the performance of their duties they are equal members of the PPO.
514. The Chief Public Prosecutor is subordinate to the Attorney-General. The Public Prosecutors, deputy Public Prosecutors and the temporary substitute Public Prosecutors are subordinate to Chief Public Prosecutor in the Office where they have been placed. When the Public Prosecutor is absent or is prevented from attending, he is substituted by another member of the PPO at the PPO.
515. At the PPO there is one prosecutor specifically appointed as contact person for the Police in regard to the investigation and prosecution of money laundering and terrorist financing cases, while all prosecutors are authorized to prosecute such cases.

516. The Public Prosecution Service consists of the first line PPO (Parket in eerste aanleg) and the office of the Attorney-General (Parket van de Procureur-Generaal). The Attorney-General is the highest authority on matters of prosecution. This official is appointed by the Queen upon recommendation of the Joint Court of Justice.
517. The PPO advised that there were certain strategic improvements that were planned for the administration of justice in Sint Maarten that related to his department. The PPO informed that there would be a creation of an MOU between the FIU(MOT) and the PPO. The PPO advised that the office currently provides informal feedback to the FIU(MOT). However, the MOU would improve this process. There are plans to have strategic meetings more frequently involving the Police, RST, Customs and the FIU (MOT). Training for judges in ML and TF will commence in the near future.
518. Whilst there was a BFO, a special Police Financial Investigation Unit for the Netherlands Antilles based outside of Sint Maarten, the authorities advised that there were imminent plans to create a BFO within the KPSM.
519. The authorities also advised on the Special Investigation Unit (*Landsrecherche*). This is also established under the Minister of Justice aimed at investigating cases where a government official or public servant is purportedly involved in financial crime, including money laundering and terrorist financing and corruption.
520. The Audit and Criminal Investigations Department under the Tax Inspectorate while relating largely to matters relating to tax fraud and tax evasion may assist the PPO as needed with respect to investigations relating to the financial background of individuals relating to their disposable income and property ownership.
521. The general objective of the Immigration Department is to ensure the coordination and implementation of a consistent, restrictive and transparent foreigners' policy, including access, admission, (temporary) stay, monitoring and the return of foreigners to their country of origin, as well as the coordination of the implementation of the Kingdom Law on the Dutch Nationality on St. Maarten. The Immigration Department is part of the Police Force and is actually staffed by police officers. The authorities have advised that a separate and distinct Immigration Department will be formed in June 2012. The authorities advise that since 10-10-10, specifically in September 2011, an Immigration back office was created within the KPSM. The intention of the back office is to target border crimes including at the airport. It is also planned for the back office to also handle customs cases and not merely immigration cases, thereby increasing the investigation skills at the border.
522. While the Customs department is responsible for the borders and the coastline, the Coast Guard department secures the territorial waters and air around and above Sint Maarten. The Coast Guard assists the Police in maritime and air investigations. In the event that the Coast Guard interdicts a vessel with respect to a particular crime, information is forwarded for the PPO for advice and action. The Coast Guard is also located under the Ministry of Justice.
523. The VDSM, the Security Service of Sint Maarten falls under the Ministry of General Affairs held by the Prime Minister. The VDSM liaises with the PPO with respect to investigations for money laundering and terrorist financing that relate or can affect the national security and stability of Sint Maarten. The VDSM is however not a law enforcement entity.
524. The authorities advised that there were aware that the KPSM did not possess personnel experienced to conduct financial investigations for money laundering. During the onsite they advised that an officer was seconded from RST to the KPSM with experience in financial investigations. With respect to statistics, KPSM advised that between 2008 and 2011, there were four (4) financial investigations conducted. Cash and assets totalling \$180,000.00USD

were seized. One suspect was convicted. In 2012, pursuant to an investigation, the sum of \$21,028.00USD was seized. The examiners however are not aware of the nature of the financial investigations. The KPSM advised that it conducted an investigation into a complaint from the Central Bank of Curacao and Sint Maarten that there was a money remitter operating without a licence. A report was forwarded to the PPO. The KPSM also received three requests for mutual legal assistance regarding the provision of financial information. The examiners are not aware of the offence involved and whether the requests were indeed honoured by the KPSM and therefore are not in a position to assess effectiveness in this regard.

525. With respect to the investigations of the RST, the RST has provided the following information:

Year	Kind of investigation	Calculated Illegal Proceeds in USD
2007-2008	Swindling, forgery & banking without a license	8,517,516.67
	Human & drug trafficking	79,200
	Drug Trafficking	281,070
	Drug Trafficking	40,000
	International Boiler Room Fraud	Unknown estimated >5,000,000
2009	Human Trafficking	108,735
	Swindle/Forgery	703,348
2010	Human Trafficking	185,000
	Drug Trafficking/Money Laundering	3,722,700
	Money Laundering	180,000
2011	Money Laundering	Over 14,250,000

526. No information was supplied with respect to investigations or training for the KPSM relating to TF. The KPSM advised that in its annual plan for 2012, it will focus on the following crimes: human trafficking and human smuggling, narcotics and firearms, robberies, burglaries and pawn shops that accept stolen articles, and ML financial investigations. In light of this information, ML and TF training is crucial.
527. Additionally, the examiners were not provided relevant statistics for Landsrecherche or the Coast Guard.
528. The Sint Maarten authorities should review the structure, functions and operations of several of the law enforcement agencies in Sint Maarten to ensure maximum effectiveness.
529. As financial resources are limited, the authorities should ensure that the existence, structure and operations of each agency are realistic to ensure the optimum use of Sint Maarten's financial and human resources. There appears to be a shortage of suitably qualified officers. This fact can limit the effective investigation of ML cases. The authorities should implement a robust and strategic recruitment drive to attract the suitable persons with relevant skills in combating money laundering to effectively execute the mandate of the various agencies. Relevant financial resources should also be directed to ensure that recruited officers are appropriately trained in ML and TF and are kept abreast of the recent developments in financial investigations.

530. PPO is authorized to decide independently how to handle circumstances in dealing with persons suspected of ML or TF. This is a fundamental principle of the criminal investigation and procedure. Furthermore, the authorities advise that various investigation departments and the PPO are not obliged to seize or impose and make arrests. These authorities can decide not to arrest or seize. However, immediate seizure is required (Article 122) in case of discovery of an offence for which the suspect can be remanded in custody and there are circumstances of imperative necessity when the PPO cannot wait on the decision of the examining judge.
531. The authorities advise that the law enforcement entities can arrest or waive or postpone arrest as necessary or can seize money for the purpose of identifying persons involved in such activities or evidence gathering. In some cases, certain entities cannot arrest or seize money. This is due to the fact that the officers are not police officers nor do they have police powers by virtue of the Penal Procedure Code. The VDSM is one such example.

#### *Effectiveness issues*

532. The examiners were informed that there were unlicensed MTCs operating within Sint Maarten. The Central Bank indicated that this matter was referred to the PPO in 2001, 2006 and 2010. As indicated, the KPSM conducted an investigation concerning a MTC operating without a licence. Yet, seven (7) MTCs continue to operate without licenses. This fact appears undermines the effectiveness of the law enforcement agencies.

#### **Additional Elements**

533. Although, the RST Protocol 2001 refers to the use of special investigative techniques, it is not clear that the local law enforcement authorities possess this power. The authorities advised that there is plans to enact the "BOB" law to provide the power to use special investigative techniques.
534. The Team was advised the special investigation powers are applied in a number of investigations. In the past special investigation powers were successfully applied in investigations into predicate crimes, such as investigations into drugs trafficking and human trafficking. Particularly in circumstances involving cooperation with foreign authorities and, in answering to international requests for assistance in criminal investigations, special investigation methods were used including surveillance and wire tapping (e.g. investigations of large drug transports). The legislation has not been supplied in order to allow the Examiners to make an assessment in this regard.
535. Financial criminal investigators are positioned at the RST on Sint Maarten and in the local Police Force. The intelligence unit of the RST in Curaçao, which can be deployed to Sint Maarten on demand, also employs analysts and financial criminal investigators who carry out investigations. Apart from the gathering and expansion of the expertise on financial investigation (both as an extra approach in classic criminal investigations, where it concerns the finding of proof of the crimes involved, as well as the intention to trace illegally gained proceeds and assets in order to have these forfeited by the court) the general intention is to integrate the financial investigation in the whole criminal justice chain of Police, PPO and the Courts. Everyone, from the policeman on patrol to the heads of police and the entire PPO must become conscious and alert of suspicious transactions, money laundering and the possibilities of confiscation and seizure and dealing with various forms of fraud. In actual practice this means that the financial criminal investigation must be an integral part of any investigation. The objective is to prosecute criminal behaviour and at the same time see to it that crime does not pay off. Furthermore, an important part of this strategy is to have the proceeds of crime forfeited.

536. According to the National Ordinance on Crime Prevention Fund 1995, the fund income shall include:
- Revenues from the sale of goods confiscated under a final judgment conviction;
  - Net revenues from the sale of objects withdrawn from circulation under a final judgment conviction;
  - Monetary amounts established under a final judgment conviction from confiscation of the proceeds of a crime;
  - Revenues from asset sharing;
  - Revenues from the collection of fines, with the exception of those fines that have been collected in connection with economic offences;
  - a contribution from the country's general resources to the extent necessary;
  - Contributions from private individuals;
537. It is possible to carry out investigations in other countries if international or interregional legal assistance is requested by Sint Maarten. Generally such requests must be based on a mutual treaty. Sint Maarten must therefore have concluded a treaty with the requested nation concerning the execution of requests on legal assistance. For requests to Sint Maarten the same rule applies.
538. Consultation on financial investigations takes place yearly during a two-day workshop for local financial detectives, officers of the RST, PPO and FIU (MOT) together with law enforcement agencies from Curacao, Aruba, the Dutch Caribbean isles (BES-islands) and Suriname.
539. Annually a Crime Status Analysis of RST, evaluations by RST and evaluations by the FIU are produced. This results in the maintenance or the improvement of the existing modes of operation/ procedures.
540. Sint Maarten has recently published its first Crime Pattern Analysis (CBA) over the years 2008-2010. In this CBA a considerable section has been dedicated to money laundering and predicate crimes. This analysis provides the Sint Maarten Minister of Justice with a tool to set priorities in law enforcement and gives the Public Prosecution Service and the Police the opportunity to rethink strategies and tactics. The full discussion of this report is found at the commencement of Recommendation 27

### **Recommendation 28**

#### **PPO:**

541. Gathering of evidence has been laid down in the Penal Procedures Code. Pursuant to Article 119 of the Penal Procedures Code all objects and claims that serve to uncover the truth or to prove unlawfully obtained benefits or all objects and claims that can be ordered for confiscation or withdrawal from circulation are subject to seizure. The related procedures for this process are determined in Articles 120- 140 of the Penal Procedures Code. At all times the investigation officers can seize objects subject to seizure and in case they catch someone *in flagrante delicto* they can enter any place for that purpose, if necessary. The citizen too has a special seizure power (Article 120.1 of the Penal Procedures Code). The Public Prosecutor or the examining judge can seize objects subject to seizure. Authorization by the examining judge is needed when dealing with the search of premises for seizure pursuant to Article 122 of the Penal Procedures Code. Pursuant Article 13, the examining judge can order that he, who is reasonably suspected to be the holder of any object subject to seizure shall hand this to the judge for seizure or transfer this to the court registry of the Court of First Instance. Anyone to whom the order is directed is required to cooperate, with the exception of those who can rely on their right of nondisclosure, such as family members, lawyers, civil law notaries and

witnesses (if the observance can lead to further prosecution). Article 130 states that the examining judge has the authority to seize all objects that are susceptible to seizure.

542. In accordance with Article 126, searches of household premises must generally take place in the presence of the occupant or owner once the urgency of the investigation does not dictate otherwise. Again, once not contrary to the interest of the investigation, the occupant or the suspect shall be given the opportunity to give explanation for seizable goods. Once delay would not be caused, the suspect's attorney may be present during the search. The authorities advise that in practicality, if the suspect is arrested on the spot, the judge of instruction will immediately order for the search to commence thereby preventing possible delay in the process. In reviewing Article 125 of the Penal Procedures Code, a great measure of protection appears to have been provided to persons with a duty of confidentiality. This protection relates specifically to the privileged information in the possession of individuals such as attorneys-at-law and notaries which may have no relation at all to any criminal offence. Consent therefore may not necessarily be required in situations where the search can be executed without the breach of the individuals' clerical, official and professional secrecy and it does not extend to documents that do not constitute part of the offence or were used in the commission of the same. In light of the foregoing, the authorities advise that in the vast majority of cases, the consent of the individual is not requested; the judge in his discretion will allow the search. If such is the case, then delay will not be created.
543. In order to be able to eventually prosecute and confiscate illegally obtained proceeds each investigation of organized crime, drug trafficking, human trafficking, arms trade and other lucrative forms of criminality will have to be investigated. Also the flow of money in connection with these crimes will have to be investigated. Very often this investigation will produce indications on money laundering practices. Actual signals of money laundering become evident based on reports on unusual transactions, which after having been investigated by the FIU, have been declared suspicious and which are brought to the attention of the police are forwarded to the PPO for dissemination to the KPSM or RST according to the circumstances of the case.
544. ML is a criminal offence that, in accordance with the law, can be punished independently of a conviction for a related predicate crime. It even is not necessary to prove any underlying crime.
545. With regard to the interrogations of witnesses in criminal proceedings the following regulations are applicable in Sint Maarten:
546. Within the scope of the criminal investigation the police and the examining judge can examine the witnesses based on Articles 243-261 of the Penal Procedures Code. The Customs Department advises that they are empowered with the power to take witness statements pursuant to the Penal Procedures Code and can do exercise these powers. Witnesses can also be examined under oath during the court session. This is not the case with witnesses interrogated by the police. The Penal Procedures Code regulates the summons of witnesses by the examining judge, the PPO (Article 421), the suspect, (article 287.3) and the judge of the court (Article 502). Based on case law the summons of witnesses by the police, not regulated by law, has become common.
547. An examining judge can be interrogated as a witness. This can form a kind of counter weight, since statements by witnesses made in his presence, can serve as evidence. The registrar of the examining judge or of the court can also be examined as a witness. However it a controversial issue as to the extent the Public Prosecutor has the obligation to act as a witness. In case the Public Prosecutor would be forced to make a statement he would not be able to act as Public Prosecutor during the court session. He would then have to be replaced. For that reason it is important that the judge applies a reserved policy with regard to this aspect. This does not



mean that in case the Public Prosecutor has claimed/alleged specific investigation activities it should be possible to interrogate him in the same way as that happens with the police. The Supreme Court has a strict criterion about this: in the Dutch prosecution system it would not be deemed fit except in special cases- to interrogate one of the parties involved in the criminal proceedings, such as a Public Prosecutor who represents the Public Prosecutor's Office when asking questions about having a judicial preliminary investigation.

548. Given the position of the lawyer as someone who offers help to the suspect and denying the role of a witness of the suspect, it is not advisable to interrogate the lawyer as a witness. Moreover, if it would be different, before long he would appeal his right to refuse to give evidence.
549. The competent investigating authorities can draw up official reports, including witness testimonies. This report can serve as evidence pursuant to Article 387 of the Penal Procedures Code. In that sense they can testify about their written findings, but they can also examine witnesses and record this in declaration stated under oath of office. The investigation officer can be summoned to be examined as a witness during the court session.
550. In case of reasonable suspicion of a criminal offence, the supervisors- without investigative powers - can inform this to their colleagues in charge of the investigation or to the Public Prosecutor. They can be examined as a witness, submit documents that can be included in the criminal file, etc

**Recommendation 30 (Law enforcement and prosecution authorities only)**

551. Duties of the Public Prosecution Service have been laid down in the Consensus Kingdom Law on the Public Prosecution Services. Just like the Joint Court of Justice the Public Prosecution Service forms part of the 'judiciary'. The Public Prosecution Service is in charge of the supervision of the enforcement of the legal regulations of Sint Maarten and of the settling of criminal cases against persons. The Public Prosecutor is the leader of the investigations by the police, and decides which cases are brought before the criminal court or which cases have to or will be dismissed. Moreover the PPO is charged with the execution of the judicial decisions in criminal cases both with regard to custodial sentences and community service as well as financial sanctions. The Public Prosecution Service is subdivided into the Office of the Attorney General and the PPO at the Court of First Instance. The Attorney General is the head of the Public Prosecution Service. He is based in Curaçao but has offices on Sint Maarten and on Bonaire (on behalf of the Dutch Caribbean Islands). He is in charge of the judicial police. In the Attorney General's Office the Solicitor General, who serves as a prosecutor in the Court of Appeal, is a substitute for the Attorney General in his absence and is in charge of the prosecution in appeal cases. There are two Solicitor General working within the Attorney General's Office, one of which is designated to Sint Maarten. He is in charge of the Sint Maarten Office of the Attorney General. The authorities advised that this point was recently created and that the individual assumed responsibilities shortly after the onsite mission. The operational management of the Public Prosecution Service (controller, HRM, IT etc.) falls under the Office of the Attorney General. The Chief Public Prosecutor is the head of the PPO with the Court in First Instance. He is subordinated to the Attorney General. The Chief Public Prosecutor is assisted by a staff of Public Prosecutors, assisting lawyers, paralegals and other supporting staff members. At the PPO there are 5 Public Prosecutors under the supervision of a Chief Public Prosecutor and assisted by 4 assisting lawyers/paralegals. The Chief Public Prosecutor is appointed by the Queen while the Public Prosecutors are appointed by the Governor.
552. The authorities advised that when combating ML the PPO focuses on all manifestations: money couriers at the airport and the seaport, the use of money transfers, money exchange (either at the indication of the FIU or otherwise), but also when combating the more organized

forms of ML such as the investing of proceeds of crime in real estate in Sint Maarten or concealing the ownership of that property. The Public Prosecutor's Office aims at seizing the proceeds of ML as much as possible and have them confiscated or forfeited by the court.

553. Until 10-10-10 the BFO/HARM of the Netherlands Antilles was a department especially charged with combating of money laundering and the applicable cases of terrorist financing. It was part of the Dutch Antillean Police Force, yet Curaçao based, and consisted of 15 staff members to perform its duties. To keep abreast of the ever changing money laundering characterizations, the members of this service attended relevant courses, seminars and conventions. In the past years the BFO/HARM conducted the several investigations on Sint Maarten. With the disintegration of the Netherlands Antilles the BFO/HARM was added to the KPC (Curaçao Police Force) and the KPSM (Sint Maarten Police Force) had the tremendous task to build up its own financial investigation team from scratch. All expertise unfortunately remained on Curaçao. KPSM had one detective assigned to RST to share the knowledge on financial investigations. This detective has now been deployed within KPSM and will have the task to build up KPSM's own BFO. In the Sint Maarten Police Force business plan the financial detectives' section is supposed to increase to 6 detectives by 2015. This section, together with RST, will in due time be in charge of ML and TF criminal investigations.
554. The staffing of the KPSM has provided some measure of a challenge since 10-10-10. The authorities have advised that the current complement is 225 persons strong. The ultimate aim is to attain the figure of 389 persons.
555. The RST is a team that cooperates with the local police and investigation services. The RST contains various disciplines among which the combating of money laundering. The staffing of the team changes periodically and the average staff consists of 2 financial experts on Sint Maarten. The authorities advised that there was need for an additional two financial experts. It was also noted that the majority of the members of the RST were from Holland with only a few locals as members of the Unit. For the financial intelligence they can rely on the experts of the centrally organized intelligence and expertise unit in Curaçao. The authorities advised that there was an officer, who had been recently recruited in the Audit and Criminal Investigations Department of the Tax Inspectorate. All the law enforcement entities reported that background checks were employed before recruitment to the agencies. As the headquarters for these agencies were previously centralised in Curacao under the Netherlands Antilles regime, it appears that Sint Maarten is now in the process of the establishment a law enforcement regime on the island. As staffing numbers are low, the relevant agencies have been looking to Holland and other Dutch islands in the region to assist in this regard.
556. Although not unlimited with regard to financial means, there are financial arrangements for the RST to organise training and other forms of knowledge gathering.

**Funding:**

557. The PPO and KPSM, receive their funds from the Government. In addition, the NO on a Crime Prevention Fund 1995 consists of the proceeds of criminal investigations (fines, forfeited money and assets, proceeds of asset sharing etc.). The PPO can apply with the Minister of Justice for funds especially for projects on crime prevention. The authorities advised that the law enforcement entities are eligible to benefit from the Fund Since the disintegration of the Netherlands Antilles, Sint Maarten will have to fill this Crime Fund partly with their share from the Netherlands Antilles Crime Fund as well as with their own funds. Apart from this, the agencies prepare their budget for the department's needs for approval by the Minister of Justice and ultimately the Minister of Finance.

558. The RST, which is basically comprised of police officers from the Netherlands and with some local police officers, receives its funds from the Netherlands (The Ministry of Interior and Kingdom affairs)

**Operational independence:**

559. All criminal investigations are conducted under the guidance and responsibility of the PPO. The PPO decides independently if and when to investigate or prosecute criminal cases. This is a fundamental principle of the criminal procedure. The Public Prosecutor's Office is accountable to the Minister of Justice about its pursued policies and results. The authorities advised that the Minister of Justice can give general guidelines with regard to prosecution policies to be pursued but the Minister of Justice cannot give orders/instructions to the PPO in specific criminal cases. He should adopt a reticent attitude in individual criminal cases
560. With respect to the judiciary, they are fully independent and the court system is free from influence. There are ethical standards for becoming a Judge. Sint Maarten recruits the members of the judiciary largely from Holland where that judge can be selected from the private Bar and once he has served as an attorney at law for three years, he is eligible to sit on the judiciary. Via the internet, the judges can access Dutch jurisprudence from a relevant database. There are currently 4 judges in Sint Maarten. The authorities are of the view that the judicial system works well generally and that there is close collaboration between the judges, the PPO and law enforcement. Search warrants are executed well. The authorities are of the view that the courthouse needs more space to accommodate persons. Training and sensitisation for the judiciary in order that they keep abreast of the latest development in AML/CFT was regarded as a need by the authorities. The Court of Justice maintains its own budget as approved by the Government.
561. When the judiciary employs new staff members these persons must be recruited via the HRM department of the Public Prosecution Service according to a fixed pattern of stipulations, such as education and expertise. A University Master's degree in law is a basic requirement. Meeting this requirement, a person can associate with the PPO by following a traineeship as a judicial officer (Raio-training). This is an internal on the job training during which one works within the Court, the PPO and elsewhere (usually as a lawyer in a law firm). The alternative route, via the external proceedings the outsider's route is applicable for lawyers with at least six years of relevant professional experience outside of the PPO (the accelerated Raio-training program). The applicant must always be assessed and he must appear before an evaluation committee in case he would like to become a Public Prosecutor. With regard to staff members other than the Public Prosecutors there will also be a thorough vetting prior to their appointment. As a result of the small-scale community there is also a social monitoring of the authorities and their employees. Equally, individuals are background checked not only with respect to the relevant databases in Sint Maarten but checks are also performed in the country where the individual has resided five years prior. Several agencies referred to a Code of Conduct to which all employees are required to adhere. Several agencies also referred to periodic screening and background checks.
562. With respect to training, many of the law enforcement agencies including the relevant sections of the Tax Department, Customs, Coast Guard, KPSM and Landsrecherche admitted that robust training in ML and TF was required.
563. Information security is a standard practice among all investigation departments in charge of money laundering investigations.

**Customs**

564. In the past custom officers have been provided with a number of training sessions regarding combating ML and FT. For instance for some years a number of Customs officers have been participating in the annual conference focused on combating financial crime that RST organizes in the month of October. This conference targets law enforcement officers, supervisory authorities, the PPO and the FIU (MOT) within the Kingdom of the Netherlands attend.
565. From January 24th till 26th 2008 there was a training seminar held in Curacao: overview of crime relating to human smuggling, human trafficking, bulk cash smuggling. From September 23rd till 27th 2008 the capacity building training session combating human trafficking and ML was continued. Both seminars were also given by US Immigration and Customs Enforcement (ICE).
566. In 2010, among other things, police officers, Customs and RST officers participated in a course on digital investigations.

### **Immigration Department**

567. There is a National Ordinance on Immigration Training (1998) for the Immigration Department which provides for different levels of training for the immigration officers. However, the training does not include training for ML or TF.

### **Public Prosecutors Office**

568. Since Sint Maarten lacks its own law school, it is difficult to recruit attorneys-at-law. There is stiff competition for jobs between the private sector and the non-profit sector. Criminal lawyers are even harder to find. As a result of this Sint Maarten fully depends on Dutch or Dutch Caribbean prosecutors to fill the vacancies at the PPO. For many years experienced Dutch prosecutors worked on Sint Maarten for a set period of time. With these prosecutors arriving on island, the Sint Maarten Prosecutor's Office generally is staffed with well trained prosecutors who are able to transfer their knowledge to paralegals working within the organization.
569. Moreover, RST organizes annually in the month of October a conference on financial crimes to which law enforcement officers, the PPO, the supervisory authorities and the FIU (MOT) within the Kingdom of the Netherlands attend. Furthermore, starting April 18, 2011 officers within the judicial chain can participate in a course on financial investigations.
570. Several of the law enforcement agencies reported receiving training for ML, TF under the regime of the Netherlands Antilles prior to 10-10-10. Some were arranged by the MOT Netherlands Antilles. The examiners are of the view in light of the new status of Country Sint Maarten and the recent creation of several agencies that in order for the structures to operate robustly and effectively on Sint Maarten, it is imperative that anti-money laundering and counter-financing of terrorism regime is a regular regimen of the development skills of every law enforcement agency. Many of the agencies including Customs, Coast Guard and the local Police admitted that they had not received local ML or TF training since 10-10-10.

### **Additional Elements**

571. The competent authorities advised that there is an absence of educational programmes for the judges and the courts concerning ML & TF to keep the judiciary apprised of the developments in the field. The judges in Sint Maarten originate from the Netherlands and therefore would have received their sensitisation and exposure in their homeland. It would be worthwhile for the authorities to arrange judicial retreats for the judiciary at which there can be discussions

on ML, TF and educational programmes in the area presented by colleagues based in the Netherlands.

## 2.6.2 Recommendations and Comments

### Recommendation 27

572. Relevant financial resources should also be directed to ensure that recruited officers are appropriately trained in ML and TF and are kept up to date in the recent developments in financial investigations. These challenges identified will therefore affect the proper investigation of ML and TF offences.
573. There should be a decisive approach with respect to the operation of certain MTCs without licenses in contravention of the law.

### Recommendation 30

574. The authorities should seek to quickly implement robust recruiting programmes to fill the vacancies in the law enforcement agencies such as the KPSM and Customs.
575. The authorities should ensure that all relevant entities including the Tax Department, Landsrecherche, Customs, Coast Guard and the KPSM are adequately and regularly trained in money laundering and counter financing of terrorism like the RST.
576. Improved facilities should be provided for the Courts of Justice.

## 2.6.3 Compliance with Recommendations 27 & 28

	Rating	Summary of factors relevant to s.2.6 underlying overall rating
R.27	PC	<b>Effectiveness:</b> <ul style="list-style-type: none"><li>• No financial resources have been allocated for ML and TF training for the local law enforcement agencies</li><li>• There is a shortage of suitably qualified law enforcement officers generally to execute effective ML investigations.</li><li>• No specific training for TF or ML for several of the law enforcement authorities.</li><li>• Unlicensed MTCs continue to operate within Sint Maarten</li></ul>
R.28	C	This Recommendation has been fully observed

## 2.7 Cross Border Declaration or Disclosure (SR.IX)

### 2.7.1 Description and Analysis

#### Special Recommendation IX

577. Dutch Sint Maarten has two main ports of entry namely the Princess Julianna International Airport and the Philipsburg Seaport. Yacht and schooner owners may also gain access to Sint Maarten via Simpson Bay and Great Bay. The Customs authorities have advised that Immigration and Customs check-points are post at these two areas. The Crime Pattern Analysis 2008-2010 as discussed in Recommendation 27 expressed concern at the vulnerability of Sint Maarten's inlets and bays for illicit crimes as they are not properly manned

578. The Customs Department in Sint Maarten falls under the Minister of Justice. The Articles 112 -121c and 220 – 258a of the General Regulation Import, Export and Transit (1908 N.G. 1949 no. 62) specify the general competence of Customs. The Examiners can state that the General Regulation of Import, Export and Transit details the administrative powers of the Customs Department. The Team was advised that the new Customs legislation, namely the General Ordinance regarding Customs and Excise is yet to be enacted.
579. Customs has dual tasks.
- The first one is the charging of duties at importation of unleaded gasoline which is governed by legal, political, economic and policy rules. (Fiscal responsibilities). Efficient task performance ensures that the barrier of trade and movement of people are limited to a minimum.
  - The other set of tasks is related to the non-fiscal responsibilities. This includes the law enforcement aspects with regards to the smuggling of drugs, weapons and protected species as well as the combating of money laundering and terrorist financing at the border.
580. In general Customs performs the following tasks:
- Control, levy and collection of duties of unleaded gasoline at importation and the control and investigation of all illegal and wrongful border crossings of goods
  - Controls and audits of (import and export) companies
    - Excise goods
    - Warehouses
    - Administrations
  - Controls of the shore and bays (preventive)
  - Night patrol against illegal droppings (go-fasts)
  - Control on small vessels with fruit, fish etc.
  - Control of Harbour of Philipsburg, Yacht-basins, Fishing ports,
  - Visitation of all kinds of ships, boats and vessels
  - Control and investigate incoming and outgoing flights, passengers and luggage
  - Close cooperation with all judicial partners
  - Close cooperation with the health, environmental and agriculture departments
  - information on ships and airplanes
  - ship registers
  - Tax and import declaration, the import duty is carried out at import of unleaded gasoline.
  - Monthly declaration
  - Payment processing
  - Temporary storage of goods
  - Inspection of Parcels
  - Handling of Correspondence
  - Handling of Complaints
581. In 2002, the NOOCMT was enacted as part of the measures to combat ML/FT. Article 2 states that where persons carrying NAF 20.000, - or more in cash and/or bearer negotiable instruments, entering or leaving the country, they must report this to the Customs authorities. Reporting takes place by completing a special designed form.
582. Sint Maarten still uses the Netherlands Antilles Customs Service Form known as “The Report of International Transportation of Currency or Monetary Instruments” in accordance with Articles 2 and 3 of the NOOCMT. On affixing the signature, individuals attest to the fact that they are aware that an incorrect or false report is a violation of the NOOCMT. Overleaf, the penalties for failure to file a report, filing a report with omissions and misstatements and filing a fraudulent or false report are laid out. The form also advises that the currency or monetary

instrument may be subject to seizure and forfeiture and are referred to Articles 5 and 7 of the NOOCMT.

583. Currently, the Sint Maarten authorities have implemented a disclosure system with respect to the physical cross-border transportation of currency or bearer negotiable instruments in the amount of NAF 20,000. The immigration card does not require passengers to make a declaration. Relevant signages was erected shortly after the immigration check-point at the airport for departing passengers. No signs were seen on entering the country in the area of the immigration check-point of before proceeding to Customs. Once the Customs authorities are aware of the threshold amount, the relevant form is produced for completion. The Sint Maarten Customs authorities advised that there are plans to use a Customs declaration form for completion by all travellers. This form will bear information in relation to the threshold amount of NAF20,000. the authorities advised that there will be a new system where the completion of the Customs form will be executed electronically by the traveller at designated computer stations. The examiners are not aware as to date of commencement of the form but based on the information supplied, this new declaration system will improve the current system of random disclosure particularly that no signage is erected in the airport on arrival informing of the relevant laws.
584. In accordance with Article 2 NOOCMT, reporting takes place by submitting a statement, according to a model laid down by the Minister, signed by the person reporting. Currently however, as was previously stated, notwithstanding this provision, the current system is a disclosure system where the Customs officials enquire as to the contents in one's luggage and whether one is carrying in excess of NAF 20,000.
585. Officials of Customs see that passengers comply with these laws. This applies to persons entering, leaving or in transit, in the harbours or the airports of Sint Maarten.
586. On arrival the passengers go to the Customs inspection counter, taking along their entire luggage and other belongings. The passenger has to present his luggage to be inspected.
587. At the inspection counter the passenger is asked by the Customs Officer if he has something to declare. The passenger is also asked if he has money to declare and what the amount is. Although it is an obligation of the passenger to report the amount of money that he is carrying when it is NAF. 20.000,- or more, Customs Officers as usual must ask the passenger whether he has something to declare or not. After the answer to the Customs Officer, the officer decides if he continues with the inspection or not. If the answer is negative and the officer decides to proceed with the inspection and finds an amount of money that's equivalent to NAF. 20.000- or more a fine of 10% is levied. In the event the money is concealed, same will be seized and the passenger will be arrested and turned over to the RST who is in charge of financial cases.
588. It depends on the reason why the passenger didn't tell the truth or if the passenger is the owner or not, what the decision on the money will be. The passenger will have to prove that he/she' is the owner of the money.
589. In cases of passengers travelling together with jointly NAF. 20,000 or more and where the Customs Officers have reasons to believe that this amount of money belongs to one person, Customs has the authority to start with an investigation to ascertain whether this amount of money belongs to one or more persons.
590. The below table represents the number of declarations made to the FIU (MOT).

Declaration/reporting Sint Marten

Year	Sint Maarten
2008	349
2009	344
2010	262
2011	489
April 2012	111

### **Inspection at departure**

591. Although it is unusual, just like in other countries, to conduct Customs inspection at departure, in Sint Maarten some flights are inspected before departure. Customs has the authority, to carry out inspection on passengers leaving Sint Maarten. According to the law, persons leaving the country, carrying NAF. 20.000,- or more must report no later than at the time when the police official employed at the Immigration Service may carry out a passport inspection or, if no passport inspection takes place, no later than at the time when the Customs and excise duties official may carry out an inspection of the luggage brought by travellers.
592. There is always a passport inspection on each and every flight on travellers leaving the island. For the flights departing to The Netherlands (Europe) the passengers are checked by Customs Officials before they get to the Immigration for their passport inspection.
593. All flights especially those departing to the U.S. and Europe (Netherlands) are checked on a regular basis. This means that during these inspections the passengers are asked and checked if they carry any amount of money. Passengers have the obligation to declare NAF. 20.000, or more. If Customs find a large amount of money for which the passenger is not able to give a adequate explanation, Customs has the authority to start an investigation.
594. For all the flights departing to the Netherlands (Europe) there is a special team to check all these passengers. Also passengers travelling to other destinations during the period that flights depart to Europe are checked on the amount of money that they carry. This is to minimize the possibility of passengers handing over amounts of money to other passengers in the transit hall. Passengers in transit are checked at random.

### **Transport of money by vessels.**

595. The transport of large amounts of money by the so called “fish and fruit boats” arriving from, or departing to St. Vincent, Dominica, St. Lucia, St. Kitts & Nevis, must be reported to Customs. Also in these cases the person(s) carrying the money must report this to Customs
596. Pursuant to Article 5 of the NOOCMT, Customs as well as the police officials employed with the Immigration Service are responsible for the supervision of the observance of the provisions laid down by or by virtue of the NOOCMT. In accordance with Article 5 the following actions can be taken by the relevant officials:
- request any information, subject property to inspection and temporarily seize such property and take it with them for such purpose;
  - access all locations, with the exception of residences or parts of vessels intended as residences, accompanied by the people designated by them, without the explicit permission of the occupant;
  - search vessels that are mooring or landing, and any stationary aircraft and vehicles and their cargo;
  - take money into custody if the person reporting does not immediately provide them with the data, referred to in article 3, or if they have reasonable doubt as to the correctness of the data provided by the person reporting.



597. Customs Officers have the authority to carry out investigations on their own, but Customs Sint Maarten has an agreement with the PPO that all the cases concerning money transport are handed over to the Police or RST who are more specialized.
598. In the following chart you can find how many cases/persons Customs handed over to the Police or RST.

Year	Police /RST
2008	6
2009	2
2010	0

599. The examiners were advised by Customs of their desire to purchase a scanner, even a second-hand one to adequately execute its work in scanning containers and/or baggage at the ports of entry. Customs expressed reservation at the possibility of acquiring the same due to the high cost of the scanner. The Council of Ministers would be required to apply for a loan for its purchase and there was a credit freeze in effect during the time of the onsite evaluation. With the number of international flights inbound to Sint Maarten and concerns with respect to human smuggling and illegal drugs, the Authorities acquire the relevant scanner. The acquisition of the scanner would increase the efficiency of the Customs Department.
600. As stated previously, Article 5 refers to the powers of Customs to request relevant information.
601. The special unit of the police (financial detectives) decide what happens with the passenger and the money. This happens in consultation with the Public Prosecutor. Customs Officers have the authority to carry out investigations on their own; Customs Sint Maarten has an agreement with the Public Prosecutor that all the cases concerning money transport are handed over to the Police or RST who are more specialized.
602. Article 3 of the NOOCMT states that when making a report for possession of NAF 20,000 or more, correct data must be provided to the Customs Officers with respect to the identity and place of residence of the person reporting and the owner of the money, the magnitude, origin and destination of the money and the reason for selecting the method of transportation of the money. It appears that the legislation does not explicitly state that the officials can request and obtain information on the origin and owner of the currency on discovery of a false declaration or disclosure of currency or bearer negotiable instruments. Article 5 states in paragraph 2 that in the reasonable execution of their duties, the customs officials have the power to ask any information.
603. Article 5 of the NOOCMT states:
- 1) The import and excise duty officials as well as the police officials employed with the Immigration Service shall be responsible for the supervision of the observance of the provisions laid down by or by virtue of this national ordinance.
  - 2) Only to the extent that such is reasonably required for the performance of their duties, the officials referred to in the first paragraph shall have the power to:
    - a. ask any information;
    - b. subject property to inspection and to temporarily and take it with them for such purpose;
    - c. access all locations, with the exception of residences or parts of vessels intended as residences, accompanied by the people designated by them, without the explicit permission of the occupant;
    - d. search vessels that are mooring or landing, and any stationary aircraft and vehicles and their cargo;

- e. take money into custody if the person reporting does not immediately provide them with the data, referred to in article 3, or if they have reasonable doubt as to the correctness of the data provided by the person reporting.
- 3) The officials referred to in the first paragraph of article 5 of the NOOCMT shall immediately draw up a report regarding the money that was taken into custody. The money can be taken into custody for a maximum of seven days. This term may be extended once by a second period of a maximum of seven days by the head of their department. When this term has lapsed the money will immediately be returned to the person reporting, unless article 6, second paragraph of the NOOCMT is applied.

*(Note: this paragraph states: The officials or persons charged with the detection of offences as referred to in the NOOCMT shall at all times have the power to seize any and all objects that are eligible for seizure in relation to the provisions of the NOOCMT pursuant to the Penal Procedures Code. They can demand that such objects be handed over. For the penal provisions please be referred to article 7 of the NOOCMT.*

*Intentional contravention of articles 2, 3, and 8 paragraph 1 NOOCMT will be punished either with imprisonment of up to 4 years or with a fine of up to NAF.500,000 or both. Unintentional contravention will be punished by imprisonment of up to 1 year or with a fine of up to NAF. 250,000 or both).*

*By National Decree containing general measures rules shall be laid down as to the report on taking into custody of the money, the place where the money is kept, the transfer and the control of the money.*

- 4) If necessary, access to a place referred to in article 5, paragraph 2, section c of the NOOCMT, shall be provided with the assistance of police officers.
- 5) The officials referred to in the first paragraph shall have the authority to search the body and the clothing of people moving from or to the vessels, vehicles or aircrafts.
- 6) The body search or the search of clothes shall be carried out by officials of the same sex as the person subjected to the search.
- 7) Persons subjected to a body search or a search of clothes shall stand still at the first order by the officials referred to in the first paragraph of article 5 of the NOOCMT, and shall follow such officials to a location designated by the officials.
- 8) The officials referred to in the first paragraph of article 5 of the NOOCMT shall always be given all cooperation that is demanded on the grounds of the second, fifth and seventh paragraphs of article 5 of the NOOCMT.
- 9) By national decree containing general measures, rules can be laid down regarding the way in which officials referred to in the first paragraph of article 5 of the NOOCMT shall carry out their tasks

604. Sint Maarten Authorities are able to restrain money, which in Article 1 is defined as “domestic and foreign paper currency, coins and currency notes as also bearer negotiable instruments”, when there is a false declaration or disclosure.

605. According to article 3 of the NOOCMT (The content of the forms and final destination of the forms) the forms must be handed over to the Customs Officer at the inspection-counter.

606. There are no particular provisions observed in the NORUT and the NOOCMT with respect to the retention of currency or bearer negotiable instruments and the identification of the bearer(s) where there is a suspicion of ML or TF. This therefore signifies that the UTRs disseminated to the FIU (MOT) may simply be threshold cross-border money transfers and may not reflect suspicion for ML or TF.

607. Article 3 of the NOOCMT establishes that when reporting, as referred to in the second paragraph of article 2, the correct data must be provided as to:

- a) the identity and place of residence of the person reporting and the owner of the money;
- b) the magnitude, origin and destination of the money;
- c) the reason for selecting the method of transportation of the money.

608. The above mentioned original forms are sent to the FIU (MOT).
609. According to article 4 of the NOOCMT, the FIU (MOT) receives the data obtained pursuant to article 3 that is the identity and place of residence of the person reporting and the owner of the money; the magnitude, origin and destination of the money and the reason for selecting the method of transportation of the money.
610. The import and excise duty officials as well as the police officials employed with the Immigration Service will immediately send to the FIU (MOT): all reports referred to in article 2 of the NOOCMT and copies of reports regarding money that has been taken into custody. The authorities have supplied statistics representing disseminations to the FIU.
611. These are the figures regarding reported Unusual Transactions from Customs sent to the Financial Intelligence Unit as per 2008 to April 9<sup>th</sup> 2012.

Year	Reports	Amount (Ang)
2008	349	265,724,809
2009	344	334,363,013
2010	262	210,090,796
2011	489	569,289,458 (up until Nov 17 <sup>th</sup> 2011)
2012	111	132,154,987 (As per April 9 <sup>th</sup> 2012)

Please note: **The currency is denoted in Guilders**

612. The authorities advise that at the domestic level, cases are forwarded from Customs to the RST/Police through the Public Prosecutor Office. There are separate meetings with the Public Prosecutor's Office, the Coast Guard and the Police on specific cases. Customs also interfaces with MOT in the dissemination of cases. Customs will be a member of the CIWG. In order to achieve adequate domestic coordination, the authorities should consider using the CIWG for Customs and other relevant entities such as the PPO and MOT to ventilate the implementation of measures relating to the physical cross-border transportation of currency and other negotiable instruments
613. Customs is member of the Caribbean Customs Law Enforcement Council (CCLEC). CCLEC is a multilateral regional organization dedicated to improving the overall professionalism of its members. In 1989, the members of the Council agreed to formalize their exchange of information through the adoption of a Memorandum of Understanding (MOU) regarding mutual assistance and cooperation for the prevention and repression of customs offences in the Caribbean zone. At that time 21 countries signed the MOU but this number has increased to 36 signatories.
614. The CCLEC comprises 38 Customs Administrations of which 36 are signatories to the CCLEC Memorandum of Understanding. Customs Sint Maarten, is very active within the CCLEC. However the examiners are not in a position to comment on the effectiveness of this cooperation as they are not in possession of any statistics relating to international cooperation involving Customs.
615. Non compliance with the obligation is an offence. According to article 7 NOOCTM:

- 1) Contravention of the provisions referred to in articles 2, 3 or 8, first paragraph, to the extent this occurs intentionally, shall be punished either with imprisonment of up to four years or with a fine up to five hundred thousand guilders or with both these punishments.
  - 2) Contravention of the provisions referred to in the first paragraph, to the extent this occurs unintentionally, shall be punished either with imprisonment or up to one year or with a fine of up to two hundred and fifty thousand guilders, or both these punishments.
  - 3) Contravention of the provisions referred to in the first paragraph shall be a criminal offence and contravention as referred to in the second paragraph shall be an offence.
616. The special financial detectives of the police decide what happens with the passenger and the money. This takes place in consultation with the Public Prosecutor.
617. Customs Sint Maarten has an agreement with the Public Prosecutor that all the cases concerning money transport are handed over to the Police or Detective Co-operation Team (RST) who are qualified to handle such matters. The authorities advised that when there is a false declaration made that the monies are seized and a fine of ten per cent of the proceeds is exacted. The proceeds may be withheld for a period not exceeding six hours during which the Customs Department liaises with the PPO for the relevant instructions as to the way in which the matter should be handled. The PPO advised that there were 4 cases sent to the PPO by Customs in this regard. The examiners are however not clear as to the relevant time period for the 4 cases. The examiners were provided information on the number of fines imposed by Customs. Based on the statistics, it appears that the sanctions regime works satisfactorily and the sanctions appear proportionate and sufficiently dissuasive. The Plans by the Customs Department to introduce the declaration form to be completed by all passengers should assist in bolstering the sanctions regime in this area. The table below provides the statistics relating to fines imposed by Customs.

Year	Fines in USD	Fines in NAF
2008	\$22,608.00	-
2009	\$7,500.00	\$10,050.00
2010	\$2,150.00	-
2011	\$10,000.00	-
2012	\$21,723.70	-

618. The examiners are however not aware of the number of investigations submitted by Customs to the Police.
619. Article 7 of the NOOCTM (sanctions) is also applicable for persons who are carrying out a physical cross-border transportation of currency or bearer negotiable instruments that are related to terrorist financing or money laundering contrary. Money laundering is punishable under the Penal Code, Title XXXA in articles 435a up to and including 435c. These articles deal with the various forms of money laundering, namely intentional money laundering, culpable money laundering and habitual money laundering. The definitions cover the transfer of "objects" which mean all goods and property rights including money that is derived from any crime. The penalty for failure to disclose/declare and the penalty for making a false declaration/disclosure qualify it as a predicate offence for money laundering. As a consequence, such an offence would trigger the powers of the law enforcement agencies, the MOT and the PPO in actions necessary to combat ML and TF.
620. In reviewing the context of Article 7, the penalties are sufficiently dissuasive. However, the examiners have not been provided statistics on the number of false declaration cases forwarded to the PPO and therefore the examiners cannot assess the effectiveness of the sanctions regime for physical cross-border transportation of cash.

621. According to article 5 of the NOOCMT the import and excise duty officials as well as the police officials employed with the Immigration Service shall be responsible for the supervision of the observance of the provisions laid down by or by virtue of the NOOCMT.
622. Only to the extent that such is reasonably required for the performance of their duties, the officials shall have the power to among other things to subject property to inspection and to temporarily take it with them for such purpose; take money into custody if the person reporting does not immediately provide them with the data, referred to in article 3, or if they have reasonable doubt as to the correctness of the data provided by the person reporting.
623. The officials referred to in the first paragraph of article 5 of the NOOCMT shall immediately draw up a report regarding the money that was taking into custody. The money can be taken into custody for a maximum of seven days. This term may be extended once by a second period of a maximum of seven days by the head of their department. When this term has lapsed the money will immediately be returned to the person reporting, unless article 6, second paragraph of the NOOCMT is applied. Article 6 states that the officials or persons charged with the detection of offences shall at all times have the power to take into custody any and all objects that are eligible for being taken into custody in relation to the provisions of the national ordinance pursuant to the Penal Procedures Code. The officials may therefore demand that such objects be surrendered. Paragraph 3 of the Article 5 will apply mutatis mutandis.
624. Confiscation of property is regulated in Article 35 of the Penal Code. In Article 38a up to and including 38d of the Penal code and Article 38e of the Penal Code. The authorities provided statistics on the number of confiscations of drugs-related and money-related cases.
625. Separately, the Customs Department provided statistics in relation to the number drug-related confiscations/seizures that were forwarded to the PPO.

Year	Drug-Related Cases Sent to PPO
2008	12
2009	18
2010	13
2011	8

626. The examiners were also provided statistics on the number of money confiscations.

Year	Confiscated Amount (USD)
2008	\$16,126.00
2009	\$119,704
2010	\$1,650.00
2011	-
2012	\$21,028.00 (Up to April 2012)

627. In reviewing the statistics, the confiscation regime regarding the physical transportation of currency appears satisfactory
628. As indicated NOOCMT, relevant have the power to among other things subject property to inspection and to temporarily take it with them for such purpose. This includes taking money into custody if the person reporting does not immediately provide them with the data or if they have reasonable doubt as to the correctness of the data provided by the person reporting
629. Procedures for confiscation of property are outlined in Section 2.3 of this report.

630. Article 5 of the Sanctions National Decree Al-Qaida states that it will be prohibited for all persons to contribute in any manner, either directly or indirectly, to acts that are prohibited in virtue of articles 1 to 4 inclusive. The Protocol UN-list and Protocol local terrorists do not mention Customs as one of the Authorities that List should be forwarded. There is no indication that Customs Sint Maarten makes any use of the UN- lists of entities and individuals associated with terrorism activities. The examiners are therefore not in a position to determine the applicability of the EC.III.1-III.10 in relation to designated persons by the UN-List or VDSM that could be in relation with physical cross-border transportation of currency or bearer negotiable instruments.
631. The Customs authorities advised on experiencing shipments transporting gold. When there is a cross-border movement of gold, for example Customs officers are contacted or contact other competent authorities from which the items originated and/or to which they are destined. Other competent investigators can also do the research regarding the source and destination of the gold. The progress of the investigation can be shared in “the investigation officers meeting”. The examiners have not been provided statistics in this regard and cannot therefore assess the effectiveness of this regime.
632. The system for reporting cross-border transactions appear to be subject to strict safeguards. The original forms are brought to the FIU (MOT). The copies are held with the Customs Department. There is also periodically (every 6-8 weeks) an “investigation officers meeting” (opsporingsdienstenoverleg), where Customs officers, tax officers, police, FIU (MOT) and the prosecutor participate. In this meeting for instance issues regarding ML and FT are discussed and actions to be taken are coordinated.
633. Before 10-10-10, Customs Sint Maarten had a training session for ML that was organised by the FIU (MOT) Netherlands Antilles. However, the authorities reported that they have not received any similar training since that time.
634. In addition, prior to 10-10-10, the Customs reporting forms belonging to Sint Eustatius, Saba and Sint Maarten were collected by Customs Sint Maarten and delivered in person to the FIU (MOT) by a Customs official. Customs advises that the original forms are carried to the FIU (MOT) Sint Maarten, while copies are retained by the Customs Department. Customs provided for the examiners information relating to confiscations for drugs and money and statistics relating to information forwarded to the FIU (MOT.). Separately, the Customs Department needs to ensure that a robust regimen of training is available for all officers with respect to ML & TF
635. With regard to enforcement, pursuant to article 7 of the National Ordinance Obligation to report Cross-Frontier Money Transportations, contraventions of the provisions in the mentioned ordinance depending on whether they have occurred unintentionally or not, can be offences or criminal offences, with punishments from leading from one year imprisonment or a fine of up to two hundred and fifty thousand guilders (approximately US\$125,000) to four years imprisonment or a fine of five hundred thousand guilders (approximately US\$ 250,000).
636. The examiners are of the view that the training, data collection and targeting programmes of Customs for Sint Maarten appear rather ad hoc. The examiners therefore strongly propose that the approach in these areas is more structured and coordinated.
637. Customs Sint Maarten has an agreement with the Public Prosecutor that all the cases concerning money transport are handed over to the Police or Detective Co-operation Team (RST) who are more specialized.
638. Upon the Customs request, the FIU (MOT) is authorized to disseminate the information needed. Customs officers have regular contact with the law enforcement agencies and the

PPO. The examiners are however not aware of the factor of timeliness in the dissemination of reports to the FIU(MOT) and the PPO. The evaluation team is therefore not in a position to comment on the effectiveness of this requirement.

### **Additional Elements**

639. All reports with regard to cross border transportation of currency above NAF. 20,000 are imported in a database of Customs. This enables Customs Authorities to properly allocate its resources for effective management.

### **FIU (MOT)**

640. All reports with regard to cross border transportation of currency above NAF. 20,000 are imported in the database of the FIU (MOT). Upon requests received from law enforcement agencies, the PPO or from other FIUs, the FIU (MOT) is authorized to disseminate this information for ML/TF purposes. The FIU (MOT) and Customs are in the process of establishing an online reporting system to make the processing of the reports more efficient

### **Recommendation 30 (Customs authorities)**

641. With respect to the structure of the Customs Department in Sint Maarten, the current structure has been in existence since 10-10-10. The structure is as follows with priority to the highest position in the hierarchy: Head of Customs, Legal Policy Adviser, Administrative Assistant and Customs Officers. The Head of Customs reports to the Minister of Justice.
642. The authorities advised that customs officers are deployed at the airport, at the harbour and on the streets. The Enforcement Division of the Customs Department utilises five teams on the streets. The Department has 20 persons. However, overall there are approximately 50 vacancies in the Customs Department. The evaluation team was advised that there was a strategic plan to fill the vacancies within a five-year period. The selection process has commenced.
643. With respect to funding, the Head of Customs prepares the annual budget according to the needs and upcoming programmes of the department. He liaises with the Financial Controller of the Ministry of Justice with respect to the preparation of the Budget and presentation to the Minister of Justice. The Customs authorities advise that the department performs its tasks independently, without undue influence or interference from the Minister of Justice.
644. The examiners were advised by Customs of their desire to purchase a scanner, even a second-hand one to adequately execute its work in scanning containers and/or cargo at the port luggage at the ports of entry. The Sint Maarten government officials however expressed reservation due to the high cost of purchase or acquisition of the same as the Council of Ministers would be required to apply for a loan to purchase it. The authorities advised during the onsite evaluation that there was a credit freeze in effect. With the number of international flights inbound to Sint Maarten and concerns related drug trafficking and human smuggling, the authorities may also wish to consider the acquisition of a luggage scanner at the airport. The acquisition of the scanner would increase the efficiency of the Customs Department.
645. In order to be eligible for recruitment, candidates are screened in several ways including criminal checks with the Criminal Investigations Department. Once recruited, customs officers are required to adhere to the Customs Code of Conduct. While performance appraisals have not recommenced since 10-10-10, this is expected to commence shortly. Every Customs

officer is screened before their enlistment. Customs officials are required in general to maintain high standards concerning confidentiality.

646. Before 10-10-10, Customs Sint Maarten had a training session for ML that was organised by the FIU (MOT) Netherlands Antilles. , For some years, Customs Officers have been participating in the financial conference that RST in Curacao has been organising in the month of October/November. However, the authorities reported that they have not received any similar training since that time. It is imperative that Customs Sint Maarten receives annual local training in ML & TF

### **Recommendation 32**

#### **Customs**

647. The authorities provided in Special Recommendation IX statistics relating to the number and value of unusual transaction reports to the FIU (MOT).
648. The authorities have also provided statistics representing the number of confiscations and/or seizures of money and drugs in Special Recommendation IX

#### 2.7.2 Recommendations and Comments

649. The authorities should ensure that they pursue the proposed declaration system to be completed by all passengers instead of the ad hoc disclosure system currently in place.
650. The Authorities should consider implementing the system to restrain currency where there is a suspicion of ML or TF.
651. The authorities should maintain statistics evidencing Customs' effectiveness in the area of international cooperation.
652. The Sint Maarten authorities should maintain the process for confiscating currency or negotiable instruments in implementing the UNSCR 1373 and 1267.
653. The authorities should maintain a system to identify the source, destination and purpose of movement of gold or other precious metals and stones.
654. A structure should be established for the training and targeted programmes for Customs.
655. The authorities should ensure that the relevant authorities possess timely access to suspicious cash declarations or disclosures, or intentional lack of disclosures information.

#### 2.7.3 Compliance with Special Recommendation IX

	Rating	Summary of factors relevant to s.2.7 underlying overall rating
<b>SR.IX</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>•An ad hoc system is in place for the disclosure of the physical cross-border transportation of currency.</li> <li>•There is no system to restrain currency where there is a suspicion of ML or TF.</li> <li>•There are no statistics evidencing Customs' effectiveness in the area of international cooperation</li> <li>•There are no statistics regarding the number of false declarations and investigations forwarded to the PPO.</li> <li>•There is no process for confiscating currency or negotiable instruments for</li> </ul>



		<p><b>persons listed in accordance with UNSCR 1373 and 1267.</b></p> <ul style="list-style-type: none"> <li>• <b>There are no statistics relating to shipments of gold or other precious metals and stones.</b></li> <li>• <b>There is no structure established for the training and targeted programmes for Customs.</b></li> <li>• <b>No current information available with respect to the timeliness of the dissemination of the information relating to suspicious cash declarations/disclosures.</b></li> </ul>
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### 3. PREVENTIVE MEASURES - FINANCIAL INSTITUTIONS

#### Overview scope Coverage of AML/CFT preventive measures

##### General

656. The Central Bank is responsible for the regulation and supervision of the financial services sector in Sint Maarten. The Central Bank exercises supervisory oversight responsibilities over the banking and other credit institutions, insurance companies, insurance brokers, pension funds, investment institutions, administrators of investment institutions, and MTCs. The banking and other credit institutions are governed by the NOSBCI, the insurance companies by the NOSII, the insurance brokers by the NOIB, the pension funds by the NOSPF, the investment institutions and their administrators by the NOSIIA, and the money transfer companies (MTC) by the RFETCSM, hereafter referred to as “ordinances”.

##### Legal framework

657. The AML/CFT framework for the financial sector constitutes the following laws and executive decrees, regulations, provisions and guidelines:

- The National Ordinance on the amendment of the Code of Criminal law (penalization of terrorism, terrorist financing and money laundering) (N.G. 2008, no. 46);
- The National Ordinance on the Reporting of Unusual Transactions (N.G. 1996, no. 21) as lastly amended by N.G. 2009, no 65 (N.G. 2010, no 41) (NORUT);
- The National Ordinance on Identification of Clients when rendering services (N.G. 1996, no. 23) as lastly amended by N.G. 2009, no. 65 (N.G. 2010, no. 40) (NOIS)
- The National Ordinance on the Obligation to report Cross-border Money Transportation (N.G. 2002, no. 74);
- The National Decree containing general measures on the execution of articles 22a, paragraph 2, and 22b, paragraph 2, of the National Ordinance on the Reporting of Unusual Transactions.(National Decree penalties and administrative fines for reporters of unusual transactions) (N.G. 2010, no. 70);
- National Decree containing general measures on the execution of articles 9, paragraph 2, and 9a, paragraph 2, of the National Ordinance on Identification of Clients when rendering Services. (National Decree containing general measures penalties and administrative fines for service providers);
- Sanctions National Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s., and locally designated terrorists (N.G. 2010, no. 93);
- Ministerial Decree with general operation of 21 May 2010, laying down the indicators, as mentioned in article 10 of the National Ordinance on the Reporting of Unusual Transactions (Decree Indicators Unusual Transactions) (N.G. 2010, no. 27);
- Ministerial Decree with general operations of March 15, 2010, implementing the National Ordinance on the Reporting of Unusual Transactions (N.G. 2010, 10);
- Ministerial Decree with general operations of 15 March 2010, implementing the National Ordinance on Identification of Clients when Rendering Services (N.G. 2010, no.11); and

- Sector specific Provisions and Guidelines of the Central Bank on the Detection and Deterrence of Money Laundering and Terrorist Financing for all supervised institutions: Credit Institutions, Insurance Business and Insurance Brokers and Money Transfer Companies.

658. The preventive measures contained in the P&Gs, inclusive of customer identification and verification, detection and (internal and external) reporting of unusual transactions, record keeping, independent testing of compliance program, and employee training, must be implemented by all supervised institutions.
659. The supervisory ordinances as well as the NORUT and the NOIS contain provisions for the Central Bank to conduct examinations, including those to test for compliance with the AML/CFT rules and regulations. They also cover the sharing of information with other competent authorities and overseas regulators on a reciprocal basis.

**Enforceability P&G:**

660. Sector-specific P&Gs for AML/CFT are generally in line with the requirements of the FATF Recommendations, except where specifically indicated in this section. The term “must” is widely used in the P&Gs for mandatory measures.
661. These P&Gs are issued by the Central Bank, who is duly authorised to issue such guidelines in accordance with Articles 11, paragraph 3 of the NOIS and Article 22h, paragraph 3 of the NORUT and the respective supervisory ordinances.
662. Under Article 10 of the NOIS (which makes specific reference to Article 11(3)), an intentional violation of this Ordinance is punishable by either a four-year maximum prison sentence or an administrative fine of five hundred thousand guilders, or both. An unintentional offence under the Ordinance is punishable by either a maximum prison sentence of one year or an administrative fine of two hundred and fifty thousand guilders. Similar provisions are found in Article 23 of the NORUT with the penalties being the same amounts, respectively for intentional and unintentional violations
663. Non compliance with the P&Gs is sanctioned by the Central Bank with gradual, proportional and dissuasive sanctions i.e. penalties, fines (articles NOIS, NORUT and NOSTSP, NOSIIA articles 9 and 9a NOIS, articles 22a and 22b NORUT, article 22 NOSTSP and article 35 NOSIIA) and ultimately with the withdrawal of the license based on the supervisory ordinances. As an example, Article 9a , paragraph 1 of the NOIS states that the Supervisor can impose an administrative fine on the Service Provider who does not comply with the obligations imposed by or pursuant to Article 11 ( paragraph 3 of which the Supervisors’ power to give guidelines). In practice, the Central Bank has issued orders/directions for credit institutions and money transfer businesses. The full range of sanctions has therefore not been tested. No penalties or fines have been imposed on financial institutions for non-compliance with the P&Gs. The Central Bank is of the view that directives/instructions are followed by the licensed financial institutions, who also report on actions taken, and that further sanctions are hardly necessary.
664. The authority given to the Central Bank to issue AML/CFT P&Gs, provides the Central Bank with greater flexibility to amend existing or issue new AML/CFT rules when deemed necessary as a result of international and local AML/CFT developments.
665. The sector-specific P&Gs have been issued based on the following legal provisions:
- article 22, paragraph 3 of the NORUT;
  - article 2, paragraph 5, and article 11, paragraph 3 of the NOIS;
  - article 21, paragraph 2e of the NOSBCI for banking and other credit institutions;

- the RFETCSM for money transfer companies.

666. The Team ascertained from its discussions with industry representatives during the on-site mission that regulated entities regard the P&Gs as enforceable by the Central Bank. The Examiners concluded that the P&Gs are “other enforceable means” (OEM) under the FATF Methodology.

### 3.1 Risk of money laundering or terrorist financing

667. To date, the Sint Maarten authorities have not conducted a formal AML/CFT risk assessment for that jurisdiction, although a threat assessment concerning terrorism in the Netherlands Antilles and Aruba was conducted in 2008. Because a broader AML/CFT risk assessment has not been conducted, the magnitude of AML/CFT risks in the various sectors, therefore, cannot be ascertained at this time. Recognition is given to the fact that, post 10-10-10, Sint. Maarten has been working on the legal and institutional framework that would enable such an assessment. Furthermore, the Central Bank of Curacao and Sint Maarten remained the sole regulator financial institutions in the jurisdiction.

668. The Central Bank considers the following financial institutions (FIs) to be very ML/FT low risk due to the nature of their businesses: credit unions, savings and credit funds, pension funds and funeral insurance companies. Life insurers are also considered ML/FT low risk. This particularly due to the nature of the activities they conduct and the type of transactions they perform. The basis for determining that these institutions are low risk for AML/CFT purposes was explained by the Central Bank as follows:

- Credit Unions. In the case of credit unions, loans are provided to their customers based on the amount of shares saved. Savings are deposited through transfers from the customer’s bank account and loans are repaid through automatic transfers from their bank account to the account of the credit union. The business is considered low risk as there is little to no cash involved. With regard to savings and credit funds, these are closed end funds. These entities receive their funds from contributions made by the employer and the participating employees as funds are being withheld directly from employees’ salaries.

- Company pension funds. Company pension funds fall under the supervision of the Central Bank pursuant to the National Ordinance Company Pension Funds (N.G. 1985, nr. 44) which contains general measures for a maximum protection for the members of pension schemes and their interests. Company pension funds are established by a particular employer (or a group of affiliated companies) who has provided a pension scheme for his employees.

The employer sets money aside in a separate legal entity which is intended for pensions of the pension fund’s participants. By giving such funds a separate legal identity, money that is intended for pensions will continue to be available for pensions and prevented from being included in the company’s assets. The employer is bound to ensure that the company pension fund receives the agreed contributions. The question then raises whether company pension funds could be used for money laundering purposes and whether these institutions should be required to report to the FIU. The answer is no. This is based on the following grounds:

- Company pension funds receive their funds from contributions made by the employer and the participating employees. They are closed end companies. In the latter case funds are being withheld directly from employees’ salaries.
- The amount of the contributions that should be paid into the fund is laid down in the rules of regulation (huishoudelijk reglement) of the fund; any contributions made into the fund can therefore be easily traced.

- The participating employee will receive a benefit when he or she reaches retirement age. The funds contributed to the pension plan remain within the fund for a long period of time.

The Central Bank as the supervisory authority exercises control in order to ensure that the pension fund adheres to the stipulation in its articles of association and its rules of regulation. The possibility for using company pension funds for the purposes of money laundering is therefore, considering the aforementioned, negligible.

- Life insurances. The types of life insurance contracts that are considered vulnerable as a vehicle for laundering money are investment related insurance. Examples of this type of insurance contract are;
  - unit linked or with profit single premium contracts;
  - purchase of annuities;
  - lump sum top-ups to an existing life insurance contract, and
  - lump sum contributions to personal pension contracts.

The vulnerability depends on factors such as the complexity and terms of the contract, distribution, payment system and contract law.

The life insurance industry characterizes itself amongst other as: 1) selling of credit life insurance (risk insurance in relation to mortgage loans). These products do not have a cash value or investment features and as such do not lend themselves to money laundering activities; 2) Selling of life insurances of which premium are being paid in monthly instalments and 3) Purchase of annuity which are the result of life insurance which have matured.

Abovementioned information is the justification of the **low risk assessment**.

- Funeral services. Funeral insurer service provider: everyone who makes a business of, for his own account entering upon insurance contracts to provide benefits in kind (natura) in connection with the death of man, including the completion of the contracts involved, even if the making of profit should not be the objective of the business activities. Premium payments are being done in very small amount. There are no monthly payments above USD 1,000.

669. The authorities indicated that company pension funds and funeral services are not subject to ACL/CFT supervision, by virtue of them being deemed as low risk. However, life insurance companies are supervised, given the potential for large cash values and investment related components.

670. The supervised institutions are also allowed, by virtue of the various sector-specific P&Gs issued by the Central Bank, to apply the RBA to their internal controls against money laundering and terrorist financing. By adopting a RBA, supervised institutions are able to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This allows for resources to be allocated and used in the most efficient way.

## **3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)**

### **3.2.1 Description and Analysis**

#### **Recommendation 5**

#### **Scope of Issue**

671. The scope of financial activities (listed under the definition of *Financial Institutions* in the Methodology) subject to AML/CFT requirements is unclear. The NOIS and the NORUT do

not include explicit wording with respect to lending; financial leasing; financial guarantees and commitments; trading in a) money market instruments, b) foreign exchange, c) transferable securities, commodity futures; participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management; factoring services and insurance activities conducted by agents. Article 1b. sub 5 of the NOIS refers to “concluding or acting as an intermediary when concluding a contract of insurance...” But the cover page of the P&G for Insurance Companies refers only to insurance brokers as intermediaries. The Central Bank, however, informed the financial examiner that the terms “broker” and “agent” are used interchangeably.

672. While the definition of “credit institution” in the National Ordinance on the Supervision of Banking and Credit Institutions appear to cover “lending,” in general, there are no specific provisions for factoring services and the finance of commercial transactions (including forfeiting). Furthermore, activities such as financial leasing and financial guarantees and commitments are absent.
673. Credit institutions, money transfer companies, insurances companies and insurance brokers are all subject to the supervision of the Central Bank through the respective supervisory ordinances and also with regard to the compliance with AML/CFT obligations through the NOIS and the NORUT.
674. The financial activities/operations as defined and numbered in the FATF glossary are covered as follows in the NOIS:
  - 1) **Acceptance of deposits and other repayable funds from the public:** Article 1, paragraph 1 sub 1° and 8°.
  - 2) **Lending:** Article 1, paragraph 1 sub b 2° (Note: with regard to factoring: activities of these companies have been included in a draft National Decree to fall under the scope of the NOIS and NORUT.).
  - 3) **Financial leasing:** Article 1, paragraph 1 sub b 2° (Note: with regard to factoring activities of these companies have been included in a draft National Decree to fall under the scope of the NOIS and NORUT).
  - 4) **The transfer of money or value:** Article 1, paragraph 1 sub b 10°
  - 5) **Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money):** Article 1 sub b 2°, 8°, 9°. (Note: when opening an account with a credit institution a customer is entitled to a debit card, cheques etc).
  - 6) **Financial guarantees and commitments:** Article 1 sub b 2° (Note: with regard to factoring: activities of these companies have been included in a draft National Decree to fall under the scope of the NOIS and NORUT).
  - 7) **Trading in : (a) money market instruments (cheques, bills, CDs, derivatives etc.); (b) foreign exchange; (c) exchange, interest rate and index instruments; (d) transferable securities; (e) commodity futures trading:** Article 1 sub b 1°, 2° and 8° (\*please note that as a result of the fact that the securities exchange (DCSX) has recently become operational in Curaçao, these services will additionally be explicitly covered in the securities/trading activities to be contained in the NOIS and NORUT. Investment institutions are engaged in the trading activities described above. The financial objects in which they are allowed to invest and trade are outlined in the investment policy contained in the investment institutions' prospectus. Furthermore, other financial institutions, such as credit institutions, are at times involved in the trading activities described in this section (reference is in this respect also made to the indicators for credit institutions, which were first issued in 1997)).
  - 8) **Participation in securities issues and the provision of financial services related to such issues:** Article 1 sub b 1°, 2° and 8° (\*please note that as a result of the fact that the securities exchange (DCSX) has recently become operational in Curaçao, these services will additionally be explicitly covered in the securities/trading activities to be contained

*in the NOIS and NORUT. Investment institutions at times participate in securities issues. The information contained in the prospectus of an investment institution dictates if and to what extent an investment institution can participate in securities issues. Financial institutions, such as credit institutions, at times also participate in securities issues (reference is in this respect made to the indicators for credit institutions)).*

- 9) **Individual and collective portfolio management:** *Article 1 sub b 1°, 2° and 8° (Investment institutions are by the very nature of their business activities engaged in collective portfolio management. At times other financial institutions, such as credit institutions, are also involved in portfolio management, particularly on an individual basis (reference is in this respect also made to the indicators for credit institutions)).*
- 10) **Safekeeping and administration of cash or liquid securities on behalf of other persons:** *Article 1, paragraph 1, sub b 1°.*
- 11) **Otherwise investing, administering or managing funds or money on behalf of other persons:** *Article 1, paragraph 1 sub b 2°, 4°, 5°, 7°, 8°.*
- 12) **Underwriting and placement of life insurance and other investment related insurance Individual and collective portfolio management:** *Article 1, paragraph 1 sub b 5°, 6°.*
- 13) **Money and currency changing:** *Article 1, paragraph 1 sub b 7°.*

675. The authorities have indicated that financial activities currently not covered have been included in a draft National Decree Providing for General Measures to fall under the NOIS and NORUT.

676. The NOIS and NORUT appear not to cover institutions specialised in the following areas: financial leasing, financial guarantees & commitments; participation in securities issues and the provision of financial services related to such issues; and individual and collective portfolio management. The assessment team was unable to assess the extent to which these activities occur outside those institutions already supervised by the Central Bank.

#### **Customer Due diligence:**

677. While there is no requirement in law or regulation prohibiting anonymous accounts, the NOIS requires all service providers to identify all clients. Article 2 of the NOIS states: "The service provider shall be under the obligation to establish the identity of a customer before rendering any service to such customer"

678. According to the P&G for CI (page 13) and IC&IB (page 10), anonymous accounts or accounts in fictitious names are prohibited in Sint Maarten. For example, the credit institution must properly identify the customer in accordance with these criteria, and the customer identification records must be available to the AML/CFT compliance officer, other appropriate staff, and competent authorities.

679. As part of the client file review conducted by the Central Bank during its on-site examinations, the examiners of the Central Bank inspect the books and records of the supervised financial institutions to determine if anonymous accounts or accounts in fictitious names appear in the books and records of the financial institutions being examined. The Central Bank has not encountered any such accounts in the books and records of the financial institutions subjected to its examination. In the few cases when the Central Bank had determined that numbered accounts exist, through a review of the names and identification documents pertaining to the corresponding numbered accounts, the names on the identification documents were satisfactorily matched with those of the clients for whom the numbered accounts were set up, evidencing that the financial institutions concerned duly comply with the obligations in the P&Gs and with the FATF recommendation.

680. With respect to the establishment of business relations, all financial institutions are required, pursuant to article 2 of the NOIS, to identify a client and the ultimate beneficiaries of the client, before rendering a service to the client. This requirement is, according to article 5 of the NOIS, also applicable in case a natural person is representing a client or is representing the representative of the client. In case a financial institution knows or should reasonable presume that the natural person appearing before it is not acting for himself, the financial institution should take, pursuant to article 5, paragraph 4 of the NOIS, reasonable measures in order to establish the identity of the customer for whom the natural person is acting and, in the event of a client being represented by a third party, the identity of such representative.
681. When carrying out occasional transactions above the applicable designated threshold (USD/€ 15,000) including situations where the transaction is carried out in a single operation or in several operations that appear to be linked; applicable designated thresholds for carrying out occasional transactions are set in article 2 of the Ministerial Decree for the Implementation of the NOIS (N.G. 2010, no. 11), at NAf. 2,500 (US\$ 1397) per annum insurance premium, and at NAf. 5,000 (US\$ 2793) if it concerns a non-recurring insurance premium. Furthermore, according to article 3 of the last mentioned Ministerial Decree, identification is required in the insurance industry when making a distribution on account of a life insurance contract as referred to in Article 1, paragraph 1, sub b, 6°, of the NOIS which is in excess of the amount of NAf. 20,000 (US\$ 11,173). The Decree also stipulates a threshold of NAf. 20,000 (US\$ 11,173) for providing a service with respect to a transactions or apparently related transactions.
682. For occasional transactions that are wire transfers in the circumstances covered by the Interpretative Note to SR VII; the Ministerial Decree for the Implementation of the NOIS (N.G. 2010, no. 11) does not specify or cross-reference any threshold for occasional transactions that are wire transfers. Wire transfers are described in Article 1; paragraph one, section b., under 10, of the NOIS.
683. CDD is conducted by financial institutions supervised by the Central Bank that are authorised to carry out such transfers, namely Banks and Money Transfer Companies. CDD measures are taken on all wire transfers, regardless of any exemptions or thresholds.
684. The basic obligation to undertake CDD when there is a suspicion of ML or TF, regardless of any exemptions or thresholds, is not set out in law or regulation for either ML or TF.
685. There are no provisions in law or regulation for a financial institution to conduct CDD when it has doubts about the veracity or adequacy of previously obtained customer identification data.
686. FIs are required, pursuant to articles 2 and 3 of the NOIS, to obtain and record the customer identification information of both natural and legal persons.
687. Article 2, paragraph 1 of the NOIS states that the Service Provider is obliged to establish the identity of a client and the ultimate interested party, if such exists, before rendering such a client a service. If the client is a natural person who is incapable of performing the juristic act, related to the service, it will be sufficient for the Service Provider to establish the identity of the person who acts as the legal representative. According to article 3, paragraph 1 of the NOIS, the identity of a natural person (being resident or non-resident) must be established through one of the following valid documents:
- a driver's license;
  - an identity card;
  - a travel-document or passport; or
  - other document designated by the Minister of Finance.
688. If the natural person lives or is staying abroad, the following will suffice:

- a photocopy of one of the documents mentioned above, provided it is accompanied by a certified copy or extract from the Civil Registration Office of the domicile or residence of the client; or
  - forwarding one of the above-mentioned documents electronically, provided the Service Provider receives a certified copy of the document sent within two weeks after receiving it.
689. FI reported that residents of French St. Martin are treated as persons living abroad and must physically present a valid government issued ID. Some financial institutions reported, however, that drivers' licenses from French St. Maarten are not accepted due the lack of expiry date and the corresponding long period for which the licences were issued.
690. Furthermore, article 3; paragraph 5 of the NOIS stipulates that the identification of a client must be verified by using reliable and independent sources. This verification requirement is also applicable to the ultimate beneficiary of a client.
691. The P & G for CI (on page 10), the P & G for IC & IB (on page 12), and the P & G for MTC (on page 10) require that the identity of a resident individual customer be verified when a business relationship is established with the customer. The verification methods that must be applied include:
- checking a local telephone directory;
  - seeking confirmation of identity or activities at other institutions;
  - verifying occupation and name of employer;
  - requesting reference letter(s);
  - checking name and address of references; and
  - requesting a copy of utility bill.
692. Furthermore, the P&G for CI (on page 11), for IC & IB (on page 12), and for MTC (on page 11) require that verification of the identity of non-resident clients be obtained by reference to one or more of the following, as deemed practical and appropriate:
- existing relationships of the prospective customer;
  - international or home country telephone directory;
  - personal reference by a known customer;
  - embassy or consulate in home country of address provided by the prospective client;
  - comparison of signature if a personal account cheque is tendered to open an account; and
  - if provided, cross reference of address printed on personal cheque to permanent address provided by client on standard application form.
693. Pursuant to article 5, paragraphs 1 through 4 of the NOIS, a FI is subjected to the following requirements:
- 1) The financial institution is under the obligation to establish the identity of the natural person appearing before it on behalf of a customer or on behalf of a representative of a customer before rendering the service;
  - 2) The financial institution is under the obligation to verify whether the natural person appearing before it is acting for himself or for a third party;
  - 3) If the natural person is acting for a third party, the financial institution is under the obligation to establish the identity of the natural person acting for a third party using the documents, to be submitted by the natural person, unless the natural person is not competent to perform the legal act related to the service. If the third party is acting for another third party, the financial institution has the obligation to establish the identity of such third party in the same manner, unless the third party is a natural person who is not competent to perform the legal act related to the service; and
  - 4) If the financial institution knows or should reasonably presume that the natural person appearing before him is not acting for himself, the financial institution must take reasonable measures to discover the identity of the customer for whom such natural



person is acting and, in the event of a customer being represented by a third party, the identity of such representative.

694. According to article 3, paragraph 2 of the NOIS provides that the identity of a legal person must be established using a certified extract from the Chamber of Commerce or an equivalent institution in the country where the customer has its registered office, or using an identification document to be drawn up by the service provider. In addition, article 3, paragraph 3 of the NOIS states that the identity of a public legal person in Sint Maarten can also be established through a declaration of the management. If the legal person is a foreign public legal person, a declaration of the foreign competent authority is also acceptable. According to the article 9 of the ministerial decree implementing the NOIS (NG 2010, no. 11):
695. The data that must be incorporated in the extract or the identification document, referred to in article 3, paragraph two, of the NOIS, are:
- a. of the legal person: the legal form, the name given in the articles of association, the trade name, the full address, the domicile, country of the registered office, and if the legal person is registered at a Chamber of Commerce and Industry, or a similar agency, the registration number and the country or island territory in which such a Chamber or similar agency is established;
  - b. of all the agents and representatives: the name, the date of birth and the document on the basis of which identification took place.
696. According to the P&G for CI (on page 12), IC & IB (on page 13), and MTC (on page 11), FIs are required to request proof of identity of any party who represents the client, including the individuals with signing authority together with a designation of the capacity in which they sign. Furthermore, the P&G for CI (on page 12) and the P&G for MTC (on page 11) state that if a customer acts for a third party or that third party acts for another third party, the financial institution must be bound to also establish the identity of each third party.
697. In addition to the certified extract from the register of the Chamber of Commerce and Industry (or an equivalent institution) referred to in the NOIS for the identification of corporate customers, the P&G for CI (on page 12) and the P&G for IC&IB (on pages 13 and 14) state that credit institutions, insurance companies and their intermediaries must identify the nature of the business, account signatories, and the (ultimate) beneficial owner(s). They must obtain personal information on the managing and/or supervisory directors. Copies of the identification documents of all account signatories, including the directors without signing authority on the corporate client's accounts, must be kept on file. The procedures for the identification of personal customers must be applied for the mentioned account signatories' director(s) and all (ultimate) beneficial owners holding a qualifying interest in the company. Financial institutions must ascertain the identity of corporate customers based on reliable identification documents, with preference for originals and official documents attesting to the legal existence, and structure of a company or legal entity.
698. Pursuant to article 2, paragraph 1 of the NOIS, FIs are required to establish the identity of the ultimate beneficiary of a client, if any, before rendering any service to that client. Ultimate interested party is defined as the natural person who has or holds a qualified participation or qualified interest in a legal person or corporation or the natural person who is entitled to the assets or the proceeds of a trust or private fund foundation. "Qualified participation" or "qualified interest" is defined as a direct or indirect interest of 25% or more of the nominal capital, or a comparable interest, or being able to exercise 25% or more of the voting rights directly or indirectly, or being able to exercise directly or indirectly a comparable control.
699. Furthermore, article 3.4 of the NOIS stipulates that the same identification requirements for natural and legal persons are applicable to the ultimate beneficiary of a client. In addition,

according to article 3.5 of the NOIS, the identification of the ultimate beneficiary must be verified by using reliable and independent sources.

700. Based on the P&Gs for CI (on page 12) and for IC & IB (on pages 10 and 13), credit institutions, insurance companies and their intermediaries, are required to establish and verify the identity of the ultimate beneficiary of a client. The P&G for IC & IB (on page 10) additionally states that if claims, commissions, and other monies are to be paid to persons (including partnerships, companies, etc) other than the policyholder, then the proposed recipients of these monies should be the subjects of verification.
701. Furthermore, the P&Gs for CI (page 12) and IC & IB (page 14) state that management may require additional information to be provided for corporate customers, including shareholder's register.
702. (Prospective) customers who want to open an account with the Central Bank must complete an application form. The application form lists all the documents that should be included in the application. The customer must also indicate the objective of the account. Application forms together with the identification documents are sent by the Central Bank's Accounting Department to the Risk Compliance Management Department for review. The latter advises the Central Bank's Management in writing on the identification of the prospective customer. At times an application regards existing customers (government departments) who wish to open an additional account.
703. Pursuant to article 6, sub c and d of the NOIS, FIs have the obligation to at all times have certain data readily accessible. These data include, but is not limited to, the nature of the service as well as the nature, number, date and place of issue of the document through which the identity of a customer has been established.
704. Based on the P&G for CI (page 12 & 13), IC & IB (pages 13 & 15) and MTC (page 13), FIs are required to obtain information on the purpose and intended nature of the business relationship with their (prospective) customers.
705. The basic obligation to conduct ongoing due diligence is not specified in law or regulation, although, pursuant to article 3, paragraph 6 of the NOIS, a FI is responsible for the correct identification data. If it appears that the data is no longer valid, the FI has the obligation to amend the data.
706. The P&Gs for CI (page 10), the for IC & IB (page 10), for SAI & AII (page 13), and for MTC (page 9) provide that ongoing due diligence must include the scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, its business and risk profile, and where necessary, the source of funds.
707. Pursuant to the P&Gs for CI (page 10), for IC & IB (page 11), and for MTC (page 10), documents, data, or information collected under the CDD process must be kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher risk categories of customers or business relationships.
708. Based on the P&Gs for CI (page 16), for IC & IB (page 18), and for MTC (page 12) FIs are required to conduct enhanced due diligence for all high risk customers.
709. Furthermore, the P&Gs for CI (pages 14, 15 & 16), for IC & IB (pages 16-18), and for MTC (pages 11 & 12) provide that the (other) high risk clients should be determined by the application of the RBA. This entails that FIs must develop risk profiles for all of their customers to determine which categories of customers expose the institutions to higher money

laundering and terrorist financing risk. The P&Gs provide on the last mentioned pages guidance on the types of (i) customer, (ii) products/services, (iii) country or geographic area, and (iv) delivery channels that are regarded as high risk. Once a client has been classified as high risk, enhanced CDD measures must be applied on that client and the financial institution must ensure that the identification documents of that client are at all times valid.

710. In addition, the P&G for IC & IB (page 11) provides that insurance companies and intermediaries should be extra vigilant to the particular risks from the practice of buying and selling second hand endowment policies, as well as the use of single premium unit-linked policies. IC & IB should check any reinsurance or retrocession to ensure the monies are paid to bona fide re-insurance entities at rates commensurate with the risks underwritten. Furthermore, the P&G for IC & IB (page 13) provide that insurance companies and intermediaries should pay special attention to non resident clients and understand the reasons why the client has chosen to enter into an insurance contract in the foreign country.
711. Based on the P&Gs for CI (page 17), and for IC & IB (pages 11 and 12), credit institutions and insurance companies and their intermediaries may apply simplified or reduced CDD measures when establishing the identity and verifying the identity of the customer and the beneficial owner. The following are examples of customers (transaction or products) where simplified or reduced CDD may be applied due to the fact that the risk may be lower:
- a) financial institutions subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and supervised for compliance with those requirements;
  - b) public companies subject to regulatory disclosure requirements, i.e., companies that are listed on a stock exchange or comparable situations; and
  - c) government administrators or enterprises.
712. While there are provisions in the section I.3 of the P&G for MTCs to apply the RBA there are no provisions for MTCs to apply simplified or reduced CDD measures. The Central Bank stated that its approach towards CDD relevant to MTCs is more conservative in that they are not explicitly allowed to apply reduced or simplified measures.
713. The P&Gs for CI (page 17) and for IC & IB (page 18) stipulate that simplified CDD measures are not acceptable whenever there is suspicion of ML or TF or specific higher risk scenarios apply. When a high risk scenario applies, including the suspicion of ML or TF enhanced CDD measures must be applied.
714. The P&Gs for CI (pages 14, 15 & 16), for IC & IB (pages 16 through 18), and for MTC (pages 11 & 12) provide specific guidance to financial institutions that must be followed when determining the extent of the CDD measures that must be applied on a risk sensitive basis.
715. According to the P&Gs for CI (pages 14, 15 & 16), for IC & IB (pages 16-18), and for MTC (pages 11 & 12), FIs must develop risk profiles for all of their customers to determine which categories of customers expose them to high money laundering and terrorist financing risk. The assessment of the risk exposure and the preparation of the risk classification of a customer, must take place after the CDD information has been received. The risk profile must comprise of minimally the following possible categories: low, medium and high risk. The FIs must apply CDD requirements to existing customers and may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship, or transaction.
716. The FIs must at least consider the following risk categories while developing and updating the risk profile of a customer: (i) customer risk, (ii) products/services risk, (iii) country or geographic risk, and (iv) delivery channels risk. The assessment of customer risk entails an assessment of the type of customer and the nature and scope of the business activities of the

customer. The assessment of the products/services risk entails an assessment of the potential risk presented by products and services offered by the institution. A key element is the establishment of the existence of a legitimate business, economic, tax or legal reason for the customer to make use of the products/services offered by the institution. Country or geographic risk encompasses the money laundering and terrorist risk characterized by specific countries/geographical locations. Delivery channels risk deals with the manner in which the institution establishes and delivers products and services to its customers.

717. The weight assigned to these risk categories (individually or in combination) in assessing the overall risk exposure may vary from one institution to another. The institution must make its own determination as to the assignment of the risk weights. The result of the risk assessment of a particular customer, as evidenced by the risk profile, will determine if additional information needs to be requested, if the obtained information needs to be verified, and the extent to which the resulting relationship will be monitored.
718. In addition, the P&G for CI (page 10), for IC & IB (page 12), and for MTC (page 10) require that the identity of a resident individual customer, including the ultimate beneficiary, be verified when a business relationship is established with the customer.
719. The P&G for CI (page 10) also provide that the identity of the customer, including the ultimate beneficiary, must be verified, in the manner described above, when the credit institution has doubts about the veracity or adequacy of the identification data obtained from existing customers.
720. The NOIS does not provide for the timing of CDD verification to be performed by financial institutions. Consequently, no provision is contained in the NOIS stating that the verification of the identity of the customer and beneficial owner can be completed following the establishment of the business relationship. However, this requirement may pose a technical challenge for compliance in practice in that not all beneficial owners may be known at the time that the business relationship is being established, such as in the case of life insurance policies, where the beneficiary may not be known at the time the business relationship with the policy holder is established. The Methodology intimates to other scenarios under E.C 5.14 where countries may permit the completion of the verification of identity for customer or beneficial owner, so as not to interrupt the normal conduct of business: non face-to-face business and securities transactions.
721. Although the P&Gs do not specifically state that the verification of the identity of the customer and beneficial owner can be completed following the establishment of the business relationship, the P & G for CI (page 11), for IC & IB (pages 12 and 13), and for MTC (page 16) provide that verification of the identity of non-resident clients must be obtained subsequent to the receipt of the certified identification document.
722. FIs are not permitted to enable customers to utilise their services prior to verification of the identity of the customers. As a result hereof, no specific procedures are prescribed in that respect relative to risk management.
723. All FIs are required, pursuant to article 2 of the NOIS, to identify a client and the ultimate beneficiaries of the client, before rendering a service to the client. Furthermore, article 8, of the NOIS provides that, the service provider shall be prohibited from rendering a service if the identity of the customer has not been established in the manner prescribed in the NOIS.
724. In addition, the P&G for CI (page 9), for IC & IB (page 10), and for MTC (page 9), state that FIs have the obligation to identify their (prospective) personal or corporate clients/customers before rendering them services. Internal procedures must clearly indicate for which services clients or their representatives must be identified and which identification documents are

acceptable. Furthermore, as stated on the aforementioned pages of the respective P&Gs, FIs are required to develop clear customer acceptance policies and procedures, including a description of the types of customer likely to pose a higher than average risk to them.

725. According to the P&Gs for CI (page 9), for IC & IB (page 10), and for MTC (page 9), there is the obligation to report any intended unusual transaction to the FIU (MOT) without delay in the event the intended unusual transaction was the reason for the decision not to enter into a business relationship with or conduct a transaction on behalf of a client.
726. The P&Gs for CI (page 10), for IC & IB (page 10), and for MTC (page 9), provide that ongoing due diligence on the business relationship must continue even after the client has been identified. Ongoing due diligence must include the scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, its/his business and risk profile, and where necessary, the source of funds.
727. In addition, P&Gs for CI and for MTC establish that if doubts arise relating to the identity of the client after the client has been accepted and accounts have been opened, the relationship with the client must be re-examined to determine whether it must be terminated and whether the incident must be reported to the FIU (MOT). However there are no similar provisions applicable to IC and IB.
728. There are no provision in the P&Gs for FIs with regard to due diligence, as required, for existing customers as at the date that national requirements were brought into force.
729. According to the P&Gs for CI (page 13), anonymous accounts or accounts in fictitious names are prohibited in Sint Maarten. Additionally, the P&G for CI states (page 13) the obligation to maintain numbered accounts in such a way that full compliance can be achieved with the FATF Recommendations.

#### Effective Implementation

730. Through discussions with FIs during the on-site visit, the Examination Team was able to confirm that in general the FIs are aware of and understand the AML/CFT requirements under the NOIS and P&Gs. The practice of identifying and verifying customer and beneficial ownership was well established. FIs have developed declaration forms, engagement letters, etc., when dealing with customer and UBO identification. The information is verified by the FIs through the supporting documentation.
731. The FIs have indicated that the culture of compliance has improved over the years. Clients are willing to provide all information and documentation required at the beginning of the business relationship. However, it was a challenge to acquire the KYC information for existing accounts.
732. FIs seemed also aware of the particulars ML/FT risks particular to Sint Maarten. Since casinos are considered high risk as a result of not being supervised, CIs have a policy not to enter into relationships with them. Clients from particular jurisdictions such as Cuba and Dominican Republic are considered high risk and enhanced due diligence is performed and in some cases, relationships are not established.
733. In general, CIs and ICs& IBs utilize RBA. They indicated that ongoing due diligence is based on the level of risk of their customers.
734. Branches and subsidiaries of local and regional FIs are able to leverage CDD resources via compliance personnel outside of Sint Maarten.

**Recommendation 6**

735. The P&Gs for CI (page 12), IC&IB (page 14), and MTC (page 12), contain the requirements to deal with PEPs.
736. There are no clear requirements within the P&Gs for FIs to put in place appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP. However, it is common practice, not contained in the P&Gs, for the compliance officers of the FIs often seek relevant information from sources other than the customer. These sources include (i) screening through World-Check; (ii) information available on in-house databases; (iii) information provided by head office or other branches, (iv) the internet, on which searches are carried out as well as local and/ or international newspapers. FIs with an international presence, often make use of their expertise abroad (*e.g.* in the PEPs home country) when deciding whether or not to take on a client who is a PEP.
737. The P&Gs provide that the decision to accept a PEP must be taken at senior management level. Additionally, where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP, financial institutions must obtain senior management approval to continue the business relationship.
738. The P&Gs provide that the institution must make reasonable efforts to ascertain that the PEPs source of wealth and source of funds/ income is not from illegal activities and where appropriate, review the customer's credit and character and the type of transactions the customer would typically conduct. Pursuant to the P&Gs, where a FI is in a business relationship with a PEP, it must conduct enhanced ongoing monitoring on that relationship.

**Additional Elements**

739. As stipulated in the P&G for CI, IC & IB and MTC, FIs are encouraged to conduct enhanced ongoing monitoring on PEPs who hold prominent public functions domestically.
740. Sint Maarten is not yet a party to the UN Convention against Corruption.

**Recommendation 7**

741. The P&Gs for CI contain specific provisions on correspondent banking activities. The Sint Maarten authorities indicated that since the other non-banking financial institutions in Curaçao conduct transactions on behalf of their clients through credit institutions, no specific provisions related to correspondent banking relationships have been issued for the non-banking financial institutions. However, the Recommendation stipulates that such provisions apply, not only to cross-border banking, but to similar relationships such as those established for securities transactions or funds transfers, whether for the cross-border financial institution or for its customers. It is recommended that Sint Maarten extend this requirement to all similar cross-border relationships.
742. According to the P&Gs for CI (page 19), CIs are not permitted to enter into, or continue, correspondent banking relationships with shell banks. CIs are required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.
743. Particular attention must be paid to correspondent services (such as correspondent banking services) provided to a FI licensed in a jurisdiction where the credit institution has no physical presence or is unaffiliated with a regulated bank, or where anti-money laundering and counter-terrorist financing measures and practices are known to be absent and/or inadequate.

744. CI must, pursuant to the P&G for CI (page 19), fully understand and document the nature of the respondent bank's management and business and determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a ML or TF investigation or regulatory action.
745. There are no provisions within the P&G for CI to assess the respondent institution's AML/CFT controls, and to ascertain that they are adequate and effective. However, the CI's policies and procedures regarding the opening of correspondent accounts must ascertain that the respondent bank has effective customer acceptance and know-your-customer (KYC) policies and is effectively supervised
746. CI must obtain approval from senior management before establishing new correspondent relationships (P&G for CI). CIs establishing correspondent relationships must communicate their documented AML/CFT responsibilities to have a clear understanding as to which institution will perform the required measures (P&G for CI). All banks abroad should adhere to the AML/CFT rules and regulations applicable in their respective country.
747. Where a correspondent relationship involves the maintenance of "payable-through accounts", credit institutions must pursuant to the P&G for CI, be satisfied that:
- their customer (the respondent financial institution) has performed all the normal CDD obligations on those of its customers that have direct access to the accounts of the correspondent financial institution; and
  - the respondent financial institution is able to provide relevant customer identification data upon request to the correspondent financial institution.
748. During the full scope examinations and the special assignments conducted by the Central Bank, specific attention has been paid by the Central Bank to "payable-through accounts". Currently in Sint Maarten most payments are done through SWIFT Transfers.
749. Sint Maarten Authorities indicated that generally, there are no "payable-through accounts" in Sint Maarten (i.e. an account maintained at the correspondent bank by the respondent bank but which is accessible directly by a third party to effect transactions on its own behalf). Nevertheless, there are specific provisions in place to deal with such accounts. Practically, most transactions are done through SWIFT. In cases where a client uses MT 202, adequate cover lists are used. In cases determined by the Central Bank that the controls of the process of identification or verification of the CDD are not adequate, the financial institutions are instructed to take appropriate measures to address the shortcomings within a limited timeframe. The financial institutions must comply with the CDD requirements as set forth in the NOIS and P&G for CI (page 9-17).

### **Recommendation 8**

750. According to the P & G for CI (page 19) IC & IB (on page 20) and MTC (page 13), FIs are required to have policies in place or take such measures as may be needed to prevent the misuse of technological developments in money laundering or terrorist financing schemes. In case of electronic services, CI are additionally required to comply with the provisions contained in the "Provisions and Guidelines for Safe and Sound Electronic Banking" (P&Gs for SSEB) issued by the Central Bank. Moreover, the P&G for CI (page 19) state that credit institutions could refer to the "Risk Management Principles for Electronic Banking" issued by the Basel Committee in July 2003.
751. Particularly for CIs, the Central Bank issues questionnaires in order to determine compliance with the P&Gs for SSEB prior to conducting its on-site examinations.

752. The P&G for CI and for IC & IB provide that FIs are required to have policies and procedures in place to address any specific risks associated with non-face-to-face business relationships or transactions. These policies and procedures must apply when establishing customer relationships and when conducting ongoing due diligence. However the P&Gs for MTC do not include any requirement on this regard.
753. Examples of non-face-to-face operations include business relationships concluded over the internet or by other means, such as through the post; services and transactions over the internet including trading in securities by retail investors over the internet or other interactive computer services; use of ATM machines; telephone banking; transmission of instructions or applications via facsimile or similar means, and making payments and receiving cash withdrawals as part of electronic point-of-sale transactions using prepaid or re-loadable or account-linked value cards.
754. According to the P&G for CI and for IC & IB, measures for managing the risks must include specific and effective CDD procedures that apply to non-face-to-face customers. Examples of such procedures include the certification of documents presented, the request of additional documents to complement those required for face-to-face customers; independent contact with the customer, third party introduction and requiring the first payment to be carried out through an account in the customer's name with another bank subject to similar customer due diligence standards. In the case of "non-face-to-face clients" identification, copies of the CDD document should be certified by a notary public or embassy/consulate.
755. In Sint Maarten, customers (of domestic banks) are not authorized/ allowed to open accounts with financial institutions through the internet, telephone, mail, post or other similar means without a verification ("face-to-face") of certification ("non-face-to-face") process .
756. According to the P&Gs for SSEB issued by the Central Bank, CIs are required to select reliable and effective authentication techniques to validate the identity and authority of their e-banking customers. Single-factor authentication, as the only control mechanism, is insufficient and not accepted by the Central Bank for transactions involving access to customer information or the movement of funds to other parties. Authentication methods that depend on more than one factor are more difficult to compromise than single-factor methods. Consequently, multifactor authentication methods (such as two-factor authentication) are more reliable and provide stronger assurance in authentication. Credit institutions should ensure that customers are identified and their identities verified before conducting business over the internet. Password generating devices, biometric methods, challenge-response systems, and public key infrastructure are some ways of strengthening the authentication process.
757. According to the P&G for CI and IC & IB, FIs are required to have policies and procedures in place to address any specific risks associated with non-face-to-face business relationships or transactions. However the P&Gs for MTC do not address this requirement.

### 3.2.2 Recommendations and Comments

758. Sint Maarten should urgently amend the NOIS and NORUT to incorporate the full range of activities and operations of financial institutions, including explicit wording with respect to lending; financial leasing; financial guarantees and commitments; trading in a) money market instruments, b) foreign exchange, c) transferable securities, commodity futures; participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management; factoring services and insurance activities conducted by agents. Furthermore, all intermediaries operating in the Curacao Stock Exchange (DCSX) should be covered by these national ordinances.



### Recommendation 5

759. There should be explicit requirements in law or regulation for CDD to be undertaken when carrying out occasional transactions that are wire transfers, as per the Interpretive Note to SR VII.
760. Require financial institutions, through law or regulation, to undertake CDD measures when they have doubts about the veracity or adequacy of previously obtained customer identification data.
761. Require financial institutions, through law or regulation, to conduct CDD when there is a suspicion of money laundering or terrorist financing, regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations.
762. Require financial institutions, through law or regulation, to conduct ongoing due diligence.
763. The requirement to verify the identity of customers and beneficial owners before the establishment of business relations is not always practical. Sint Maarten should amend the NOIS to allow for verification at after the establishment of a business relationship in specified circumstances.
764. Require insurance companies and insurance brokers to re-examine the relationship with the client to determine whether to terminate and whether to report to the MOT if doubts arise relating to the identity of the client after the client has been accepted and accounts have been opened.

### Recommendation 6

765. Amend the P&Gs to state that FIs should put in place appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP.

### Recommendation 7

766. Correspondent activities provisions should be incorporated in all the other P&Gs, similar to the P&G for CI, which contains specific provisions on correspondent banking activities.
767. The P&Gs should require the respondent institution's AML/CFT controls, and to ascertain that they are adequate and effective.

### Recommendation 8

768. P&Gs for MTCs should incorporate requirements regarding E.C 8.2 and EC 8.2.1

#### 3.2.3 Compliance with Recommendations 5 to 8

	Rating	Summary of factors underlying rating
R.5	PC	<ul style="list-style-type: none"> <li>• The current version versions of the NOIS and NORUT do not adequately cover the scope of financial services activities and operations conducted by financial institutions that are subject to AML/CFT requirements. Activities and operations not covered include: <ul style="list-style-type: none"> <li>○ Lending (factoring)</li> <li>○ Financial leasing</li> <li>○ Financial guarantees and commitments</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>○ Trading in money market instruments</li> <li>○ Participation in securities issues and the provision of financial services related to such issues</li> <li>○ Individual and collective portfolio management</li> <li>• Certain categories of financial services providers are not covered in the scope of the NOIS and NORUT: <ul style="list-style-type: none"> <li>○ Intermediaries operating in the Curacao Stock Exchange (DCSX)</li> <li>○ Life insurance agents</li> </ul> </li> <li>• Ministerial Decree for the Implementation of the NOIS (N.G. 2010, no. 11) does not specify or cross-reference any threshold for occasional transactions that are wire transfers, and it is unclear whether Article 4 of the Ministerial Decree (referencing article 1, paragraph one, section b., under 7, of the NOIS) apply to wire transfers.</li> <li>• There are no provisions in law or regulation for a financial institution to undertake CDD measures when it has doubts about the veracity or adequacy of previously obtained customer identification data.</li> <li>• The basic obligation to conduct CDD when there is a suspicion of money laundering or terrorist financing, regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations is not set out in law or regulation.</li> <li>• The basic obligation to conduct ongoing due diligence is not specified in law or regulation</li> <li>• The requirement to verify the identity of customers and beneficial owners before the establishment of business relations is not always practical.</li> <li>• There are no provisions for insurance companies and insurance brokers to re-examine the relationship with the client to determine whether to terminate and whether to report to the MOT if doubts arise relating to the identity of the client after the client has been accepted and accounts have been opened</li> </ul>
R.6	LC	<ul style="list-style-type: none"> <li>• No clear requirements within the P&amp;Gs for financial institutions to put in place appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP.</li> </ul>
R.7	LC	<ul style="list-style-type: none"> <li>• Only the P&amp;G for CI contain specific provisions on correspondent banking activities. No similar provisions exist for other types of financial institutions.</li> <li>• There are no provisions for financial institutions to assess the respondent institution's AML/CFT controls, and to ascertain that they are adequate and effective.</li> </ul>
R.8	LC	There is no requirement for MTC to comply with criteria 8.2 and 8.2.1

### 3.3 Third parties and introduced business (R.9)

#### 3.3.1 Description and Analysis

##### **Recommendation 9**

769. P&Gs for CI and IC & IB provide measures regarding reliance on third parties. However, for MTCs, the P&Gs do not include any requirement on this matter.

770. According to the P&Gs for CI (pages 13 & 14), and IC & IB (on pages 15 & 16), FIs, relying upon a third party, are required to immediately obtain from the third party the necessary information concerning certain elements of the CDD process:

- identification and verification of the customer's identity;

- identification and verification of the beneficial owner; and
  - obtaining information on the purpose and intended nature of the business relationship.
771. Pursuant to the P&G for CI and for IC & IB FIs must satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay.
772. FIs that have outsourced the CDD process to a third party are required to ensure that the requested CDD information is provided without delay, within 48 hours.
773. The P&G for CI and IC & IB, provide that FIs must satisfy themselves that the third party located in or from a jurisdiction that is adequately regulated and supervised, and has measures in place to comply with the required CDD requirements. As defined in the P&Gs a jurisdiction is considered to be “adequately supervised” where its AML/CFT Mutual Evaluation Report discloses less than 10 “Non Compliant or Partially Compliant” regarding the 16 “key and core” FATF Recommendations.
774. The “adequately supervised” criterion is not in line with the requirements of essential criteria 9.3, which requires that FI satisfy themselves that the third party is regulated and supervised (in accordance with Recommendations 23, 24 and 29).
775. According to the P&G for CI and IC & IB, FIs should satisfy themselves that the third party is adequately regulated and supervised by referring to Mutual Evaluation Reports produced by the FATF, IMF or FSRB. This could be expanded to more broadly encompass reports, assessments or reviews pertaining to AML/CFT from these bodies.
776. Additional guidance has been issued by the Central Bank in the P&Gs on countries and territories that should be regarded as high risk countries and territories. These countries are:
- Countries subject to sanctions and embargoes issued by e.g. the United Nations and the European Union;
  - Countries identified by FATF and FATF-style regional bodies as lacking appropriate AML/CFT laws, regulations and other measures; and
  - Countries identified by credible sources, such as FATF, FATF-style regional bodies, IMF and World Bank
777. The P&G for CI and IC & IB provide that even though a FI can rely on other third parties for part of the CDD process or the process may be outsourced, the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party.
778. In case the Central Bank determines that a FI is not taking full responsibility for the CDD process, the FI is instructed to take appropriate measures to correct this shortcoming within a limited timeframe. The financial institution must comply with the CDD requirements as set forth in the “NOIS” and P&Gs.

### 3.3.2 Recommendations and Comments

779. Amend the “adequately supervised” provisions of the P&Gs, in line with the requirements of essential criteria 9.2, which requires that financial institutions satisfy themselves that the third party is regulated and supervised (in accordance with Recommendation 23, 24 and 29).
780. Amend the P&G’s to require that financial institutions satisfy themselves that the third party adequately regulated and supervised by referring more broadly to reports assessments and

reviews of reports produced by the FATF, IMF or FSRBs, rather than specifically to Mutual Evaluation Reports.

781. P&Gs for MTC should incorporate requirements to comply with Recommendation 9.

### 3.3.3 Compliance with Recommendation 9

	Rating	Summary of factors underlying rating
<b>R.9</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• The “adequately supervised” criterion in the P&amp;Gs is not in line with the requirements of essential criteria 9.3.</li> <li>• The sources through which financial institutions should satisfy themselves that a third party is adequately regulated is limited to Mutual Evaluation Reports</li> <li>• There are no requirements for MTC to comply with Recommendation 9</li> </ul>

## 3.4 Financial institution secrecy or confidentiality (R.4)

### 3.4.1 Description and Analysis

#### **Recommendation 4**

782. There is no secrecy law in place in Sint Maarten that inhibits the implementation of the FATF recommendations by the FIs. Pursuant to the different national ordinances, financial institutions are required to provide the Central Bank with information to enable the Central Bank to exercise its supervisory function (article 12 of the NOSBCI, article 28 of the NOSII, article 18 of the NOIB, article 78 of the RFETCSM, article 22h paragraph 4 of the NORUT and article 11 paragraph 4 of the NOIS). For the purpose of efficient and effective supervision the Central Bank may request financial institutions to provide additional information whenever it deems necessary.

783. The P&Gs issued by the Central Bank pursuant to the stipulations in the different national ordinances. These P&Gs should be complied with by the supervised institutions. The Central Bank, based on the authority granted by virtue of the different national ordinances is empowered to request and access information from the FIs in order to verify their compliance with the P&Gs.

784. With respect to the existence of any financial secrecy law which might inhibit the implementation of the FATF Recommendation it can be said that the different (supervisory) national ordinances contain stipulations which empower the Central Bank to request all necessary information to properly exercise its supervisory task.

785. The Central Bank has signed in 2002 an MOU with the Public Prosecutor, ‘Exchange of information Public Prosecutor - the Bank’, which was updated on September 10, 2007. This MOU provides for the sharing of information between these two authorities for the purpose of integrity supervision.

786. The different (supervisory) national ordinances provide for the sharing of information (both locally and internationally) between supervisory authorities and the Central Bank. Reference is in this respect made to the following articles in the supervisory national ordinances:

- article 41 of the National Ordinance on the Supervision of Banking and Credit Institutions (N.G. 1994, no 4);
- article 20 paragraph 5 National Ordinance on the Insurance Brokerage Business, (N.G. 2003, no.113);

- article 24 of the National Ordinance on the Supervision of Trust Service Providers, (N.G. 2003, no 114);
- article 28 of the of the National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137);
- article 78 of the National Ordinance on Insurance Supervision (N.G. 1990, no. 77): paragraph 2 of this article states that the Central Bank is authorized on the basis of reciprocity, on request to provide the administrative body which in another country is charged with the supervision of the insurance business, with data which that body needs to comply with the task entrusted to it pursuant to its national legislation, provided that said body has pledged itself to the Central Bank to keep the data provided by the Central Bank secret;
- article 27, paragraph 5 of the RFETCSM states that the Central Bank is authorized to inform the FIU of facts encountered when conducting its supervisory tasks which implies money laundering or financing of terrorism;
- article 28 of the RFETCSM provides for the sharing of information (both locally and internationally) between the Central bank and supervisory authorities and the Public Prosecutor or other authorities responsible for tracing and prosecuting.
- article 20, paragraph 3 of the NORUT states that the supervisory authorities are authorized to inform the FIU of facts encountered when conducting its supervisory tasks which implies money laundering or financing of terrorism;
- article 20, paragraph 4 sub a of the NORUT provides that the FIU is authorized to inform the supervisory authorities with information on the reporting institutions; and
- article 21 of the NORUT states that the FIU is authorized to provide information to law enforcement authorities within the Dutch Kingdom and foreign authorities with similar responsibilities as the FIU.

787. After analysing the provisions above the Examiners are not clear on whether FIU (MOT) its function as supervisor is able to exchange information with the local authorities such as Central Bank or with other foreign DNFBPs supervisor. Since FIU has not commenced its role as supervisor and there is no supervisor for casinos, the effectiveness of information sharing among competent authorities is diminished.

#### 3.4.2 Recommendations and Comments

788. FIU (MOT) as supervisor should have the possibility to exchange information with other local and international supervisory authorities

#### 3.4.3 Compliance with Recommendation 4

	Rating	Summary of factors underlying rating
<b>R.4</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• <b>No clear provision for the FIU (MOT) as supervisor to exchange information with other foreign supervisors</b></li> </ul>

### 3.5 Record keeping and wire transfer rules (R.10 & SR.VII)

#### 3.5.1 Description and Analysis

##### **Recommendation 10**

789. Article 15a (on Bookkeeping) of Book 3 of the CC requires a person who carries on a business or independently exercises a profession to keep books showing assets and liabilities and everything concerning his business or profession, for a period of ten (10) years, according to the requirements of that business or profession. Article 15a further states that the person shall keep all books, papers and other data carriers in respect thereof, so that his rights and

obligations may be ascertained at any time. Similar provisions are contained in Article 15 Book 2 of the CC as it relates to records of the financial condition of a legal person and the books, documents and other data carriers in respect thereto.

790. However, these provisions do not make clear the obligation under E.C. 10.1 to maintain all necessary records and transactions (“transactions” underlined for emphasis). This obligation should be in law or regulation.
791. The Authorities expressed that these provisions are applied in practice by all FIs and are observed for tax purposes, including provisions related to business correspondence for third parties. Meetings with FIs during the onsite visit confirmed that, in effect, all necessary records and transactions are kept.
792. According to the P&G for CI (page 24), IC & IB (page 25), MTC (page 17), document retention policy must include the following: all necessary records on transactions (both domestic and international) must be maintained for at least five years after the transaction took place. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts, currencies, and type of transaction involved) so as to provide, if necessary, evidence for prosecution of criminal behaviour.
793. Furthermore, FIs must ensure that investigating authorities must be able to identify a satisfactory audit trail for suspected transactions related to money laundering and terrorist financing. A document retention policy must weigh the statutory requirements and the needs of the investigating authorities against normal commercial considerations.
794. Article 7 of the NOIS stipulates that the service provider shall be under the obligation to keep the (due diligence) data referred to in article 6 of the NOIS in an accessible manner until 5 years after the termination of the agreement on the grounds whereof the service was rendered, or until 5 years after the performance of a service as referred to in article 1, paragraph 1, sub b under 2-7 and 9-16 of mentioned ordinance.
795. However, the provisions above do not make a reference as to business correspondence for at least five years following the termination of an account or business relationship (or longer if requested by the competent authority in specific cases and upon proper authority).
796. The P&Gs for CI, IC & IB and MTC state that FIs must ensure that all customer and transaction records and information are available on a timely basis to the domestic competent authorities. However, this obligation should be in law or regulation.
797. In situations where the records relate to on-going investigations or transactions which have been the subject of disclosure to the FIU, investigating or law enforcement authority, they must be retained until it is confirmed by these parties that the case has been closed.
798. During on-site examinations it is verified whether the financial institutions are able to comply with a request to reproduce customer and transaction records and information to competent authorities, if so requested

### **Special Recommendation VII**

799. Sint Maarten lacks comprehensive guidance with respect to wire transfers. In practice banks follow standard procedures as is required in the SWIFT system, originator and beneficiary information being recorded and transmitted with transfers. The P&G for MTCs also has a short section regarding wire transfer(s), which states that, based on the FATF's Special Recommendation (SR) VII; MTC must include accurate and meaningful originator information (at least the receivers and senders name and address) on funds transfers within or

from Curaçao and Sint Maarten. However, all requirements of the E.C. for wire transfers are not detailed in the relevant P&Gs. With no detailed provisions for wire transfers in the relevant P&G's the possibility of non-adherence to the requirements increases.

800. The Sint Maarten authorities indicated that in the P&G for CI, wire transfers are widely covered. However, the Examiners found that the P&G for CI is not detailed to meet the relevant requirements under SRVII. Internationally, wire transfers are increasingly being used to launder funds from illegal sources and for illegal activities or to finance terrorism. It is therefore very important that credit institutions be extremely vigilant before accepting funds from non-accountholders and non correspondent banks for transfer to equally unknown parties. The guidelines provide that if such funds are accepted, suitable identification of the new depositor and knowledge of the source of funds must be required through a source of funds declaration form as presented in Appendix 4.
801. Page 18 of the P&G for CI requires CIs to include accurate and meaningful originator information (at least the name, address, and account number) on funds transfers within or from Sint Maarten, and on related messages sent. The information must remain with the transfer or related message through the payment chain. If the information seems inaccurate or incomplete, additional information must be requested prior to accepting or releasing funds. The P&Gs for CI states that CIs must observe the latest Interpretative Note to SR VII and apply its relevant parts. The Central Bank indicated that there is no (EUR/US 1,000) threshold for wire transfers and that ordering institutions must obtain and maintain the relevant information relating to the originator. However, the "no threshold" approach conflicts with the obligation stated in the P&G for CI that credit institutions "must observe the latest Interpretative Note and apply its relevant parts."
802. While there are no explicit provisions within the P&G for CI for the ordering financial institution to verify the identity of the originator in accordance with recommendation 5, the P&G for CI states that Credit institutions must observe the latest Interpretative Note to SR VII and apply its relevant parts.
803. The P&G for CI requires that all wire transfers have meaningful originator information, not just cross-border transfers of EUR/USD 1,000 or more. Domestic wire transfers are treated in the same manner as foreign transfers in that Page 18 of the P&G for CI provides refers to "funds transfers within or from Curacao and Sint Maarten".
804. In Sint Maarten it is not possible for ordering institutions to provide only the originator's account number or a unique identifier within the message or payment form. This poses a direct contradiction to the provision in the P&G for CI to observe the latest Interpretive Note to SRVII and apply its relevant parts given that there is some flexibility to only provide the originator's account number or a unique identifier in the case of domestic transfers
805. As indicated on page 18 of the P& for CI, based on SRVII, credit institutions must include accurate and meaningful originator information (at least the name, address, and account number) on funds transfers within or from Sint Maarten, and on related messages sent. The information must remain with the transfer or related message through the payment chain. If the information seems inaccurate or incomplete, additional information must be requested prior to accepting or releasing funds.
806. P&G for CI based on SRVII, credit institutions must include accurate and meaningful originator information (at least the name, address, and account number) on funds transfers within or from Sint Maarten, and on related messages sent. The information must remain with the transfer or related message through the payment chain. If the information seems inaccurate or incomplete, additional information must be requested prior to accepting or releasing funds. This contradicts the obligation ("must" provision) in the P&G for CI to observe the latest

Interpretive Note to SRVII and apply its relevant parts. E.C VII.4.1 makes provisions, in cases where technical limitations, prevent the full originator information accompanying a cross-border wire transfer from being transmitted with a related domestic wire transfer, for a record to be kept for five years by the receiving intermediary institution of all the information received from the ordering FI.

807. No risk based procedures are applied for identifying and handling wire transfers that are not accompanied by complete originator information as all wire transfers should be accompanied by said information. This level of inflexibility is contrary to the requirement whereby beneficiary financial institutions should be required to adopt effective risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information.
808. In addition to monitoring institution's compliance with regulations issued by the Central Bank from the desk (e.g. meetings, periodic reporting), on-site examinations also verify whether the financial institutions under review observe the requirements as set forth in SR VII. Part of this exercise concerns interviews held with individuals responsible for SWIFT transactions as well as sample tests. However, it is easier to monitor compliance with detailed and specific requirements in the relevant P&G rather than monitor compliance with the general requirement for credit institutions to observe the latest Interpretive Note to SR VII.
809. Non compliance with P&Gs on wire transfers can be sanctioned with an administrative fine or penalty in accordance with the National Decree containing general measures Penalties and Administrative Fines Reporters Unusual Transactions (NPFRUT)(N.G. 2010, no.71) and the National Decree containing general measures Penalties and Administrative Fines Service Providers (NDPSP)(N.G. 2010, no. 70).
810. Based on article 22h, paragraph 3, juncto article 22a NORUT and article 11, paragraph 3, juncto article 9 NOIS violation of the compulsory requirements in the Provisions and Guidelines on AML & CFT are subject to a maximum penalty of Naf. 500,000. Additionally, based on article 22h, paragraph 3, juncto article 22b NORUT and article 11, paragraph 3, juncto article 9a NOIS violation of the compulsory requirements in the Provisions and Guidelines on AML & CFT are also subject to a maximum administrative fine of Naf. 1,000.
811. These sanctions are imposed for each individual violation. This means that, if, for example, wire transfers were not completes 10 times, there are 10 violations in conformity with the NOIS.
812. In order to promote the observance of the NORUT, NOIS, and the P&Gs can also bring to the notice of the public the fact with respect to which an order for a penalty or an administrative fine is imposed, the violated instruction and also the name, the address and the domicile of the person on whom the order for a penalty or the administrative fine is imposed.
813. In case of violation of or acting contrary to the provisions in the relevant articles mentioned in article 23 NORUT, or violation of regulations set by or pursuant to the relevant articles mentioned in article 10 NOIS, and the compulsory requirements in the P&Gs the Central Bank may immediately refer the violation to the Public Prosecutor for further (criminal) investigation and prosecution. An example of a case where the Central Bank may immediately refer the violation to the Public Prosecutor for further (criminal) investigation and prosecution is that the Central Bank, during an onsite examination, takes notice of serious or grave violation of the NORUT, NOIS or the compulsory requirements in the P&Gs.
814. Based on the NOSBCI the Central Bank can also impose the following, not exhaustive, actions or (administrative) sanctions on the supervised (financial) institutions or individuals.
- 1) ***Issuance of an order /direction/instruction*** (article 22 paragraph 1 NOSBCI)



- 2) *The appointment of a trustee/administrator* (article 22 paragraphs 2 and 3 NOSBCI)
- 3) *Penalizing of violation* (article 46 NOSBCI)
- 4) *Revocation of the license or dispensation* (article 9 NOSBCI)

### Additional Elements

815. As indicated before all wire transfers of whatever size both incoming and outgoing are required to have accurate and meaning full originator information.

### 3.5.2 Recommendations and Comments

#### Recommendation 10

816. The NOIS should be amended to reflect the obligation to maintain all necessary records on transactions, both domestic and international for five years following the termination of an account or business relationship (or longer if requested by the competent authority in specific cases and upon proper authority).
817. The NOIS should be amended to reflect the obligation to maintain records of business correspondence for at least five years following the termination of an account or business relationship.
818. The NOIS should be amend to require that all customer and transaction records and information be available to competent authorities upon appropriate authority on a timely basis should be in law or regulation.

#### Special Recommendation VII

819. Sint Maarten should detail the requirements with respect to SR VII for the relevant financial institutions instead of relying on the general provision in the P&G for CI to observe the latest Interpretive Note to SR VII.

### 3.5.3 Compliance with Recommendation 10 and Special Recommendation VII

	Rating	Summary of factors underlying rating
R.10	PC	<ul style="list-style-type: none"> <li>• The obligation under E.C. 10.1, which compels financial institutions to maintain all necessary records on transactions, is not clearly stipulated in law or regulation.</li> <li>• The obligation to maintain records of business correspondence for at least five years following the termination of an account or business relationship is not stated in law or regulation.</li> <li>• The obligation under E.C. 10.3 requiring that all customer and transaction records and information be available to competent authorities upon appropriate authority on a timely basis should be in law or regulation</li> </ul>
SR.VII	PC	<ul style="list-style-type: none"> <li>• The E.C. for wire transfers are not detailed in the relevant P&amp;Gs.</li> <li>• There are no explicit provisions in the P&amp;G for CI to be risk-based.</li> </ul>

### Unusual and Suspicious Transactions

### 3.6 Monitoring of transactions and relationships (R.11 & 21)

#### 3.6.1 Description and Analysis

**Recommendation 11**

820. According to the P&Gs for CI, IC & IB (page 19), and MTC (page 13), FIs are required to pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. FIs are required to examine as far as possible the background and purpose of such transactions and to set forth their findings in writing. Furthermore, management must provide its staff with specific guidelines and training to recognize and document adequately the unusual transactions.
821. Additional sector-specific requirements have been included in the respective P&Gs with respect to the special areas of attention for unusual transactions, due to the particular type and complexity of the transactions of the clients of the various types of FIs.
822. According to the P&G, CIs are required to aggregate and monitor balances and activities in customer accounts and apply consistent CDD measures on a fully consolidated worldwide basis, regardless of the type of accounts, such as on or off balance sheet, and assets under management. Employees of credit institutions must not only focus on financial statements of the client, but also on aspects, such as the client's local or foreign relationships and the financial profile of the client, and the client's engagement in other business activities.
823. The aforementioned P&Gs provide that FIs are required to pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. FIs are required to examine as far as possible the background and purpose of such transactions and to set forth their findings in writing.
824. There are no specific provisions in the P&Gs for FIs to keep documented findings of their findings regarding complex, unusual large transactions, or unusual patterns of transactions, available for competent authorities and auditors for at least five years.

**Recommendation 21**

825. According to the P&G for CI (page 17), IC & IB (page 20) MTC (page 13) FIs are required to give special attention to business relationships and transactions with persons (including legal persons and other financial institutions) from or in countries that do not or insufficiently apply the FATF Recommendations including the high-risk and non-cooperative jurisdictions.
826. The Central Bank routinely circulates to FIs and publishes on its website, extracts from FATF public statements regarding jurisdictions for which the FATF calls for action (either counter-measures or consideration of the risks arising from the deficiencies associated with the specified jurisdictions). It would be useful for those notices to include other monitored jurisdictions as these countries also have strategic deficiencies and may or may not be making sufficient progress.
827. Pursuant to the P&G for CI, IC & IB and MTC, FIs are required to examine as far as possible the background and purpose of such transactions and to set forth their findings in writing. In addition, FIs are required to maintain a satisfactory audit trail for suspected transactions related to AML/CFT and report all unusual (intended) transactions immediately to the FIU (MOT). Furthermore, the P&G requires all customer and transaction records and information to be available on a timely basis to the domestic competent authorities.
828. As there is no evidence that Sint Maarten has applied counter-measures and there is no regulatory provision or instructions in this regard, it is not clear whether Sint Maarten would have the power to apply counter measures to countries that continue not to apply or insufficiently apply the FATF Recommendations.

### 3.6.2 Recommendations and Comments

#### **Recommendation 11**

829. The P&Gs should be amended to incorporate specific provisions for FIs to keep documented findings of their findings regarding complex, unusual large transactions, or unusual patterns of transactions, available for competent authorities and auditors for at least five years.

#### **Recommendation 21**

830. Ensure that financial institutions are advised of concerns about weaknesses in the AML/CFT systems of all countries specified by the FATF, not only those countries for which the FATF calls for action.
831. Ensure that Sint Maarten has the ability to apply counter-measures to countries that continue not to apply or insufficiently apply the FATF Recommendations.

### 3.6.3 Compliance with Recommendations 11 & 21

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.11</b>	<b>LC</b>	<b>There are no specific provisions in the P&amp;Gs for financial institutions to keep documented findings regarding complex, unusual large transactions, or unusual patterns of transactions, available for competent authorities and auditors for at least five years.</b>
<b>R.21</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• <b>Notices with respect to strategic deficiencies are limited to jurisdictions for which the FATF calls for action</b></li> <li>• <b>Countermeasures are not clearly specified with respect to countries that do not apply or insufficiently apply the FATF Recommendations</b></li> </ul>

## **3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)**

### 3.7.1 Description and Analysis

#### ***Recommendation 13& Special Recommendation IV***

832. Pursuant to article 11 of the NORUT anyone who renders a service by virtue of his profession or in the ordinary course of his business is required to report any unusual transaction to the FIU (MOT) without delay. An unusual transaction is defined based on the indicators laid down in the Ministerial Decree Indicators Unusual Transactions 2010, no. 27 (MDIUT), pursuant to article 10 of the NORUT. The indicators for the various types of FIs are contained as attachments to the MDIUT
833. The indicators are divided into objective and subjective indicators. The objective indicators explicitly set the threshold for specific amount of transactions related to e.g. cash deposits, currency exchange, credit card, wire transfer, money remitting and customs transactions, that must be reported to the FIU (MOT). The subjective indicators oblige the reporting entities to report transactions which they qualify as unusual transactions and which they have reasonable grounds to suspect that the transactions relate to ML/TF. Furthermore, the P&Gs provide specific guidance on the recognition, documentation and reporting of unusual transactions.
834. The jurisdiction of Sint Maarten takes an ‘all crimes’ approach. All acts which are qualified as a felony in the Penal Code and other legislations could constitute a predicate offence for ML.

However, as indicated in section 2.1 not all the designated categories of offences for ML were confirmed (refer to paragraph 242).

835. As indicated earlier, the indicators for the FIs are laid out in the MDIUT, which also include indicators for the TF. Under the subjective indicators, there is the obligation to report an UTR when there is reason to assume that the funds are related to ML or to the TF. Article 1, first paragraph, subsection k of the NORUT defines “financing terrorism” as “a conduct described in article 2 of the Terrorist Financing Convention committed by a natural person, a legal person or a company, or by or for or in connection with an organization, institution, company, person or a group of persons or population groups”.
836. Pursuant to article 11 of the NORUT anyone who renders a service by virtue of his profession or in the ordinary course of his business is required to report any hereby conducted or intended unusual transaction to the FIU (MOT) without delay. Based on the subjective indicator a transaction needs to be qualified as unusual and must be reported to the FIU (MOT) if there are reasonable grounds to suspect that a transaction is related to money laundering or terrorism financing, regardless of the amount of the transaction involved. The examination team is of the view that “intended transaction” covers attempted transaction.
837. In case a predicate offence for ML has been determined, an unusual transaction report (UTR) must be filed with the FIU (MOT). Sint Maarten may wish to consider express provisions in law regulation or other enforceable means to require that suspicious transactions should be reported regardless of whether they involve tax matters.

#### **Effectiveness issues**

838. As some of the designated categories of predicate offenses for ML are not confirmed as being covered in Sint Maarten (see paragraph 242), the scope of UTR reporting may not be as extensive as required by FATF.
839. The effectiveness of UTR reporting to the FIU (MOT) by FIs appears to be mixed. While FIs were aware of their UTR reporting obligations, the prescriptive nature of the indicators in general, and the burden of reporting subjective (rules based) indicators, could detract from the FIs reporting genuine suspicious transactions. There appears to be a reliance on the objective indicators specially the thresholds in reporting UTRs. This suggests that UTR reporting is not effective.
840. The figures presented in section 2.5 indicate that the UTRs based on subjective indicators appear to be is low. In 2011, only 810 UTRs based on subjective indicators were submitted by FIs as a whole, while and 6479 UTRs based on objective indicators were submitted to the FIU(MOT).

#### **Additional Elements**

841. When a predicate offence for ML has been determined, an UTR must be filed by the financial institution with the FIU (MOT). No distinction is made between domestically and internationally related offences.

#### **Recommendation 14**

842. Any person who, by virtue of his profession or in the ordinary course of his business, reports any unusual transaction with the FIU (MOT) in accordance with article 15 of the NORUT is not liable for any damages caused by the filing of such report unless the damage is caused by intent or gross negligence. According to article 14 of the NORUT, data or information that, in accordance with articles 11 or 12, paragraph 2, of the NORUT have been supplied, cannot

serve as a basis for or in favour of a criminal investigation or a prosecution due to suspicion of, or as a proof with respect to an indictment due to money laundering or an offense underlying this or the financing of terrorism by the person who has supplied these data or information. It is not clear whether directors, officers and employees (permanent or temporary) are protected by law from both criminal and civil liability for breach of any restriction on disclosure of information reported in good faith. Article 14 of the NORUT protects the person filing the report against criminal investigation or prosecution, while Article 15 protects the person who “has proceeded to reporting” against civil liability.

843. Pursuant to article 20 paragraph 1 of the NORUT the person that reports the unusual transaction is prohibited by law to disclose such. The prohibition against disclosure is limited to persons who supplied the data or information, or persons who work for the person who supplied the data or information. The NORUT should be enhanced to make clear that financial institutions and their directors, officers and employees (permanent or temporary) should be prohibited by law from disclosing (“tipping off”) the fact that STR or related information is being reported or provided to the FIU

***Recommendation 25 (only feedback and guidance related to STRs)***

844. The new FIU (MOT) in Sint Maarten has conducted about 10 training sessions for financial institutions on its own and an additional five training sessions organised jointly with the Central Bank in which guidance with respect to the filing of UTR was included. However, no feedback has been provided with respect to typologies or sanitized cases, or on specific cases that have been closed.
845. It is not anticipated that MOT will provide feedback related to UTRs. The MOT is strongly encouraged to continue its outreach, particularly to DNFBPs, and to provide feedback with respect to the reporting of suspicious transactions.

**Recommendation 19**

846. A system for reporting of unusual transactions has, based on article 11, paragraph 1 of the NORUT, been implemented in Sint Maarten since 1996. Cash transactions above certain fixed threshold are in that respect required to be reported to the FIU (MOT), which is the national central agency with a computerized database.

**Recommendation 32**  
*Statistics*

847. Section 2.5 refers to statistics on UTRs filed by type of reporting entity. Section 2.7 refers to statistics on cross border transportation of currency.

3.7.2 Recommendations and Comments

**Recommendation 13 and IV**

848. Sint Maarten should ensure that all designated categories of predicate offenses for ML are covered in order to eliminate the restrictions in the UTR reporting system in this regard (refer to paragraph 277).
849. Sint Maarten should consider express provisions in law regulation or other enforceable means to require that suspicious transactions should be reported regardless of whether they involve tax matters.

850. The MDIUT should be amended to allow the reporting entities to identify suspicion of ML or FT and avoid reliance on the prescriptive indicators.

#### **Recommendation 14**

851. Make it clear that financial institutions, their directors, officers and employees (whether permanent or temporary) are prohibited by law from disclosing (“tipping off”) the fact that an STR or related information is being reported or provided to the FIU.

#### **Recommendation 25**

852. The FIU should provide feedback with respect to typologies or sanitized cases, and on specific cases that have been closed.
853. FIU (MOT) is strongly encouraged to continue its outreach programme to specifically encompass both feedback and guidance related to UTRs.

### 3.7.3 Compliance with Recommendations 13, 14, 19 and 25 (criteria 25.2), and Special Recommendation IV

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.13</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• The scope of UTR reporting may not be as extensive as required by FATF as some designated categories of predicate offenses for ML are not covered in Sint Maarten (see R1).</li> <li>• It is unclear that suspicious transactions apply regardless of whether they involve tax matters.</li> </ul> <p><i>Effectiveness issues</i></p> <ul style="list-style-type: none"> <li>• Heavy reliance on objective indicators (i.e threshold).</li> <li>• The burden of reporting subjective (rules based) indicators could detract from the FIs reporting genuine suspicious transactions.</li> </ul>
<b>R.14</b>	<b>PC</b>	It is not clear that this prohibition covers financial institutions and their directors, officers and employees (permanent or temporary).
<b>R.19</b>	<b>C</b>	This Recommendation has been fully observed.
<b>R.25</b>	<b>PC</b>	No feedback has been given with respect to STRs. Guidance related to STRs for DNFBPs has recently started.
<b>SR.IV</b>	<b>NC</b>	Rating factors in R13 apply to this Recommendation

#### **Internal controls and other measures**

### **3.8 Internal controls, compliance, audit and foreign branches (R.15 & 22)**

#### 3.8.1 Description and Analysis

#### **Recommendation 15**

854. According to the P&G for CI (page 8), MTC (page 8), IC & IB (pages 8 & 9), FIs must issue a policy statement, which clearly expresses their commitment to combat the abuse of facilities and services for the purpose of ML and TF. The policy statement must, among other things, address the implementation of a formal system of internal control to identify (prospective) clients and deter, detect and report unusual transactions and keep adequate records of the clients and transactions. This policy statement must be communicated to the employees of the financial institutions.

855. The internal policies and procedures of the financial institution must clearly describe which identification documents are acceptable for the acceptance of customers.
856. These policies and procedures must also include a description of the types of customers that are likely to pose a higher than average risk to the FIs. The policies and procedures must ensure that (prospective) customers will not be accepted in case they fail to provide satisfactory evidence of their identity. FIs must also be able to retrieve the information received from customers, when needed, without any undue delay. Hence, the implementation of a checklist containing the identification and/or transaction information of customers and a centralized record keeping system must be in place.
857. The policies and procedures of the supervised institutions are reviewed during the Central Bank's on-site examinations.
858. The P&G for CI, MTC and IC & IB, provide that the policy statement to be issued by FIs must, among other things, address the appointment of one or more compliance officers at management level responsible for ensuring day-to-day compliance with the AML & CFT procedures. The officer(s) must have the authority to investigate unusual transactions extensively.
859. Furthermore, the responsibilities of the compliance officer are outlined in the P&Gs. The responsibilities are:
- to verify the adherence to the local laws and regulations governing the detection and deterrence of ML and FT;
  - to organize training sessions for the staff on various compliance related issues;
  - to review compliance with the policy and procedures of the FI
  - to analyze transactions and verify whether any are subject to reporting according to the indicators as mentioned in the MDIUT
  - to review all internally reported unusual transactions for their completeness and accuracy with other sources;
  - to keep records of internally and externally reported unusual transactions;
  - to prepare the external report of unusual transactions;
  - to execute closer investigation on unusual or suspicious transactions;
  - to remain informed of the local and international developments on ML and TF and to make suggestions to management for improvements; and
  - to periodically report information on the institution's effort to combat ML and TF to the (Board of) managing directors, including at least the local managing directors.
860. The above-mentioned responsibilities must be included in the job description of each designated compliance officer(s). The job description must be signed off and dated by the officer, indicating her/his acceptance of the entrusted responsibilities.
861. The Examiners were able to confirm during the mission to Sint Maarten, through discussions with FI, the widespread practice of designating a compliance officer(s) at management level.
862. Pursuant to the P&G for CI, MTC and IC & IB the compliance officer(s) and other appropriate staff must have timely access to the customer identification data and other customer due diligence information, transaction records, and other relevant information. In discussions with FI, compliance officers reported that they had timely access to all relevant information.
863. P&G for CI, MTC and IC & IB provide that the policy statement to be issued by FIs must, among other things, address a system of independent testing of the AML /CFT policies and

procedures by the institution's internal audit personnel, compliance department, or by a competent external source to ensure their effectiveness.

864. Furthermore, the P&Gs stipulate that FIs must maintain an adequately resourced and independent audit function to test compliance (including sample testing) with their policies, procedures and controls. The independent testing must be conducted at least annually by an internal audit department or by an outside independent party such as the external auditor of the FI. These tests may include:
- evaluation of the AML/CFT manual;
  - file review of the financial institutions;
  - interviews with employees who handle transactions and with their supervisors;
  - a sampling of unusual transactions on and beyond the threshold(s) followed by a review of compliance with the internal and external policies and reporting requirements; and
  - assessment of the adequacy of the record retention system.
865. The scope of the testing and the testing results must be documented, with any deficiencies being reported to senior management and/or to the Board of Supervisory Directors, and to the designated officer(s) with a request to take prompt corrective actions by a certain deadline.
866. The P&G for CI, MTC and IC & IB, provide that the policy statement to be issued by FIs must, among other things, address the preparation of an appropriate training program for personnel to increase employees' awareness and knowledge in the area of ML and prevention and detection.
867. Furthermore, the P&Gs provide that FIs must at a minimum develop training programs and provide (ongoing) training to all personnel who handle transactions that may qualify.
868. The provisions on training vary depending on the type FI (P&Gs for CI (pages 22 & 23), MTC (pages 16 & 17) and the P&G for IC & IB (pages 23 & 24)). The P&Gs state at least the following:
- creating awareness by the employee of the ML and TF issue, the need to detect and deter ML and TF, the laws and regulations in this respect and the reporting requirements;
  - the detection of unusual transactions or proposals, and the procedures to follow after identifying these;
  - making sure that the need to verify the identity of the client is understood;
  - the areas of underwriting of new policies or the modification of existing policies; and
  - to keep abreast of the developments in the area of ML and TF.
869. Training must be provided to all new employees dealing with clients, irrespective of their level of seniority. Similarly, training must also be provided to existing members of the staff (such as account and assistant account managers) who are dealing directly with clients, as they are the first point of contact with potential money launderers and financiers of terrorism and their efforts are therefore vital to the organization's strategy in curtailing ML and TF.
870. A higher level of instruction covering all aspects of ML and TF policies, procedures and regulations must be provided to those with the responsibility to supervise or manage the staff.
871. The FIs must make arrangements for refreshment training at regular intervals to ensure that the staff members do not forget their responsibilities and that they are updated on current and new developments in the area of money laundering and terrorist financing techniques, methods and trends. The training must include a clear explanation of all aspects of the laws or executive decrees in Sint Maarten relating to ML and TF and requirements concerning customer identification and due diligence. The training must be provided at least annually



(for CIs, semi-annually) and include, among other things, the review of the instructions for recognizing and reporting of unusual transactions.

872. In order for a FI to be able to demonstrate that it has complied with the aforementioned guidelines with respect to staff training, it must at all times maintain records which include:
- details of the content of the training programs provided;
  - the names of staff who have received the training;
  - the date on which the training was provided;
  - the results of any testing carried out to measure staff understanding of the money laundering and terrorist financing requirements; and
  - an on-going training plan
873. According to the the P&G for CI, MTC and IC & IB FIs must ensure that their business is conducted at a high ethical standard and that the laws and regulations pertaining to financial transactions are adhered to. Each FI must screen its employees for criminal records.
874. Furthermore, the Central Bank's *Policy Rule for Sound Business Operations in the event of Incidents and Integrity-sensitive Positions* provide that all supervised institutions must screen new staff members for integrity-sensitive positions. Furthermore, internal procedures will be necessary to screen staff members who are already employed by the institution and are appointed in an integrity-sensitive position. The supervised institution should in that respect maintain a record of its integrity-sensitive positions, mentioning the tasks, competences, and responsibilities for each position. In the event that an institution employs a staff member (in-employment screening) or is taking a staff member into its service (pre-employment screening) who will be working in an integrity-sensitive position, it must form an opinion on the integrity of the person in question. To this end, it shall at least proceed to:
- a) obtain written information about the integrity of the person in question from the employer(s) of this person during the past five years;
  - b) ask the applicant in question for permission and also authorization to obtain information from the (ex)-employer(s);
  - c) explicitly ask the person in question (by means of an application form) about incidents from the past that could be significant for judging the integrity of the person in question;
  - d) have the person in question submit a declaration concerning the conduct, in the meaning of the National Ordinance on Judicial Documentation and on the declarations concerning conduct (N.G. 1968, no. 213).

#### **Additional Elements**

875. In accordance with the P&G for CI, MTC and IC & IB, the designated officers must prepare a report of all unusual transactions for external reporting purposes. The report must be submitted to senior management for their review for compliance with existing regulations and their authorization for submission to the FIU (MOT).
876. If an unusual transaction is not authorized by senior management to be incorporated in the report to the FIU (MOT), all documents relevant to the transaction including the reasons for non authorization must be adequately documented, signed off by the designated officer and senior management, and kept by the reporting institution.
877. Taking into account the above mentioned procedure for external reporting, the compliance officer(s) should be able to act independently.

#### **Recommendation 22**

878. The Central Bank issued in 2007 the Guidelines for the Statement of Regulatory Compliance to all financial institutions. In accordance with this regulation supervised institutions should inform the Central Bank in a narrative form on their foreign entity's compliance with regulatory (including AML/CFT) regime. The Central Bank periodically verifies the content of each Statement with the relevant foreign supervisory authority. It is also important to note that this Recommendation has limited implications for Sint Maarten as the jurisdiction is more substantially a host jurisdiction rather than a home jurisdiction.
879. According to the P&G for CI (page 9), MTC (page 9), and IC & IB (page 20), FIs are required to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with home country requirements and the FATF Recommendations, to the extent that local (i.e., host country) laws and regulations permit. FIs incorporated in Sint Maarten (home country) are required to develop their group policies on AML/CFT and extend them to all of their branches and subsidiaries which are located outside of Sint Maarten
880. The P&G for CI, MT and IC & IB, require FIs to pay particular attention that this principle is observed with respect to their branches and subsidiaries in countries that do not or insufficiently apply the FATF Recommendations.
881. The P&G for CI, MTC and IC & IB state that where the minimum AML/CFT requirements of the home and host countries differ, branches and subsidiaries in host countries are required to apply the higher standard, to the extent that local (i.e., host country) laws and regulations permit.
882. According to the P&Gs, FIs are required to inform the Central Bank when a foreign branch or subsidiary is unable to observe appropriate AML/CFT measures because this is prohibited by local (i.e., host country) laws, regulations, or other measures.
883. Furthermore, the Guidelines for the Statement of Regulatory Compliance require all FIs to inform the Central Bank on their foreign entity's non-compliance with regulatory (including AML/CFT) regime. The Central Bank is entitled to periodically verify the content of each Statement with the relevant foreign supervisory authority

### 3.8.2 Recommendations and Comments

### 3.8.3 Compliance with Recommendations 15 & 22

	Rating	Summary of factors underlying rating
<b>R.15</b>	<b>C</b>	<b>This Recommendation has been fully observed.</b>
<b>R.22</b>	<b>C</b>	<b>This Recommendation has been fully observed.</b>

## 3.9 Shell banks (R.18)

### 3.9.1 Description and Analysis

#### **Recommendation 18**

884. The NOSBCI does not explicitly prohibit shell banks but the conditions for licensing and operating are of such nature that shell banks cannot be established neither can they operate in or from Sint Maarten. In accordance with the admission requirements for credit institutions one or more managing and supervisory director must be residents in Sint Maarten or Curaçao. At all times at least two members of the Board of Managing Directors must work in and be a resident of Sint Maarten or Curaçao. At least one member of the Board of Supervisory Directors must be a resident of Sint Maarten or Curaçao.

885. The P&G for CI stipulate that CIs are not permitted to enter into, or continue, correspondent banking relationships with shell banks
886. During the on-site inspection, the Central Bank assesses which correspondent banks are used by the FI under review. The on-site examinations conducted by the Central Bank have not revealed that correspondent banking relationships exist with shell banks.
887. According to the P&G for CI, CIs are required to satisfy themselves that respondent FIs in a foreign country do not permit their accounts to be used by shell banks.

### 3.9.2 Recommendations and Comments

### 3.9.3 Compliance with Recommendation 18

	Rating	Summary of factors underlying rating
<b>R.18</b>	<b>C</b>	<b>This Recommendation has been fully observed.</b>

### **Regulation, supervision, guidance, monitoring and sanctions**

### **3.10 The supervisory and oversight system - competent authorities and SROs Role, functions, duties and powers (including sanctions) (R.23, 29, 17 & 25)**

#### 3.10.1 Description and Analysis

#### **Recommendation 23& 30 –Authorities/SROs roles and duties & Structure and resources**

888. As of 10-10-10 in accordance with Article 46 of the Central Bank Statute for Curacao and Sint Maarten (N.G. 2010, no. 51), the shares of both Sint Maarten and Curacao were transferred from the Central Bank of the Netherlands Antilles to the Central Bank of Curacao and Sint Maarten. Article 3 of this Statute outlines the functions of the Banks as follows:
- to promote the stability of the value of the currency of the Countries;
  - to promote the health/soundness of the financial system of the Countries; and
  - to promote a safe and efficient payment traffic/flow of payments in the Countries.
889. Article 8, paragraph 2, of the Central Bank Statute states that the Bank shall, by virtue of rules established by a uniform national ordinance, exercise the supervision over
- a. the banking and credit system;
  - b. company pension funds;
  - c. the insurance sector;
  - d. the stock exchanges;
  - e. investment institutions and administrators;
  - f. the providers of management services;
  - g. the insurance brokers.
890. Article 9, paragraph 2, further gives the Bank the power to regulate the payment traffic/flow of payments with foreign countries.
891. Article 43 of the Statute states that
1. *Effective from the entry into force of these Regulations the supervision referred to in Article 8, second paragraph, regarding:*

- a. *the banking and credit institutions shall be effected by virtue of the provisions of the National Ordinance on the Supervision of Banking and Credit institutions of 1994;*
- b. *the company pension funds shall be effected by virtue of the provisions of the National Ordinance on Company pension funds;*
- c. *the insurance sector shall be effected by virtue of the provisions of the National Ordinance on the Supervision of the Insurance sector and its implementing decrees;*
- d. *the stock exchanges shall be effected by virtue of the provisions of the National Ordinance on the Supervision of Stock Exchanges;*
- e. *investment institutions and administrators shall be effected by virtue of the National Ordinance on the Supervision of investment institutions and administrators;*
- f. *the providers of management services shall be effected by virtue of the National Ordinance on the Supervision of the Trust Business;*
- g. *the insurance brokers shall be effected by virtue of the National Ordinance on Insurance Brokerage;*
- h. *the money transaction offices shall be effected by virtue of the National Ordinance on the Supervision of Money Transaction Offices;*
- i. *in the manner as said national ordinances were worded immediately prior to the entry into effect of these Regulations.*

892. The NOSBCI, NOSII, NOIB, NOSPf and the NOSSE, which have been enacted based on the aforementioned article of the Central Bank Statute, regulate the supervision of FIs. Furthermore, the Central Bank is, pursuant to the NOIS, article 1, paragraph 1, sub a and the NORUT, article 22h, paragraph 1, sub a entrusted with the supervision of AML/CFT compliance of the FIs.
893. Currently with regard to factoring services, the authorities indicated that the activities of these companies have been included in a draft National Decree to fall under the scope of the NOIS and NORUT.
894. FIs have to be licensed or registered by the Central Bank under the respective supervisory legislation. The licensing or registering occurs after the conditions of the legislations/executive decrees and or provisions and other admission requirements are met.
895. The Central Bank has issued P&Gs based on article 22h, paragraph 3 of the NORUT, article 11, paragraph 3 of the NOIS and the respective supervisory ordinances. Adherence to the P&Gs and the different supervisory national ordinances are also assessed during the on-site examinations conducted by the Central Bank. Reference is made to the following pages in the P&G for information requested by the Central Bank, before or during the periodic on-site examinations.
- P&G for CI paragraph II.3 “Examination by the Central Bank” page 22;
  - PG for IC & IB paragraph II.34 “Examination by the Central Bank” pages 26 and 27;
  - P&G for MTC paragraph II.3 “Examination by the Central Bank” page 18

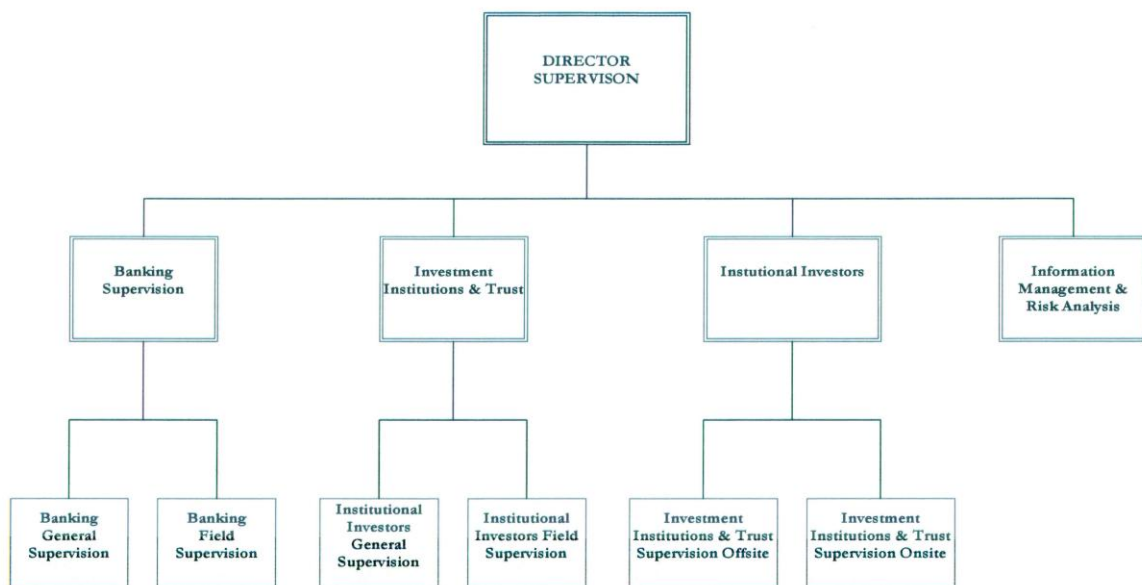
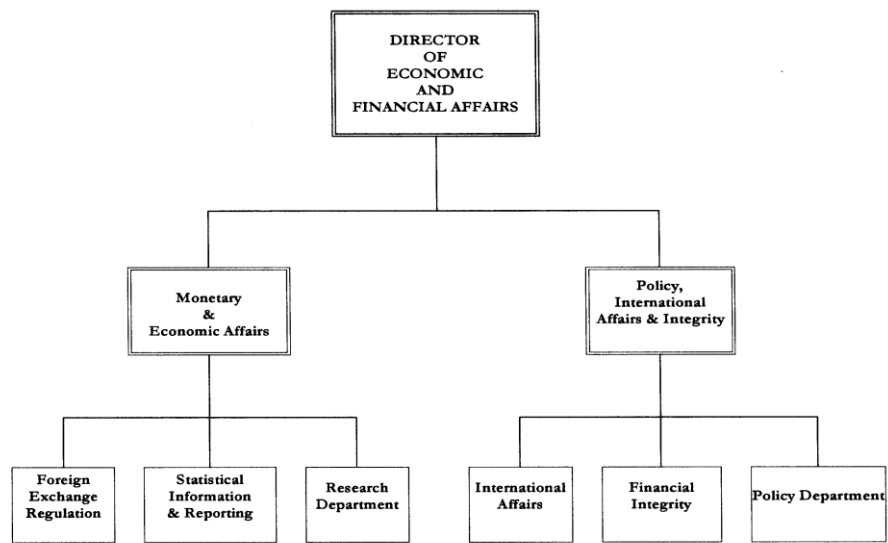
#### ***Resources (Supervisors)***

896. The Central Bank Statute provides the basis to acquire the necessary financial, human and technical resources for the effective execution of its supervisory function. It also provides the Central Bank with the desirable independence and autonomy.

#### **The Central Bank**

##### **Structure:**

897. The Central Bank is by virtue of the Central Bank Statute an independent supervisory authority for the financial sector. The Central Bank carries out its supervisory task independently, without any external influence or interference in accordance with article 18 of the Central Bank Statute. The Government does not give any operational direction and/or guidance to the Central Bank. It should also be noted that in an effort to strengthen the Central Bank's independent position vis-à-vis the government, the Central Bank Statute limits the monetary financing of budget deficits to 5% of the government's revenues in the previous year. Furthermore, there is no interference in the operational independence of the Central Bank by the industry. The private sector is often times being consulted to provide comment on draft supervisory policies and legislations, particularly when this is legally prescribed.
898. The Board of Supervisory Directors (the Board) of the Central Bank consists of seven members, including chairman. The chairman is appointed and removed jointly by both countries by national decree, and is effected upon joint nomination by Ministers, which is based on a recommendation made by a 5/6 majority of the Board. Three of the other six members are appointed upon the recommendation of each of the countries
899. The Board of Management consists of a President and two Executive Directors, who are appointed from a joint nomination of Ministers based on their reputation and professional experience in the financial and economic fields, and based on the recommendation made by at least five members of the Board. The appointment, suspension, and dismissal of the members of the Board of Management are outlined in article 20 of the Central Bank Statute. The Statute provides for a term of eight years of office of the president and the statutory executive directors with one possible extension for another term of eight years.
900. The organizational structure relative to the supervisory and integrity affairs of the Central Bank is as follows:



901. In meetings with government officials and the Central Bank, the assessment team was informed that Sint Maarten is currently assessing options for the Central Bank in Sint Maarten. The Minister of Finance indicated that there were plans for Sint Maarten to have its

own central bank, while the Central Bank acknowledged receiving a proposal from the Government of Sint Maarten for a full-fledged division of the Central Bank in Sint Maarten. Currently there are four full time members of staff in the Sint Maarten office of the Central Bank who are focused on operational issues such as cash handling, statistics and inter-bank clearing. The Examiners are of the view that the current structure of the Central Bank in may not be sustainable in the longer term given Sint Maarten's desire for a greater presence on that jurisdiction.

**Funding:**

902. The supervisory activities of the Central Bank are partially funded through fees charged to the supervised sector. The fees charged to the supervised institutions are based on different criteria. CIs are, for example, charged monthly fixed fees which are periodically calculated based on the rating assigned to the institution by the Central Bank, the capital adequacy and the size of the institution. Insurance companies are charged a certain percentage of their premium income, whereas investment institutions are charged a fee based on their total assets.
903. The remaining funds to cover the expenses pertaining to the supervisory activities of the Central Bank are generated from the operational results of the Central Bank. Funding resources appear to be adequate to allow the Central bank to oversee its AML/CFT responsibilities in Sint Maarten.

**Staffing:**

904. Financial resources are annually budgeted to hire staff in the supervision departments and to train the staff of the supervision departments. All supervision departments have their own budget and have a career development plan to ensure the professional development of all supervisory staff. The number of staff members directly involved with supervision of the financial sector amounts to approximately 50. The number of persons indirectly involved with the supervision of the financial industry, e.g. legal department, policy making department, and IT amount to approximately 10.
905. While no supervisory members of staff are resident in Sint Maarten, the Central Bank shuttles in inspection staff from Curacao as needed.
906. Staff hired by the Central Bank to conduct the supervision work have PhD, masters and or a bachelor's degree. These staff members have expertise in a wide range of fields namely finance, economics, accounting, legal, ICT, Organisational and IT & Security Auditing. The supervisory staff members have job descriptions outlining their responsibilities.
907. The overall AML/CFT level of knowledge and expertise of the Central Bank's examiners are considered to be adequate and assigned staff is capable of maintaining a helicopter view on the situations encountered. The staff is well trained and capable of understanding and acting upon critical situations that may arise in the sector. The Central Bank also serves as a main source of information to the financial sector where inquiries in terms of AML/CFT are addressed.

**Sufficient technical and other resources:**

908. The prudential supervision departments of the Central Bank have computerized databases and analytical software tools e.g. Business Objects enabling them to periodically analyze the financial position and result of the supervised institutions and verify their compliance with legal stipulations. The staff is well trained in the use of analytical tools and receives refreshment courses periodically.

909. In carrying out its supervisory responsibilities, the supervision departments are assisted by the Financial Integrity Unit of the Central Bank which is responsible for assessing the integrity of the policymakers of supervised institutions. Assistance to the supervision departments is also provided by other departments within the Central Bank, for example the legal and the policy making departments. Furthermore, technical assistance is on request provided by the Dutch Central Bank and the AFM (the Dutch authority financial markets)
910. The prospective staff members of the Central Bank are carefully selected based on their educational background, training, expertise, and integrity. The integrity screening entails that a thorough background check is performed on the candidate. The Central Bank has a code of conduct for its personnel. Moreover, the supervision staff members are also subjected to a separate code of conduct (*Besluit beroepsregels toezicht functionarissen*).
911. As for confidentiality purposes, all staff members are required to sign a confidentiality agreement at the beginning of their working relationship with the Central Bank. According to article 31 of the Central Bank Statute, the Supervisory directors, President and directors of the Central Bank are required to keep confidential all information obtained during the execution of their function, in so far disclosure of such information is not prescribed by or pursuant to national ordinance. Furthermore, in the employee hand book "*Reglement arbeidsvoorwaarden personeel van de Bank van de Nederlandse Antillen*" it is also mentioned that staff members should maintain confidentiality on all information that they are exposed to in connection with their work. In addition, according to article 40 of the NOSBCI, article 25 of the NOSSI, article 20 NOIB, article 28 of the NOSPF and article 10 of the NOSSE, no information obtained from a FI may be disclosed further or in any other manner than as required for the performance of tasks or decisions taken pursuant to the application of the national ordinances.
912. For all supervisory staff members there is a career development plan in place and (local and international) training is provided.
913. Training is provided to the supervisory staff members who are involved in AML/CFT assessments where insight is given on the scope of possible offences, different typologies and also techniques used to trace unusual transactions that could possibly be related to ML and/or TF. Examiners of the Supervision Departments are required to attend AML & CFT trainings on a regular basis. These trainings comprise of both internal training, specifically tailored to the examiners of the aforementioned departments, or external training organized by other foreign supervisory authorities, international standard setting bodies, such as the IAIS, IOSCO, or other regional groups, such as the Offshore Group of Collective Investment Schemes Supervisors, Commission of Securities Regulators of the Americas, the Caribbean Group of Securities Regulators, and the Offshore Group of Banking Supervisors (for trust-related trainings).
914. In addition, some of the Central Bank's personnel annually attend FATF and or CFATF and other relevant local or international conferences where current trends and typologies in AML and CFT are discussed and reported upon. A number of the Central Bank's personnel are accredited CFATF assessors

**Recommendation 29& 17 –Authorities powers and Sanctions**

915. Based on the NORUT and the NOIS the Central Bank has the authority to impose sanctions on the FI under its supervision that does not or does not timely comply with the obligations set forth in these legislations. The penal provisions are laid down in article 23 of the NORUT and article 10 of the NOIS. In addition, the Central Bank has the authority to impose sanctions on the financial institutions under its supervision that do not adhere to the compulsory requirements as set out in the P&Gs. Compliance by the supervised institutions with the



provisions outlined in aforementioned provisions is assessed by the Central Bank during its on-site examinations.

916. In accordance with article 11, paragraph 4 of the NOIS and 22h, paragraph 4 of the NORUT, the Central Bank also has the authority to conduct inspections of FIs, including on-site inspections, to ensure compliance.
917. The on-site examination process for AML/CFT entails reviews of 1) written policies and procedures, 2) job descriptions, 3) internal audit reports, 4) employee screening, 5) employee training, 6) inspection of clients' files, and 6) sample testing of transactions.
918. The FI must be prepared to make available the following items:
- its written and approved policy and procedures on ML and TF prevention;
  - the name of each designated officer responsible for the institution's overall ML and TF policies and procedures and her/his designated job description;
  - records of reported unusual transactions;
  - unusual transactions which required closer investigations;
  - the completed source of funds declaration;
  - schedule of the training provided to the institution's personnel regarding ML and TF;
  - the assessment report on the institution's policies and procedures on ML and TF by the internal audit department or the institution's external auditor;
  - documents on system tests, such as the customers' transactions data and files, other relevant information such as Swift daily-overview, nostro-account reconciliation, list of clients that make use of deposit boxes, and non-account holders transactions; and
  - required copies of identification documents
919. The Central Bank's power to compel production of or to obtain access to all records, documents or information relevant to monitoring compliance is provided for in article 11 paragraph 4 of the NOIS and article 22h paragraph 4 of the NORUT.
920. Moreover, the supervisory ordinances NOSBCI (article 21), NOSII (articles 28 and 30), NOIB (article 18) provide the Central Bank with the powers to monitor and ensure compliance by FIs, with requirements to combat ML and TF
921. Additionally, pursuant to the P&G for CI (on page 22) and IC & IB (on pages 25 and 26), FIs are required to make available a list of items to the Central Bank's examiners before or during an on-site examination and upon the Central Bank's request during the year.
922. Under Article 17, paragraph 5 of the Central Bank Statute for Curacao and Sint Maarten, everybody within Curacao and Sint Maarten are obligated, at the Bank's request to provide all information and data to the Bank which are important for the collection of the statistics concerning the areas that fall within the Bank's competence. This power to compel the production of or to obtain access to information is further reinforced by Article 11, paragraphs 4 a and b of the NOIS and Article 2h, paragraphs 4 a and b of the NORUT.
923. The power of enforcement to act against FIs and their directors can be derived from a general statutory provision in the Penal Code. Article 53 of the Penal Code provides that offences can be committed by natural persons and legal persons. When an offence is committed by a legal person, prosecution can be instituted and the penal sanctions and measures provided for in general ordinances, if eligible, can be pronounced:
- a) against the legal person, or
  - b) against those who ordered the execution of the offence as well as against those who actually lead the execution of the prohibited conduct, or
  - c) against the ones mentioned in section a and b jointly.

924. The above mentioned provision makes it possible to act against directors or senior management, because the director or senior management are the ones who gives the orders on the work floor and because there is a so called switch provision (article 96) of the Penal Code that provides for the application of article 53 of the Penal Code to other facts which are penalized by other general ordinances, unless the general ordinances provides otherwise.
925. Pursuant to article 14 of Book 2 of the CC, the members of the Board of directors are personally and severally liable towards the legal entity for any loss caused by the improper performance of duties.
926. There are no indications outside of the Penal Code and CC that sanctions could be applied to directors and senior management of financial institutions.

#### **Administrative and penal Sanctions**

927. The Central Bank has been designated to be responsible for FIs and to ensure their compliance with the NOIS and the NORUT. The NOIS and the NORUT establish different sanctions, which can be divided into administrative sanctions and punitive (penal) sanctions. The administrative sanctions that can be administered by the Central Bank as well as the rules for implementation thereof are set out in article 9 up to and including article 9f of the NOIS and articles 22a up to and including 22g of the NORUT. The penal sanctions (article 50 of the NOSBCI, article 122 of the NOSII, article 38 of the NOSIIA, article 81 of the RFETCSM article 23 of the NORUT and article 10 of the NOIS), can only be administered/ imposed by the Court after conviction can and consists of imprisonment of up to four years, or a fine of up to five hundred thousand guilders, or both.
928. The violation of the obligations imposed by or pursuant to the articles in the table below is subject to a maximum penalty of Naf. 500,000 (article 2 of the NDPFRUT (N.G. 2010, no. 71) and article 2 of the NDPFSP. (N.G. 2010, no. 70)). In addition, Central Bank can impose, for each day that the FI continues to none comply with articles below, a maximum administrative fine of Naf. 1,000 (article 3 of the NDPFRUT (N.G. 2010, no. 71) and article 3 of the NDPFSP. (N.G. 2010, no. 70)).

NORUT	NOIS
- Article 11	- Article 2, paragraph 1, 2, and 5
- Article 12, paragraph 2	- Article 3
- Article 13	- Article 5, paragraph 1 through 4
- Article 22h, paragraph 3	- Article 6
	- Article 7
	- Article 8
	- Article 11, paragraph 3

929. Before proceeding to imposing a fine, the Central Bank shall inform the FI or individual in writing of the intention to impose a fine, stating the grounds on which the intention is based, and shall offer him the opportunity to redress the default within a reasonable term. The amount due can be collected by way of a writ of execution, including by the costs of collection. The writ of execution shall be served on the offender by means of a bailiff's notification and will produce an entitlement to enforcement.
930. Furthermore, the following sanctions can be administered:

931. **Issuance of an order /direction/instruction** (article 22, paragraph 1, of the NOSBCI, article 33, paragraph 1 of the RFETCSM). If a supervised FI is found not to satisfy the requirements, rules, restrictions or instructions laid down by or pursuant to the relevant supervisory legislations, the Central Bank can issue an instruction specifying that the supervised FI must satisfy such requirements, rules, restrictions or instructions within the time specified by the Central Bank. In some cases the Central Bank can also publish the issuance of the instruction.
932. **The appointment of a trustee/administrator** (article 22, paragraphs 2 and 3 of the NOSBCI), In case in the Central Bank's opinion its request stated in an order has not or not adequately been complied with within the term specified by the Central Bank then the Central Bank can by registered letter serve notice to the supervised FI that, with effect from that date stipulated by the Central Bank, all or particular organs of the supervised (financial) institution may only exercise their powers after approval by one or more persons appointed by the Central Bank and with due observance of the instructions of said persons. The Central Bank may also take this action if special circumstances threaten an adequate functioning of certain supervised FIs.
933. **Penalizing of violation** (article 46 of the NOSBCI, articles 35 and 43 of the RFETCSM). If the FI fails to satisfy its obligations resulting from the relevant supervisory legislations or fails to satisfy such obligations in time, the Central Bank can impose an administrative fine on the FI. In some cases the Central Bank can also impose a penalty.
934. **Revocation of the license or a dispensation and cancel the registration** (article 9 of the NOSBCI, article 7 NOIB, articles 11 and 22 of the NOSIIA, article of the 22 RFETCSM and articles 5 and 9 of the NOSTSP). In case the supervised (financial) institution or individual refuses to comply with or is in violation of the provisions and the compulsory requirements as stipulated in the relevant supervisory legislations and the Provisions and Guidelines on AML & CFT, respectively, the Central Bank can revoke the license or dispensation of the supervised (financial) institution or individual or cancel the registration of the insurance broker. In some cases emergency measures is applied (articles 59 – 73 of the NOSII and article 27-38 of the NOSBCI).
935. **Public Notice** (article 69 of the RFETCSM, article 9d of the NOIS and article 22e of the NORUT). The Central Bank can bring to the notice of the public the fact with respect to which an order for a penalty or an administrative fine is imposed, the violated instruction and also the name, the address and the domicile of the person on whom the order for a penalty or the administrative fine is imposed.

### **Recommendation 23 –Market entry**

936. The Central Bank is the supervisor for financial institutions operating in Sint Maarten. Market entry by financial institutions is subject to the stipulations of the respective supervisory laws which are administrated by the Central Bank as the supervisor for FIs operating in Sint Maarten. The NOSBCI, NOSII, NOIB and RFECTCSM provide the rules and licensing requirements for CI, IC & IB and MTC respectively.
937. In general the requirements for the FIs to apply for a license to be granted by the Central Bank are:
- Extract Chamber of Commerce
  - Personal Questionnaires (notarized)
  - Articles of Incorporation
  - Deed of appointment (in case of a representative)
  - Audited annual statements of the last three years and/or business plan// if applicable last three annual reports of the parent company which may not contain other than an unqualified opinion by a certified accountant or another expert with equal authority;

- Organizational Chart / if applicable company structure of the group to which the corporation or institution belongs.
938. Additional information will be required depending of the type of FI and their particular circumstances. For example, CIs will be required to provide information on: the initial capital of the corporation or institution, the identity, financial status and antecedents of those who exercise authority in the corporation or institution by means of voting rights derived from their number of shares, in the general meeting of shareholders or in a comparable manner; the number, the identity and the antecedents of the persons who, in the Central Bank's opinion, determine the day-to-day policy of the corporation or institution.
939. In any case, after submission of the application for licensing with the required data, documentary proof, and information, the Central Bank will decide on the application within 60 days. In case the Central Bank decides to deny the request, the reasons will be cited.
940. The licensing requirements for securities exchanges are outlined in the document "Minimum Information Needed for the Central Bank to Evaluate a Request to Establish a Stock Exchange in Curaçao and Sint Maarten". As indicated in section 1 there is no securities exchange operating on Sint Maarten.
941. The Central Bank is authorized to grant a license to persons or institutions empowering them to hold a bureau de change (RFETCSM, Article 8, paragraph 1). However, it is the Central Bank's policy for more than two decades not to grant such licenses. Only domestic commercial banks operating under the provisions of the NOSBCI are permitted to provide the service of exchanging foreign currencies.

#### **Overview integrity testing policy**

942. The decision to admit a FI to the financial sector is among others based upon the outcome of the integrity testing. The intention to sell or transfer shares in a supervised financial institution is also communicated to the Central Bank. The management of the FI must inform the Central Bank of the intention to sell or transfer the shares by the present shareholders to others by means of a letter, detailing the reasons why the shares are being sold or transferred, and the consideration paid per share by the new shareholder(s). The Central Bank also reviews the antecedents and plans of the prospective shareholders.
943. The Central Bank is legally entitled to perform integrity testing on (candidate) (co-) policymakers of FIs and (candidate) holders of qualifying interests in supervised institutions and other persons involved. The legal basis can be found in: article 3, paragraph 2, sub b, c and d; article 4, paragraph 1, sub d, e and f; article 9, paragraph 1, sub a; and article 23, paragraph 2 of NOSBCI; article 17 of the NOSII; article 4 of the National Decree on Special Licenses (NDSL); article 19 of the NOSPF; article 6, paragraph 1, sub b on the NOIB; article 2 of the NOSSE; article 4, paragraph 1. The integrity testing applied by the Central Bank is laid down in the Central Bank Policy Rule on Integrity Testing which was last revised in January 2011. This policy rule is applicable to the following persons involved:

**1. Policymakers and participants in supervised institutions.** This includes each and every (and any future) body of any institution supervised by the Central Bank, notably:

- a) (candidate)(co-)policymaker such as Director, Board Member, or Investment Manager/Adviser;
- b) (candidate)member of a Board of Supervisory Directors or Supervisory Board;
- c) (candidate) holder of a qualifying interest.

**2. Other persons involved.** This includes:

- a) any natural person or legal entity who applies for, or has been granted dispensation in pursuance of article 45 of the 1994 NOSBCS, for the purpose of extending credit on a

- regular basis or of raising funds by means of the issue of, among other things, debt instruments; and any natural person or legal entity who applies for, or has been granted dispensation in pursuance of article 2 of the 2003 NOSTSP, for the purpose of providing trust services;
- b) the (candidate)(co-)policymaker of an institution that applies for, or has been granted dispensation in pursuance of article 45 of the 1994 NOSBCI, for the purpose of extending credit on a regular basis or of raising funds by means of the issue of, among other things, debt instruments; the (candidate)(co-)policymaker of a legal entity that applies for, or has been granted, dispensation in pursuance of article 2 of the 2003 NOSTSP, for the purpose of providing trust services, with the exception of the (candidate)(co-)policymaker of a group financing company or an international credit institution referred to in article 2 and article 3 of the National Decree laying down general measures (N.G. 1995, no. 219);
  - c) the (candidate)holder of a qualifying interest of an institution that applies for, or has been granted dispensation in pursuance of article 45 of the 1994 NOSBCI, for the purpose of extending credit on a regular basis or of raising funds by means of the issue of, among other things, debt instruments; the (candidate) holder of a qualifying interest of a legal entity that applies for, or has been granted, dispensation in pursuance of article 2 of the 2003 NOSTSP, for the purpose of providing trust services, with the exception of the (candidate) holder of a qualifying interest of a group financing company or an international credit institution referred to in article 2 and article 3 of the National Decree laying down general measures (N.G. 1995, no. 219).
944. A qualifying interest as mentioned above is defined as follows: A direct or indirect holding (shareholder as Ultimate Beneficial Owner) equal to or exceeding 10% of the nominal capital of a (non) public-listed enterprise or institution (financial interest equal to or exceeding 10%), or the ability to exercise directly or indirectly the voting rights in a (non) public-listed enterprise or institution equal to or exceeding 10% (controlling interest equal to or exceeding 10%), as well as the sole proprietor of the insurance brokerage business.
945. As part of the integrity testing and in connection with the further developments, the Central Bank issued in January 2006, regulation concerning the number of permitted (co)-policy-making positions per person. The purpose of this regulation is to prevent conflicting interests when combining a number of (co-) policy positions in the financial sector. The possible conflict of interests that may arise include:
- a) a further specification with regard to the required independence of the supervisory directorship, in the case of financial and controlling interests, in conformity with the Principles of Good Governance (Any combination of (co)-policy-making positions with a financial or controlling interest in the mutual business relationship is only permitted, provided within the same group) (*Article 6. Financial or controlling interest within a group*);
  - b) preventing conflicting financial and/or co-determination interests with other non-supervised legal persons and institutions (*Article 8. Conflicting co-determination interest and/or co-determination interest with other non-supervised legal person(s)/institution(s) and functioning local PEPs*); and
  - c) the aspect of functioning local PEPs (*Article 8. Conflicting co-determination interest and/or co-determination interest with other non-supervised legal person(s)/institution(s) and functioning local PEPs*). Local PEPs are understood to be in general persons who a) hold or have held a prominent public function, and b) the close relatives or c) immediate associates of these persons. In the event of an integrity testing of any application of a local PEP for holding a (co)-policy-making position at a supervised institution, the following distinction shall apply: a) functioning local PEPs (persons holding a public function); and b) non-functioning local PEPs (persons that have held a public function). Normally, there is in this case of a functioning local PEP possibly a conflicting interest

and for that mere reason, the person in question will not qualify for holding a (co)-policy-making position

946. Pursuant Article 1 of the *Policy Rule on Integrity Testing*, the UBO holding a ‘*qualifying interest*’, must be subjected to the Central Bank’s integrity testing. The integrity testing includes the submission of an organizational chart explaining the current and future shareholder or control structure, which if need it, needs to be updated every year, not later than June 30. In addition. all candidates are subject to a screening of criminal records on Court decisions in relation to: a) violation of penal provisions, transactions with the PPO, (conditional) dismissal, acquittal, or discharge from prosecution (inclusive of countries abroad), and other facts and circumstances; and b) Court decisions for insider trading in securities transactions, serious larceny, embezzlement, forgery, false testimony, injury to creditors or entitled parties (inclusive of countries abroad).
947. The *Policy Rule on Integrity Testing* also contains a number of screening process with regard to financial, supervisory and other records or courses of action, which play a role in some way when forming an opinion. The financial records for example give an indication or risk factor with respect to integrity. These are subdivided into personal and business-related. The personal financial antecedents refer particularly to the person’s financial situation. Financial difficulties can make a person vulnerable, for example, for conflict of interest and misappropriation. The business-related antecedents give a picture of eventual financial difficulties that arise or have arisen at an institution whose policy was (co)determined by the person involved.
948. The persons involved must inform the Central Bank of any antecedents, when filling in the questionnaire. This implies not only the antecedents included in the policy rule, but all antecedents, i.e., all other information with respect to his past that may seem relevant for the integrity testing by the Central Bank.
949. All cases of doubt on integrity are officially presented and dealt with at ‘Integrity Commission’ the highest advisory level within the Central Bank. The members of this Commission are: General Legal Council (chairman); Deputy Director Supervision (vice-chairman); Head Integrity Financial Sector Unit (secretary); Deputy Director BOTFI, International Affairs and Financial Integrity (member); and Head Legal Department (member). Due caution is exercised in this respect, by applying the principle “hear both sides/the other side (of the argument)”. In accordance with the National Ordinance Administrative Law (N.G. 2001, no. 79), objection or appeal against a disqualification for integrity by the Central Bank is possible within six weeks
950. If the (candidate) *member of a Board of Supervisory Directors* or Supervisory Board is a legal entity, then the (candidate) (co-)policymaker, the (candidate) member of the Board of Supervisory Directors or Supervisory Board, and the (candidate) holder of a qualifying interest within the legal entity will be tested.
951. All FIs are subjected to the Central Bank’s fit and proper assessment which concerns both integrity and expertise and includes the following:

**Fit and proper criteria relating to integrity**

952. The integrity of the proposed directors and senior management is evaluated by the Central Bank through the aforementioned fit and integrity testing, as required by the respective supervision law(s) when obtaining a license.

**Fit and proper criteria relating to expertise**

953. Another important aspect of the “fit and proper” test conducted by the Central Bank is the assessment of the competence of (co-)policymakers of (prospective) supervised institutions. The assessment of the competence is being performed (1) at the licensing phase, (2) after the licensing phase when a person is proposed to the Central Bank to be appointed as a (co) policymaker of a supervised institution, and (3) in case the facts and circumstances merit a re-evaluation of the competence of an approved (co-)policymaker, after a person has been approved by the Central Bank to act as a (co-)policymaker of a supervised institution.
954. A person to be subjected to the Central Bank’s competence assessment, is required to submit a curriculum vitae along with his/her Personal Questionnaire, containing information on his/her work experience and educational background. The information contained in the curriculum vitae forms the basis for the competence assessment. The competence assessment comprises of a thorough evaluation of the knowledge, skills and professional experience of the person concerned to act as a (co-)policymaker of the (prospective) supervised institution. The knowledge includes theoretical knowledge acquired through higher education and/or knowledge gathered through relevant trainings and courses. The skills and professional experience includes practical relevant experience gathered over the years, including competence in being active in managerial positions and functions, particularly in the financial sector.
955. Some important aspects that are considered by the Central Bank during the assessment of the competence of a person, is the position (to be) fulfilled, the nature of the activities, size and complexity of the institution concerned, and the collective knowledge, skills and professional experience of the Managing Board/Management Team that exist within the institution concerned. The Central Bank deems it important that on a collective basis, a supervised institution has (co-)policymakers that have sufficient competency to manage the institution, taking the nature of the institution’s activities, size, and complexity into consideration.

**Recommendation 23& 32 –Ongoing supervision and monitoring**

**Application of the Basel principles**

956. Credit institutions are subject to the Core Principles of the Basel Committee. Principle 18 of the Core Principles of the Basel Committee dated October 2006 prescribes the following with regard to the abuse of financial services: “*Supervisors must be satisfied that banks have adequate policies and processes in place, including strict “know-your-customer” rules, that promote high ethical and professional standards in the financial sector and prevent the bank from being used, intentionally or unintentionally, for criminal activities.*”
957. Principle 18 also addresses 12 essential criteria and 1 additional criterion. (Reference documents: *Prevention of criminal use of the banking system for the purpose of money-laundering*, December 1988; *Customer due diligence for banks*, October 2001; *Shell banks and booking offices*, January 2003; *Consolidated KYC risk management*, October 2004; *FATF 40 + IX*, 2003 and *FATF AML/CFT Methodology*, 2004, as updated.)
958. The P&G for CI which are issued by the Central Bank, prescribe the policies and processes that should be in place, including the “know-your-customer” rules, that promote high ethical and professional standards in the financial sector and prevent the bank from being used, intentionally or unintentionally, for criminal activities.”
959. Global consolidated supervision. There are MOUs in place between the Central Bank and other supervisory authorities. Under the MOUs that are in place, the Central Bank’s directors and staff have regular contact with the supervisory authorities. During these contacts, the status and the expertise of the local management of the relevant foreign banking operations

are discussed, which also helps to evaluate the oversight of the bank's management of its foreign operations.

960. The supervisor has the authority to supervise the overseas activities of locally incorporated banks. Pursuant to article 18 of the NOSBCI, the Central Bank supervises all CIs, including the overseas activities of locally incorporated banks. According to article 17, the Central Bank has the authority to request for all information from every corporation or institution in which the supervised institution is participating, or from every corporation or institution that is participating in a CI, which it deems necessary for the exercise of supervision on a consolidated basis. As per article 21, the Central Bank can give binding instructions to CIs in the interest of good conduct of business, and of their solvency or liquidity.
961. Home country supervisors are given on-site access to local offices and subsidiaries for safety and soundness purposes. Article 25 of the NOSBCI provides that the Central Bank has the authority, within the framework of the prudential supervision, to permit foreign supervisory authorities to carry out investigations at credit institutions established in Curaçao that are under the consolidated supervision of the foreign authorities. Furthermore, the article specifies that the Central Bank may stipulate conditions or give directions for the implementation of such supervisory activities. The MOUs also state that branches and subsidiaries established in the country of one of the parties may be inspected on-site by the home supervisor, provided adequate notification procedures and procedures to communicate results of such examinations are established.
962. For significant overseas operations of its banks, the home country supervisor establishes informal or formal arrangements (such as MOUs) with host country supervisors for appropriate information sharing on the financial condition and performance of such operations in the host country. Information sharing arrangements with host country supervisors include being advised of adverse assessments of such qualitative aspects of a bank's operations as the quality of risk management and controls at the offices in the host country.
963. Article 41 of the NOSBCI allows the Central Bank to provide information and data obtained in the performance of its duty to foreign supervisory authorities responsible for the supervision of institutions and corporations operating on the financial markets provided certain conditions are met.
964. Insurance companies should be managed prudently. In line with IAIS Core Principle 9, the Central Bank has issued Corporate Governance provisions and guidelines for the Supervisory Board of the supervised financial institutions, and requires compliance with these corporate governance guidelines. The Central Bank has also issued guidelines as to the number of (co) policy-positions permitted per person.
965. The companies supervised by the Central Bank's Institutional Investors Department are required to report on an annual basis to the Central Bank. For this reporting, the Central Bank has designed statements (ARAS filings) which upon submission have to provide a clear picture of the management carried out by the insurer and of his financial situation. Through this reporting risks are identified which are further dealt with either through desk supervision or onsite examinations. Companies are required to report within six months after the end of each financial year.
966. Based on article 27 paragraph 1 of the NOSII, insurance companies with a registered office within Sint Maarten together with the ARAS filings, have to submit to the Central Bank a copy of the annual report. The annual report should provide an accurate picture of the situation on the date the balance sheet was made up and of the business transactions during the financial year. The annual report should also contain information regarding events of particular significance which have taken place since the end of the financial year, and



furthermore announcements have to be made concerning business prospects. The annual report and the ARAS filings should not be conflicting.

967. Article 27, paragraph 2 of the NOSII requires that insurance companies operating through a branch office in Sint Maarten, together with the ARAS filings submit an annual report concerning the entire business, wherever it may be operated, to the Central Bank as soon as the company should have made the annual report public.
968. Together with the financial documentation, companies are also required to submit the following documentation:
- Information Form
  - Statement of Employment
  - Certified shareholders' Information Form
  - Management letter issued by external auditor
  - Statement of Compliance signed by the Board of Supervisory Directors and certified by the external auditor
969. The P&G for IC & IB issued by the Central Bank are in line with the prescriptions set forth in the "International Association of Insurance Supervisors, Guidance Paper on Anti-Money Laundering and Combating the Financing of Terrorism" dated October, 2004. These provisions and guidelines enable the Central Bank to supervise insurers and intermediaries for AML/CFT purposes to prevent and counter such activities. The Central Bank assesses the adequacy and quality of the AML/CFT measures taken by the companies under supervision to ensure that they are in compliance with relevant AML/CFT laws and regulations.

*Central Bank's Approach to Supervision (Risk Based Approach)*

970. The Central Bank of Curacao and Sint Maarten indicated that an important objective of its supervision of the financial sector is to promote the stability of the financial system and the reputation of Curaçao's and Sint Maarten's financial sector. Considering the significant number and types of institutions supervised by the Central Bank, the Central Bank deems it imperative that its supervisory regime is conducive to the application of the RBA. The application of the RBA allows the Central Bank to allocate and use its resources more effectively among supervised institutions, while at the same time it allows the Central Bank to distinguish those institutions that pose a higher threat to the achievement of supervisory objectives. The monitoring of controls to combat ML and FT also forms an integral part of the supervisory risk-based regime applied by the Central Bank.
971. Even though the nature, scope and complexity of the activities of the institutions supervised by the Central Bank vary from institution to institution, the overarching aim of the risk-based regime applied by the Central Bank is to focus on the institutions that pose a higher risk to the stability of the financial system. The assessment of the risk of a supervised institution, from a regulatory perspective, is not only performed through off-site measures, such as evaluation of the timeliness of filings and the content of financial reports, but also through deficiencies identified during on-site examinations in areas such as management, capital, assets, earnings, and liquidity and the rating or risk classification assigned to each one of these areas. Based on the Central Bank's overall risk assessment conducted in light of the qualitative factors, as mentioned before, the Central Bank will determine the appropriate supervisory strategies and the intensity of the supervision and on-site examinations to be applied to a particular supervised institution.
972. The Central Bank's department which is charged with the supervision of the financial institutions is the *Banking Field Supervision Department*. The RBA is used to determine the priority and frequency to visit the institution and hence a yearly examination plan is set up. The approach used is the *CAMEL* system where the C stands for Capital adequacy, the A

stands for Asset quality, the M for Management and Organization, the E for Earnings and the L for Liquidity. The supervision of the AML/CFT regime is incorporated in the Management and Organization section of the *CAMEL*. The examination can take place in different forms; it can be a full-scope examination, a targeted examination, a quick scan or a special assignment

973. The Examiners are of the view that the RBA, as explained by the Central Bank, is suited for prudential purposes (financial safety and soundness) and is not specifically calibrated for AML/CFT risks. There is no evidence, for example, that the AML/CFT risks influence the on-site inspection cycle.

#### *Prudential Meetings*

974. The following table shows the limited use of prudential meetings with financial institutions in Sint Maarten outside of the on-site examination process. A total of 10 meetings were held during the four year period to 2011, mainly concentrated in insurance companies. Prudential meeting were mostly held with management at the head-office in Curacao of the branches that are located in Sint Maarten. These meetings serve as an important tool for the central Bank to be informed on a wide range of issues including operating performance, off-site surveillance or on-site inspection issues, corporate strategies, AML/CFT compliance, risk management, and other ongoing prudential matters. Although the Central Bank has pointed to an additional 31 meetings with management of credit institutions at head offices in Curacao between 2008 and 2011, not having supervisory staff in Sint Maarten makes prudential meetings with the relevant persons operating in Sint Maarten an expensive proposition.

#### Central Bank's Prudential Meetings 2008-2011

#### *Off-site Monitoring*

975. The Central Bank relies on a number of periodic returns that enable it to conduct off-site monitoring of FIs. These include:
- their Shareholders' Information Form as of December 31, which should be reviewed by their external auditor and sent separately to the Bank to the attention of the Director of Supervision;
  - their Statement of Compliance as of December 31, which should be prepared along the lines of our *Summary of Best Practice Guidelines* as of November 2006 and also be reviewed by their external auditor. Branches of foreign banks are exempted from this requirement;
  - their audited Chart of Account and Supporting Schedules as of December 31, ~~2011~~ along with the external auditor's report;
  - their audited Financial Statements and, if applicable, of their parent company as of calendar year-end along with the external auditor's report;

Institution Type	2008	2009	2010	2011	Total
<b>Credit Institutions</b>	0	0	0	0	0
<b>Insurance</b>	0	0	0	10	10
<b>Money Transfer companies</b>	0	0	0	0	0
<b>Total</b>	0	0	0	10	10

- the management letter resulting from the audit of the Financial Statements as of calendar year-end 2011; and
- The 'information form supervised financial institution' completed as of March 31

976. Local CIs are also required to provide the Bank with their Management Report with cut off date June 30, and no later than August 15 of each year. This report should be prepared along the lines of Policy Memorandum on the periodic filing of a management report as of November 2006 and signed by all managing directors.

#### *Onsite Inspection*

##### Integrity supervision General

977. The Central Bank has established a special and separate department to assist other supervision departments with additional expertise in the area of integrity risk prevention. The Integrity Financial Sector Unit executes its advisory, instructive and coordinating function within the Central Bank on the basis of i.a. the following instruments:
- the Register Integrity Financial Sector (with Regulation Code), including reported incidents pursuant to the *Central Bank Policy Rule For Sound Business Operations In The Event Of Incidents And Integrity-Sensitive Positions*;
  - the Covenant on Information Exchange as concluded with the Public Prosecutor's Office;
  - MOUs with foreign supervisory authorities; and
  - the Policy Rule on Integrity Testing.
978. The Central Bank's AML/CFT supervision is part of its regular (integrity) supervision. This is an ongoing process whereby the supervisor regularly request information and visit the (financial) institutions. Whenever insufficient compliance with the laws is detected, the supervisor will use moral suasion, disciplinary meetings and issue an order/directive/instruction to take measures and require them to make regular reports on the measures taken. As measures are normally taken the need to impose further sanctions is then in most cases, not necessary.

Table Central Banks Onsite Inspection Programme for Sint Maarten

<b>Institution Type</b>	<b>Type of Onsite Examination</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>Total</b>
Banks	Without AML	0	1	1	4	6
	With AML	1	3	0	1	5
Money Transfer Companies	Without AML	0	0	0	0	0
	With AML	0	0	1	0	1
Life Insurance	Without AML	0	0	1	0	1
	With AML	0	0	3	0	3
<b>Total</b>	<b>Without AML</b>	<b>0</b>	<b>1</b>	<b>2</b>	<b>4</b>	<b>7</b>
	<b>With AML</b>	<b>1</b>	<b>3</b>	<b>4</b>	<b>1</b>	<b>9</b>

979. During the four-year period 2008-2011, the Central Bank conducted 7 on-site inspections in Sint Maarten that did not include AML/CFT examinations and 9 onsite inspections that included AML/CFT examinations. There were no examinations insurance brokers or the sole specialised credit institution; and there was only one onsite inspection of MTCs during the period. One onsite inspection of the sole life insurance company, that is not a branch of a Curacao insurer, was conducted in Sint Maarten during the period. The Central Bank indicated that branches of Curacao life insurers were assessed while conducting consolidated examinations of those insurers in Curacao. Neither were there examinations for the sole credit

union (which closed operations in Sint Maarten in 2010<sup>14</sup>), or the sole savings bank, which opened operations in July 2011. The authorities are of the view that, as similarly stated in the MER of the Netherlands, insurance brokers do not handle clients' money and the risk of money laundering or terrorist financing through these businesses is low. It must be noted however, that one onsite inspection of licensed MTCs (2) over a four-year period is deemed low, given the inherent risks.

### **Credit Institutions**

Total number of files examined 2008-2011

	2008	2009	2010	2011	Total
Incomplete	1	3	0	0	4
Complete	25	29	0	33	87
Partially Complete	14	18	0	0	32
Total Files Examined	40	50	0	33	123

980. The Table above shows, based on the onsite inspections of Credit institutions conducted by the Central Bank between 2008 and 2011, a total of 123 files examined. A complete file contains one of the following documents for individual clients (resident and non-resident):

- a driver's license;
- an identity card;
- a travel document or passport; or
- other documents designated by the Minister of Finance.

How many examinations resulted in incomplete manuals, insufficient training and Compliance Officers not appointed

	2008	2009	2010	2011	Total
Incomplete manual	0	1	0	0	1
Insufficient training for employees	0	1	0	0	1
Compliance Officer not appointed	0	0	1	0	1
<b>Total</b>	<b>0</b>	<b>2</b>	<b>1</b>	<b>0</b>	<b>3</b>

981. Table above shows that over the period 2008-2012, there was instance each where onsite examinations of credit institutions revealed an incomplete manual, insufficient training for employees, and compliance officer not appointed

How many examinations resulted in unusual transactions not reported to the MOT,  
not timely reported to the MOT.

	2008	2009	2010	2011	Total
Unusual transactions reported to MOT	1	2	0	0	3
Untimely reporting to the MOT	0	1	0	1	2
<b>Total</b>	<b>1</b>	<b>3</b>	<b>0</b>	<b>1</b>	<b>5</b>

<sup>14</sup> As a silent trustee was appointed by the Central Bank, all or particular organs of the supervised (financial) institution could only exercise their powers after approval by one or more persons appointed by the Central Bank and with due observance of the instructions of said persons. Thus the Central Bank was continuously informed of the status of the institution by the person appointed. Conducting an onsite examination under mentioned circumstances does not make any sense.

982. During the same three-year period, there were three instances where the inspection revealed that unusual transactions were not reported to the FIU (MOT), and two instances where the report to the FIU (MOT) was not timely.

### **Insurance companies**

983. The Central Bank is entrusted with the prudential supervision of all insurance companies and with AML/CFT supervision on life insurance companies and insurance brokerage firms. In its ongoing supervision the Central Bank uses the STAMECER analysis as an instrument to assess the soundness of the insurance companies. Aforementioned acronym stands for Solvency, Technical Provisions, Assets, Management, Compliance, Earnings and Reporting. The outcome of the STAMECER analysis will be the input for planning, priority setting and resource allocation which directs the supervision operations. Other market information such as the latest financial crisis may also direct the supervision. If a life insurance company is scheduled for an examination, the examiners in principle address the issue of money laundering. In this respect overall policy matters of the institution are discussed and assessed. Although limited or no AML/CFT examinations may be conducted in a year (e.g. the year of the financial crisis, only pension funds were listed as priority), the Central Bank may plan visits to all life insurance companies for an AML/CFT visitation at any moment. This was done in 2003 and 2010. In the future the Central Bank will maintain the interval of 3 to 5 years to visit all life insurance companies in relation to the anti money laundering activities.
984. There is only 1 life insurance company and two life insurance branches on Sint Maarten. The Central Bank conducted consolidated examination and as such the file review of the branches was part of the examinations conducted at the head office in Curaçao.
985. Since there was only one examination conducted in Sint Maarten the Central Bank did not consider it prudent to list the weaknesses in a separate table. The weaknesses encountered in Sint Maarten falls under the below mentioned list which contains the total weaknesses encountered both in Curaçao and Sint Maarten.
986. List of weakness encountered both in Sint Maarten and Curaçao:
- Incomplete manual (indicators as set forth in the P&G for IC & IB appendix 3 were not included);
  - Insufficient training for employees;
  - Incomplete files (copy of ID was missing or the copy was eligible);
  - Lack of written job description;
  - No internal control procedures in place to detect attempts to launder money.

### **Money transfer companies**

987. Supervision of these companies occurs based on this law (article 78 of the RFETCSM. In addition, the Central Bank conducts AML/CFT supervision on these companies based on article 11, paragraph 1 sub a of the NOIS as well as article 22h paragraph 1, sub a of the NORUT.
988. The Central Bank's Banking Supervision Department performs on-site examinations on these types of institutions. A risk based approach is adopted as to the frequency and timing of the examinations. During the on-site examinations a thorough review of the area of AML/CFT takes place in which the following is assessed:
- The presence and functioning of a compliance officer;
  - Client identification before rendering of financial services;
  - Timely reporting to the reporting center;
  - The presence and quality of the AML/CFT manual;

- The frequency and quality of the AML/CFT training sessions to staff;
- Internal control measures, e.g. segregation of duties.

### **Measures**

989. The on-site examinations conducted by the Central Bank at mentioned institutions are full scope or targeted (which entails AML/CFT compliance). The Central Bank gives instructions in the examination reports to the supervised institutions to take corrective measures within a stipulated timeframe. The timeframe to remedy the violation/issue is dependent among other things upon the gravity and frequency of occurrence of the violation issue. For the most serious violations/issues, the supervised institution is requested to file on a periodic basis a progress report with the Central Bank until the violation /issue is corrected or resolved. The Central Bank also conducts follow-up examinations to determine the status of progress made relative to the correction/resolution of the violation/issue. Meetings with the management of the supervised institution are at times in that respect also held at the Central Bank or at the supervised institution.
990. Failure to adhere to the instructions of the Central Bank or to take corrective measures in a timely manner may result in further actions, such as imposing of fines or withdrawal of the license.

### **Effective implementation (recommendation 23, 17&29)**

991. The Authorities have indicated that in the period of 2008-2012, twelve order/directives were issue to CI and MTC. The Central Bank indicated that, in most instances, financial institutions comply with its instructions before sanctions are applied. The Bank also indicted that, in a few instances, penalties were imposed but that there was no publication of same. A company (trust) service provider's licence was revoked by the Central Bank in 2010.
992. With respect to unlicensed MTCs operating within Sint Maarten, the Central Bank indicated that this matter was referred to the PPO in 2001, 2006 and 2010. The fact that these MTCs continue to operate without licenses calls into question the effectiveness and dissuasiveness of sanction, or at least the authorities' willingness to apply them

### **Recommendation 25 –Guidelines (Guidance for financial institutions other than on STRs)**

993. The P&Gs issued by the Central Bank provide the financial institutions and DNFBPs under its supervision with assistance to implement and comply with the AML/CFT requirements. P&G for providers of factoring services is not in place. P&Gs issued by the Central Bank are fairly comprehensive. However, very little guidance is provided with respect to TF.
994. In addition, the Central Bank provides guidance in the form of seminars and consultations available to the financial institutions and DNFBPs under its supervision. The last sessions for the respective sectors under the Central Bank's supervision were held in June 2010. During these sessions information was i.a. given on the latest changes to the P&Gs. The audience was given the opportunity to exchange ideas with the Central Bank's personnel on how, practically, to meet particular AML/CFT obligations.
995. Furthermore, the Central Bank publishes, among other things, warning notices on its website which include publications from the FATF and/or MONEYVAL. In addition, the Central Bank sends letters to the representative organizations to inform them about the matters covered in the publications as well as other relevant matters that require immediate attention.
996. The representative organizations are:

- Sint Maarten Bankers Association;
- Nederlands Antilliaanse Vereniging van Verzekeraars (representative organisation for insurance companies);
- St. Maarten Insurance Brokers Association (SIBA) (St. Maarten representative organisation for insurance brokers).

### 3.10.2 Recommendations and Comments

#### Recommendations 17

997. Include explicit provisions in the NOIS and NORUT to indicate that sanctions apply to directors and senior management of financial institutions.
998. Take immediate action against directors and senior management of unauthorised MTCs.
999. The Central Bank should have a wide range of sanctions and should be prepared to use them.

#### Recommendation 23

1000. Take immediate action to close unlicensed MTCs.
1001. Increase on-site inspections of MTCs.
1002. Implement a regulatory and supervisory regime for factoring services.
1003. Develop a risk based approach system to determine the AML/CFT focus of onsite inspections.
1004. Commit resources to having supervisory staff in Sint Maarten for greater onsite monitoring of licensees.

#### Recommendation 25

1005. Provide guidance to financial institutions with respect to terrorism financing.
1006. Issue guidance to providers of factoring services.

#### Recommendation 29

1007. Include explicit provisions in the NOIS and NORUT to indicate that sanctions could be apply to directors and senior management of financial institutions
1008. Ensure that there are no unauthorised MTCs.

### 3.10.3 Compliance with Recommendations 23, 29, 17 & 25

	Rating	Summary of factors relevant to s.3.10 underlying overall rating
<b>R.17</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Outside of the Civil and Penal Codes, there are no indications that sanctions could apply to directors and senior management of financial institutions.</li> <li>• Sanctions not effective against MTCs that continue to operate without licenses</li> <li>• Sanctions appear to be used sparingly</li> </ul>
<b>R.23</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Unlicensed MTCs continue to operate within Sint Maarten, impacting on effectiveness with respect to E.C. 23.1, E.C 23.5 and E.C. 23.6</li> </ul>

		<ul style="list-style-type: none"> <li>• <b>Low number of on-site inspections for MTCs</b></li> <li>• <b>Factoring services are yet to be subject to Central Bank supervision under the NOIS and NORUT.</b></li> <li>• <b>The RBA is not calibrated for AML/CFT risks.</b></li> </ul>
<b>R.25</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• <b>Not much guidance is given to financial institutions on TF techniques and methods.</b></li> <li>• <b>P&amp;G for providers of factoring services is not in place.</b></li> </ul>
<b>R.29</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• <b>There are no explicit provisions in the NOIS or the NORUT for sanctions against directors or senior management of financial institutions.</b></li> <li>• <b>Sanctions have not dissuaded money remitters from operating without a licence.</b></li> </ul>

### 3.11 Money or value transfer services (SR.VI)

#### 3.11.1 Description and Analysis (summary)

##### **Special Recommendation VI**

1009. The Central Bank, through Article 17 of the RFETCSM, has been assigned responsibility to license natural and legal persons that perform money or value transfer services, to maintain a current list of the names and addresses of licensed and/or registered MTC, and be responsible for ensuring compliance with licensing and/or registration requirements. Article 17, paragraph 1a of the NOIS and article 22h, paragraph 1a of the NORUT also give the Bank supervisory powers over MTCs. The Central Bank has issued P&Gs for the MTC

1010. The MTC are subject to the applicable FATF Recommendations. The deficiencies identified for FIs in Recommendations 4-1, 13-15 and 21-23 also apply to MTCs.

1011. The Central Bank is entrusted with the supervision of the MTC's compliance with the NOIS (article 11, paragraph 1, under a), the NORUT (article 22h, paragraph 1, under a) and the RFETCSM (article 21). Onsite inspections to verify the compliance with the NOIS and NORUT are done based on these articles moreover article 78 of the RFETCSM.

1012. During the on-site examinations the Central Bank verifies whether the MTC comply with the FATF recommendations as set forth in the P&G for MTC. Interviews held with the compliance officers of these institutions constitute an important part of the field work. In addition the following is assessed:

- A review of the AML/CFT manual of the institution;
- The (technological) methodologies used to detect unusual transactions;
- The timeliness of reporting of the unusual transactions through a sample review;
- The security related to working space of the compliance officer;
- Whether legal persons are making use of the services of the MTC.

1013. There are no explicit requirements for MTCs to maintain a current list of agents which must be available to the Central Bank. However, the Central Bank has requested that all companies authorized by the Central Bank to conduct money or value transfer activities are update the Central Bank on the number of (sub-) representative(s) of their companies and the location from which each (sub-) representative conducts money or value transfer business.

1014. Furthermore, the current companies authorized by the Central Bank to conduct money or value transfer activities are not allowed to increase their number of outlets offering money or value transfer services without prior consent of the Central Bank.



1015. There are no specific provisions for sanctions to be available in relation to directors and senior managers of MTCs.

1016. The range of sanctions appears to be broad and proportionate to the severity of the situation. However, the effectiveness of sanctions is called into question given the fact that unlicensed MTCs remain in operation after the Central Bank referred the matter to the PPO. Sint Maarten needs to urgently review the regulatory regime for MTCs to ensure that there are no unlicensed MTCs operating within the jurisdiction

### 3.11.2 Recommendations and Comments

1017. Shut the operations of unauthorised MTCs operation in Sint Maarten.

1018. Provisions for MTCs to update the Central Bank on the number of agents and sub-agents should be formalised.

### 3.11.3 Compliance with Special Recommendation VI

	Rating	Summary of factors underlying rating
SR.VI	NC	<ul style="list-style-type: none"> <li>• There continue to be MTCs operating within Sint Maarten without licenses from the Central Bank.</li> <li>• Provisions for MTCs to update the Central Bank on the number of agents and sub-agents should be formalised.</li> </ul>

## 4. PREVENTIVE MEASURES – DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS (DNFBPs)

### General

1019. The in Sint Maarten are: administrators of investment institutions, company trust service providers (TSP), lawyers, notaries, accountants, real estate brokers, dealers in precious metals and precious stones, tax advisers, administration offices, car dealers and Casinos, some of which are stand alone and others associated with hotels.

1020. The NOIS and the NORUT apply also to DNFBPs. In addition, administrators of investment institutions are governed by the National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2003, no.114) (NOSIIA) and TSP are governed by the National Ordinance on the Supervision of Company (Trust) Service Providers (NOSTSP).

1021. Article 1, first paragraph, sub b under 11° through 15° of the NOIS and article 1, first paragraph, sub a under 11° through 15° of the NORUT stipulate the services of the DNFBPs brought under the AML/CFT obligations of both ordinances. These services are as follows:

- i. Offering prices and premiums, which can be competed for against payment of a value that is more than an amount to be determined by the Minister, in the framework of:
  - a) the operation of games of hazard, casinos and lotteries
  - b) the operation of offshore games of hazard
- ii. Acting as an intermediary with respect to purchasing and selling real estate and associated rights ;
- iii. Dealing in vehicles, precious stones, precious metals, ornaments, jewels or other matters of great value so designated by Government decree
- iv. Granting fiduciary services including the provision of management services in or from the Netherlands Antilles for international companies including ;
  1. making natural or legal persons available as a manager, representative, administrator or other official for international companies;
  2. providing domicile and office facilities for international companies;

- 3. establishing or liquidating international companies by order of, and at the expense of third parties.
- v. A natural or legal person or company performing activities in the capacity of a lawyer, notary, accountant, tax adviser or a similar legal profession or trade, giving advice or assistance for :
  - a. Purchasing or selling of real estate
  - b. Managing funds, securities, coins, Government notes, precious metals, precious stones or other values
  - c. Establishing and managing corporations, legal persons or similar bodies
  - d. Buying or selling or taking over enterprises.

1022. Based on above there are no AML/CFT requirements for internet casinos.

1023. According to the NOIS, Article 11, paragraph 1, sub a, the Central Bank is the AML/CFT supervisor for administrators and company (trust) service providers. As such, the Central Bank has issued P&G for SAI&AII and P&G for TSPs.

1024. The FIU (MOT) in Sint Maarten is entrusted with the AML/CFT supervision of lawyers, notaries, accountants, real estate agents, jewellers, car dealers, tax advisors and administrative offices. The FIU (MOT) oversight functions have recently commenced, to date no P&Gs have been issued as yet.

1025. At present, there is no comprehensive regulatory and supervisory AML/CFT oversight regime in Sint Maarten for casinos.

#### **Enforceability of P&Gs:**

1026. According to paragraph 3 of the mentioned Article, the Central Bank is authorized to issue P&Gs in order to advance compliance with the NOIS. As mentioned above, it has issued P&G for SAI & AII and TSPs. It should be noted that the sector-specific P&G issued by the Central Bank under the authority of the NOIS, the NORUT and the respective supervisory ordinance are considered OEM. Conditions as noted in section 3.1 of this report with regard to sector specific P&Gs in the financial sector issued by the Central Bank are similar to those of the P&G issued for administrators and company (trust) service providers. Therefore, the P&Gs for SAI & AII and TSPs are considered OEM.

#### **4.1 Customer due diligence and record-keeping (R.12)** (Applying R.5, 6, and 8 to 11)

##### **4.1.1 Description and Analysis**

#### **Recommendation 5**

1027. According to the NOIS, casinos are subject to customer identification requirements when they engage in financial transactions equal to or above Naf 20.000 (about USD11.173). This threshold does not comply with the threshold set by FATF of USD3.000 for casinos.

1028. As noted, DNFBPs supervised by the Central Bank, DNFBPs supervised by the FIU (MOT) and casinos are required to comply with the AML/CFT obligations of the NOIS, which covers requirements of Recommendation 5. These requirements in relation to the provisions of NOIS have been analyzed in Section 3.2 of this Report and the deficiencies identified are also applicable to DNFBPs supervised by the Central Bank DNFBPs under the supervision of the FIU(MOT) and casinos.

1029. The following requirements, that should be in law or regulation, for all DNFBPs are outstanding as they are not contemplated in the NOIS:

- The requirement for CDD to be undertaken when carrying out occasional transactions that are wire transfers, as per the Interpretive Note to SR VII.
- The obligation to undertake CDD when there is a suspicion of ML or TF.
- The requirement to conduct CDD when it has doubts about the veracity or adequacy of previously obtained customer identification data.
- The requirement to conduct continuous due diligence on the business relationship.

1030. It is important to note that the majority of DNFBPs interviewed during the onsite did not seem to be aware that they are also subject to AML/CFT obligations under the NOIS. For example, some DNFBPs do not consider as part of their obligations the basic requirement of customer identification. In practice DNFBPs typically transfer CDD and KYC obligations to the banks by requesting that large payments for goods and services be effected by cheque payments and credit cards. The Authorities have also acknowledged that outside of the services supervised by the Central Bank knowledge of the ML and FT laws, obligations and related processes is quite limited.

1031. The following requirements for DNFBPs supervised by the FIU and casinos are outstanding as they are not contemplated in the NOIS and there are not P&Gs for these DNFBPs:

- To establish the purpose and intended nature of the business relationship.
- Ongoing due diligence must include the scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, its business and risk profile, and where necessary, the source of funds.
- To ensure that documents, data or information collected under the due diligence process is kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher risk categories of investors.
- To apply enhanced due diligence for higher risk clients and reduced or simplified measures for low risk customers
- The requirement for the termination of a business relationship already in existence or determining the submission of a report to the FIU (MOT) when the service provider has reasonable doubt regarding the accuracy of the data previously obtained and is unable to perform CDD measures.
- Application of CDD measures to existing customers on the basis of materiality and risk and to conduct due diligence on such existing relationships at appropriate times.

1032. As indicated, the Central Bank has issued P&Gs for SAI & AII and TSP. The following paragraphs will focus on analyzing the compliance of the said P&Gs with the criteria that is not required to be in law or regulation.

1033. The P&G for SAI & AII and TSP establish that the administrator/TSP must verify the existence and nature of the investment institution's business or international company's business through reliable identification documents, with preference for originals and official documents. The existence and nature of a (prospective) investment institution must be legally identified with the aid of a certified extract from the register of the Chamber of Commerce and Industry, or an equivalent institution, in the country of domiciliation, or with the aid of an identification document to be drawn up by the administrator. The extract or the identification document must contain at least the information stipulated by the Minister of Finance.

1034. Documents regarding the administered investment institution containing at least the following information must be kept on file:

- official name according to its articles of association or similar document;
- trade name, if different;

- registered address in full;
- country of incorporation and/or country of seat;
- registration number in the country of incorporation or establishment;
- name of the persons who exercise ultimate effective control in the investment institution or the international company; and
- control structure of the investment institution or the international company.

1035. The administrator may require additional information to be provided by the investment institutions, such as:

- shareholders' register;
- prospectus or offering memorandum;
- a list to include full names of all directors (including supervisory directors, if applicable) to be signed by a minimum number of those directors sufficient to form a quorum;
- a list to include names and signatures of other officials authorized to sign on behalf of the investment institution, together with a designation of the capacity in which they sign;
- audited financial statements/cash flow statements; and
- business plan.

1036. The identification of an individual and the verification of his identity may be also done by a professional or institution subject to adequate AML/CFT supervision. This implies that a financial institution subject to adequate supervision may identify the individual and verify that a copy of passport was taken from the original passport.

1037. According to the P&G for SAI & AII (page 13), the administrator must obtain the name of the persons who exercise ultimate effective control in the administered investment institution, the control structure of the investment institution, and the shareholders' register of the administered investment institution.

1038. In addition, for the investors of the administered investment institutions that are legal persons the P&G for SAI & AII provides for the request of information relative to the ownership and control structure as well as the identification of the individuals who directly or indirectly hold 25% or more of the issued share capital of the company, except for investors being corporate entities listed on securities exchanges. For institutional investors, such as pension funds, collective investment schemes or unit trust, endowment fund or charity, documentary evidence must at all times be collected and kept on file regarding such institutional investors, including documentary evidence on the identity of its representatives.

1039. According to the P&G for TSP (page 13), the company (trust) service provider must obtain the organizational chart of the structure of which the international company is part of; name of the persons who exercise ultimate effective control in the international company; and control structure of the international company.

1040. According to the P&G for SAI & AII and TSP administrators and TSP are required to obtain information on the purpose and intended nature of the business relationship with their (prospective) clients prior to offering those services. Furthermore, administrators (page 12) and TSP (page 12) are required to obtain information on the purpose and intended nature of the business relationship with the (prospective) investors of the administered investment institutions or the international company's business.

1041. The P&G for SAI & AII (page 13) and TSP (page 13) establish that the continuous due diligence process must include scrutiny of transactions undertaken throughout the course of the relationship to ensure that the transactions being conducted are consistent with the administrator's/company service provider's knowledge of the client, its source of funds, and its (business and) risk profile, and where necessary, the source of funds.

1042. The P&Gs for SAI & AII (pages 13 & 18) and TSP (page 14) indicate that administrators and TSP are required to ensure that documents, data or information collected under the CCD process is kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher risk categories of clients or business relationships.
1043. The P&G for SAI & AII (page 22 & 23) TSP (page 18) provide that enhanced due diligence must be conducted on high risk clients.
1044. The P&G for SAI & AII (pages 23 & 24) and TSP (page 19) provide that administrators and TSP are allowed to apply simplified or reduced CDD ML/TF risks are lower.
1045. Examples of customers where the risk may be lower include:
- a) Financial institutions that are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations and are supervised for compliance with those requirements;
  - b) Public companies that are subject to regulatory disclosure requirements. This refers to companies that are listed on a securities exchange or in comparable situations; or
  - c) Government administrations or enterprises.
1046. Additionally, for the following categories of investors administrators and self-administrated investment institutions can apply simplified/reduced customer due diligence. These categories of investors are:
- Investor is a financial institution*
1047. The Minister of Finance grants exemption from the obligation to identify an investor that is a financial institution as referred to in article 2 paragraph 4 sub a and b of the NOIS jo article 7 of the Ministerial Decree (N.G. 2010, no. 11), provided that the investor is a(n):
- 1) credit institution or insurance company registered in Sint Maarten under respectively the NOSBCI and the NOSII;
  - 2) institution affiliated to a stock exchange that is a member of the World Federation of Exchanges and that is not established in a state that does not comply with at least 10 of the key and core recommendations of the FATF;
1048. Administrators must document in their records the reason why no further identification documents were requested from the relevant investor.
- Investor is an institutional investor*
1049. Where the investor is an institutional investor e.g. a pension fund, local authority, collective investment scheme or unit trust, endowment fund or charity, the administrator as the case may be will refer to appropriate sources to check identity depending on the circumstances. Where the investor is a pension fund of a listed company (or its subsidiary), or of a Government agency or local authority, no further steps to verify identity, over and above existing business practice, will normally be required. Administrators must at all times ensure that documentary evidence is collected and kept on file regarding such institutional investors including documentary evidence of the identity of its representatives.
1050. The P&G for SAI & AII (page 24) and the P&G for TSP (page 19) stipulate that simplified CDD measures are not acceptable whenever there is suspicion of money laundering or terrorist financing or specific higher risk scenarios apply.
1051. The application of the RBA when conducting CDD is allowed as set forth in the P&Gs issued by the Central Bank SAI & AII and for TSP.

1052. The P&G for SAI & AII (pages 21 & 22) and TSP (16 & 17) stipulate that the administrator and TSP must develop risk profiles for all of its clients, to determine which categories of clients expose them to higher ML and TF risk. The assessment of the risk exposure and the preparation of the risk classification of a client, must take place after the CDD information mentioned above has been received. The risk profile must comprise of minimally the following possible categories: low, medium and high risk. Administrators and TSP must apply CDD requirements to existing clients and may determine the extent of such measures on a risk sensitive basis depending on the type of client, business relationship, or transaction.
1053. Administrators and TSP must at least consider the following risk categories while developing and updating the risk profile of a client: (i) client risk, (ii) products/services risk, (iii) country or geographic risk, and (iv) delivery channels risk.
1054. The weight assigned to these risk categories (individually or in combination) in assessing the overall risk exposure may vary from one administrator/TSP to another. The administrator/TSP must make its own determination as to the assignment of the risk weights.
1055. The result of the risk assessment of a particular client, as evidenced by the risk profile, will determine if additional information needs to be requested, if they obtained information needs to be verified, and the extent to which the resulting relationship will be monitored.
1056. Article 2, paragraph 1 of the NOIS stipulates that service providers are obligated to identify a client and the ultimate beneficiary, if any, prior to rendering a service. Article 3, paragraph 4 of the NOIS stipulates that in the event of an ultimate beneficiary, the identity of this person shall be established as stipulated in the paragraph 1-3 of that same article.
1057. When establishing the identity of a natural person residing abroad, article 3, paragraph 1, second sentence under b of the NOIS allows the service provider to accept that the identification documents are sent electronically, with the condition that within 2 weeks after the electronic receipt a certified extract of the document is received by the service provider.
1058. Article 8 of the NOIS stipulates that the service provider is prohibited from rendering a service if the identity of the customer has not been established in the manner prescribed in the NOIS.
1059. The P&G for SAI & AII provide on page 14 that administrators must develop client acceptance policies and procedures, ensuring that the administrator will not provide administrative services to clients who fail to provide satisfactory evidence of their identity.
1060. Where the administrators decline to establish a business relationship with a potential client or refuses to render additional administrative services to an existing client because of serious doubts about the client's or representative's "bona fides" and potential criminal background it is important to provide an audit trail for suspicious funds and report all the unusual (intended) transactions to the FIU.
1061. The P&G for TSP provide on page 21 that if the company (trust) service provider declines to establish a business relationship with a potential client or refuses to render additional administrative services to an existing client because of serious doubts about the client's or representative's "bona fides" and potential criminal background it is important to provide an audit trail for suspicious funds and report all the unusual (intended) transactions to the FIU.
1062. The P&G for SAI & AII (page 25) and TSP (page 21) indicate that there may be circumstances where an administrator or TSP (declines to establish a business relationship with a potential client or) refuses to render additional administrative services to an existing client because of serious doubts about the client's or its representative's "bona fides" and

potential criminal background it is important to provide an audit trail for suspicious funds and report all the unusual (intended) transactions to the FIU (MOT).

1063. The P&G for SAI & AII (page 13) and TSP (page 13) provide that where an administrator or TSP has doubts relating to the identity of the client after the client has been accepted, the relations with the client must be re-examined to determine whether it must be terminated and whether the incident must be reported to the FIU (MOT).

1064. Furthermore, the P&G state on page 11 that administrators must not accept or maintain a business relationship if the administrator knows or must assume that the funds of the client were derived from corruption or misuse of public assets, without prejudice to any obligation the institution has under criminal law or other laws or regulations.

1065. The P&G for SAI & AII (page 18) provide that administrators must apply CDD requirements to existing clients and may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction.

1066. The P&G for TSP (page 13) provide on page 13 that TSP are required to apply CDD measures to existing customers and may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. Examples of when it may otherwise be an appropriate time to do so is when:

- a) a transaction of significance takes place;
- b) there is a material change in the way that the account is operated;
- c) customer documentation standards change substantially; and
- d) the company service provider becomes aware that it lacks sufficient information about an existing customer.

1067. It is prudent that in these instances updated copies of the identification document be retained.

Recommendations 6, 8, 9 and 11 applied to DNFBP supervised by the FIU (MOT) and Casinos

1068. Sint Maarten has not established requirements regarding the criteria for Recommendations 6, 8, 9 and 11 for DNFBPs supervised by the FIU (MOT) and casinos.

Recommendations 6, 8, 9 and 11 applied to DNFBP supervised by the Central Bank

**Recommendation 6**

1069. There are no requirements within the P&Gs for SAI and AII and TSP to put in place appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP.

1070. The P&G for SAI & AII (page 18) and TSP (page 14) stipulate that senior approval management is required to establish a business relationship with politically PEPs families and associates of PEPs.

1071. The P&Gs provide that administrators and TSP must undertake regular reviews of at least the more important customers to detect if an existing customer subsequently becomes a PEP. The approval of the senior management is required to continue the relationship with a customer that has become a PEP.

1072. Administrators and TSP must make reasonable efforts to ascertain that the PEPs source of wealth or income is not from illegal activities (P&Gs for SAI & AII (page 18) and TSP (page 14)).

1073. The P&G for SAI & AII (page 18) and TSP (page 14) indicate that administrators and TSP are required to conduct more extensive due diligence for high risk clients, PEPs, families and associates of PEPs.

1074. SAI & AII and TSP are encouraged to conduct enhanced ongoing monitoring on PEPs who hold prominent public functions domestically (page 18 of the P&G SAI and SAI and page 14 of the P&G for TSP).

## **Recommendation 8**

1075. The P&G for SAI & AII (page 11) and TSP (page 21) requires to have policies in place or take such measures as may be needed to prevent the misuse of technological developments in money laundering or terrorist financing schemes

1076. The P&G for SAI & AII and TSP require that administrators and TSP must have policies and procedures in place to address any specific risks associated with non-face to face business relationships or transactions. These policies and procedures must apply when establishing customer relationships and when conducting ongoing due diligence

1077. Measure for managing the risks must include specific and effective customer due diligence procedures that apply to non face-to face customers (P&G for SAI & AII and TSP).

1078. The P&Gs provide for measures such as: the certification of documents presented; the requisition of additional documents to complement those which are required for face-to-face customers; develop independent contact with the customer; rely on third party introduction and require the first payment to be carried out through an account in the customer's name with another bank subject to similar customer due diligence standards.

## **Recommendation 9**

1079. According to the P&G for SAI & AII (page 19) and TSP (page 15) the following step must be taken when relying on intermediaries or other third parties to perform aforementioned elements of the CDD process: immediately obtain from the third party the necessary information concerning the elements of the CDD process.

- identification and verification of the customer's identity;
- identification and verification of the beneficial owner; and
- obtaining information on the purpose and intended nature of the business relationship.

1080. In accordance with the P&G for SAI & AII (page 19) and TSP (page 15). Administrators and TSP must satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay, however, no longer than within two (2) working days.

1081. The P&G for SAI & AII (page 19) and TSP (page 15) provide that the following step must be taken by a administrator and TSP when relying on intermediaries or other third parties to perform aforementioned elements of the CDD process: satisfy themselves that the third party is AML/CFT regulated and supervised, and has measures in place to comply with the required CDD requirements.

1082. According to the P&Gs, a jurisdiction is "adequately supervised" when its Mutual Evaluation Report discloses less than 10 'non compliant or partially compliant' ratings regarding the 16 'key and core' FATF Recommendations. However, this criterion is not line with FATF Standards which requires that third party is regulated and supervised in accordance with Recommendations 23, 24 and 29.



1083. The P&G for SAI & AII (page 19) and TSP (page 15) provide that in case of reliance on foreign third parties, administrators and TSP should satisfy themselves that the third party AML/CFT adequately regulated and supervised by referring to Mutual Evaluation Reports produced by the FATF, IMF or FSRB.
1084. The P&G for SAI & AII (page 20) and TSP (page 16) state that it should be noted that even though the administrators and TSP can rely on intermediaries or other third parties for part of the CDD process or the process may be outsourced, the ultimate responsibility for customer identification and verification remains with the SAI & AII and TSP.
1085. Furthermore, administrators and TSP are encouraged to perform antecedent screening on persons subject to CDD. This could be done by e.g. searching the internationally accepted authoritative lists on the internet.

#### **Recommendation 11**

1086. P&Gs for SAI & AII (page 24) and for TSP (page 20) establish the requirement to pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.
1087. The P&Gs for TSP and SAI & AII, provide that supervised institutions are required to examine as far as possible the background and purpose of all complex, unusual large transactions and unusual patterns of transactions and to set forth their findings in writing.
1088. Article 7 of the NOIS states that all service providers shall be under the obligation to keep the data referred to in article 6 in an accessible manner until five years from the termination of the agreement under which the service was rendered, or until five years from the performance of a service as referred to in article 1, paragraph 1, sub b, under 2°-7° and 9°- 16°.

#### **Recommendation 10**

1089. As indicated earlier, the requirements of the NOIS are also applicable to, DNFBPs supervised by the central Bank, DNFBPs supervised by the FIU (MOT) and casinos. The analysis with regard to the level of compliance of NOIS with the requirements of Recommendation 10 it is reflected in section 3.5. The deficiencies identified in that section are also applicable.
1090. Additionally, according to the P&G for TSP (page 26) and SAI & AII (page 30), a document retention policy must include the following: all necessary records on transactions (both domestic and international) must be maintained for at least five years after the transaction took place. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts, currencies, and type of transaction involved) so as to provide, if necessary, evidence for prosecution of criminal behaviour. There are not P&Gs for DNFBPs supervised by the FIU (MOT) and casinos that contained the previous requirement.

#### **4.1.2 Recommendations and Comments**

1091. The threshold for identification requirements for casinos in legislation should be amended in accordance with the FATF standard.
1092. AML/CFT requirements should apply to internet casinos.
1093. DNFBPs should be required by law or regulation to comply with 5.2.c, 5.2.d, 5.2.e and 5.7 of Recommendation 5

1094. Authorities should put legislation for DNFBPs supervised by the FIU (MOT) and casinos with the requirements of criteria 5.5.2, 5.6 to 5.11, 5.16 and 5.17 of recommendation 5.
1095. The deficiencies in section 3.5 for Recommendation 10 which are applicable to all DNFBPs should be remedied.
1096. The Authorities in Sint Maarten should issue legislation for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 6, 8, 9 and 11.
1097. Central Bank should incorporate in the P&Gs for SAI and AII requirements regarding E.C 6.2 of Recommendation 6 and E.C 9.3 of Recommendation 9.

#### 4.1.3 Compliance with Recommendation 12

	Rating	Summary of factors relevant to s.4.1 underlying overall rating
<b>R.12</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• <b>The threshold for identification requirements for casinos is not in accordance FATF standard.</b></li> <li>• <b>No AML/CFT requirements for internet casinos.</b></li> <li>• <b>No requirements, by law or regulation for DNFBPs regarding criteria 5.2.c, 5.2.d, 5.2.e and 5.7</b></li> <li>• <b>No requirements for DNFBPs supervised by the FIU (MOT) and casinos regarding criteria 5.6 to 5.11, 5.16 and 5.17</b></li> <li>• <b>The deficiencies in section 3.5 for Rec. 10 which are applicable to all DNFBPs</b></li> <li>• <b>No legislation i.e. law or guidelines for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 6, 8, 9 and 11</b></li> <li>• <b>No requirements for SAI and AII regarding criteria 6.1 and 9.3</b></li> </ul>

## 4.2 Suspicious transaction reporting (R.16) (applying R.13 to 15 & 21)

### 4.2.1 Description and Analysis

1098. The services that fall under the scope of the NORUT are stated in article 1. Sint Maarten requires reporting entities to report 'unusual' instead of 'suspicious' transactions. The indicators which apply are laid down in a joint ministerial decree of the Minister of Finance and the Minister of Justice (Ministerial Decree Indicators Unusual Transactions (N.G. 2010 no.27), which decree is based on article 10 of the NORUT.
1099. DNFBP who render a service by virtue of their profession or in the ordinary course of their business are also required to report any hereby conducted or "intended" unusual transaction to the Reporting Centre without delay. The DNFBP's were introduced in the latest amendments of the NORUT that came into force on May 15<sup>th</sup>, 2010.
1100. For lawyers, public notaries and accountants it is stipulated that activities related to the establishing of the legal position of a client, his representation in court, the offering of counsel before, during and after a lawsuit, or offering of counsel about entering into or preventing legal proceedings, are not considered a service within the meaning of the NOIS and the NORUT.
1101. FIU (MOT) has been designated to be responsible for supervising DNFBP to ensure compliance with the NOIS and the NORUT. The Government has also decided to include car dealers under the reporting obligations and supervision of the FIU (MOT).

### **Recommendations 13 and 14**

1102. The criteria for Recommendation 13 and as set out in the NORUT was analyzed in section 3.7 of this Report and it is applicable to all DNFBPs.

1103. The Examiners are extremely concerned with the low number of UTRs submitted by DNFBPs. In particular it is noted that only casinos and TSP have submitted UTRs (no clarity whether based on objective or subjective indicators) and these numbers very low. For 2010 only one (1) report was submitted by a TSP and there were none for 2011. These figures suggest that UTR reporting by DNFBPs is ineffective.

1104. The analysis and conclusions on compliance of the NORUT with recommendation 14 as detailed in section 3.7 of this report it is also applicable to all DNFBPs.

### Recommendations 15 and 21 applied to DNFBP supervised by the FIU (MOT) and Casinos

1105. Sint Maarten has not established requirements regarding the criteria for Recommendations 15 and 21 for DNFBPs supervised by the FIU (MOT) and casinos.

### Recommendations 15 and 21 applied to DNFBP supervised by the Central Bank

### **Recommendation 15**

1106. The P&G require administrators (page 9, 26 and 27) and TSP (page 9, 22 and 23) to develop appropriate compliance management arrangements, including at a minimum, the appointment of a compliance officer who is at the management level and who is responsible for AML/CFT matters.

1107. The P&Gs give guidance on the responsibilities of the compliance officer. These responsibilities are:

- to adhere to the local laws and regulations governing the detection and deterrence of ML and TF;
- to organize training sessions for the staff on various compliance related issues;
- to review compliance with the policy and procedures of the administrator or self-administered investment institution;
- to analyze transactions and verify whether any are subject to reporting according to the indicators as mentioned in the MDIUT
- to review all internally reported unusual transactions on their completeness and accuracy with other sources;
- to keep records of internally and externally reported unusual transactions;
- to prepare the external report of unusual transactions;
- to execute closer investigation on unusual or suspicious transactions;
- to remain informed of the local and international developments on ML and TF and to make suggestions to management for improvements; and
- to periodically report information on the institution's effort to combat ML and TF to the (Board of) managing directors, including at least the local managing directors.

1108. These responsibilities must be included in the job description of each designated compliance officer(s). The job description must be signed off and dated by the officer, indicating her/his acceptance of the entrusted responsibilities.

1109. The administrators and TSP are required to ensure that the compliance officer(s) must have timely access to customer identification data and other customer due diligence information,

transaction records, and other relevant information. The P&Gs require administrators and TSP to maintain an audit function that is adequately resourced and independent to test compliance with the policies, procedures and controls. The audit function should regularly assess the effectiveness of the internal policies, procedures and controls, and its compliance with regulatory requirements.

1110. The independent testing must be conducted at least annually by the internal audit department or by an outside independent party such as the external auditor of the administrators and TSP. These tests may include:

- evaluation of the AML/CFT manual;
- file review of the (self-)administered investment institutions;
- interviews with employees who handle transactions and with their supervisors;
- a sampling of unusual transactions on and beyond the threshold(s) followed by a review of compliance with the internal and external policies and reporting requirements; and
- assessment of the adequacy of the record retention system.

1111. The scope of the testing and the testing results must be documented, with any deficiencies being reported to senior management and/or to the Board of Directors, and to the designated officer(s) with a request for a response to take prompt corrective actions or to take corrective actions in the future by a certain deadline.

1112. The P&Gs require to ensure that business is conducted at a high ethical standard and that the laws and regulations pertaining to financial transactions are adhered to. These companies must screen their employees on criminal records.

1113. Additionally, P&Gs also require that at minimum training programs are developed and that training is provided to all personnel who handle transactions susceptible to the activities listed in the National Decree containing general measures and the MDIUT. Training must at least include:

- creating awareness by the employee of the ML and TF issue, the need to detect and deter ML and TF, the internal and external laws and regulations in this respect and the reporting requirements;
- the detection of unusual transactions or proposals, and the procedures to follow after identifying these;
- making sure that the need to verify the identity of the client is understood;
- the areas of underwriting of new policies or the modification of existing policies; and
- to keep abreast of the developments in the area of ML and TF

1114. Training must also be provided to existing members of the staff. A higher level of instruction covering all aspects of ML and TF policies, procedures and regulations must be provided to those with the responsibility to supervise or manage the staff.

1115. It will also be necessary to make arrangements for refreshment training at regular intervals to ensure that the staff does not forget their responsibilities and that they are updated on current and new developments in the area of ML and TF techniques, methods and trends.

1116. The P&G also require the administrators and company (trust) service providers to demonstrate their compliance with the guidance relative to staff training, it must at all times maintain records which include:

- details of the content of the training programs provided;
- the names of staff who have received the training;
- the date on which the training was given;
- the results of any testing carried out to measure staff understanding of the ML and TF requirements; and an on-going training plan.

## Recommendation 21

1117. The P&Gs for TSP and SAI & AII requires to give special attention to business relationships and transactions with persons (including legal persons and other financial institutions) from or in countries which do not or insufficiently apply the FATF Recommendations including the high-risk and non-cooperative jurisdictions.
1118. The Central Bank routinely circulates and publishes on its website, extracts from FATF public statements regarding jurisdictions for which the FATF calls for action (either counter-measures or consideration of the risks arising from the deficiencies associated with the specified jurisdictions). It would be useful for those notices to include other monitored jurisdictions as these countries also have strategic deficiencies and may or may not be making sufficient progress.
1119. Pursuant to the P&G for SAI & AII and TSP, it is required to examine as far as possible the background and purpose of such transactions and to set forth their findings in writing. Furthermore, the P&Gs requires that all customer and transaction records and information are available on a timely basis to the domestic competent authorities.
1120. There is no requirement for DNFBPs to apply counter-measures to countries which do not or insufficiently apply FATF Recommendations.

## Additional Elements

1121. The reporting requirements are not extended to the rest of the professional activities of accountants.
1122. The DNFBPs have to report to transactions objectively when a certain threshold applies and also subjectively when they have reasonable grounds to suspect that funds are the proceeds of ML, TF and other criminal activities.

### 4.2.2 Recommendations and Comments

1123. The deficiencies identified for Recs. 13 and 14 in section 3.7 for all DNFBPs should be address
1124. The Authorities in Sint Maarten should issue legislation for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 15 and 21.
1125. DNFBPs supervised by the Central Bank should be required to apply counter-measures to countries which do not or insufficiently apply FATF Recommendations

### 4.2.3 Compliance with Recommendation 16

	Rating	Summary of factors relevant to s.4.2 underlying overall rating
R.16	NC	<ul style="list-style-type: none"> <li>• The deficiencies identified for Recs. 13 and 14 in section 3.7 apply to all DNFBPs</li> <li>• No legislation i.e. law or guidelines for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 15 and 21</li> <li>• DNFBPs supervised by the Central Bank are not required to apply counter-measures to countries which do not or insufficiently apply FATF Recommendations.</li> </ul>

		• UTR reporting by DNFBPs is ineffective
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### 4.3 Regulation, supervision and monitoring (R.24-25)

#### 4.3.1 Description and Analysis

##### **Recommendation 24**

1126. In Sint Maarten, there is no authority entrusted with the responsibility to regulate and supervise casinos. The Examiners were advised that within the Government there has been discussion regarding the creation of a Gaming Control Board. In addition, the industry mentioned to the Team their support of the idea of having a supervisory authority.

1127. Casinos and other regulated institution expressed their concerns with regard to the risk of the Sector and how over the years that risk has grown. The Team was advised for example that banks do not open accounts for casinos based on (perceived) risks.

1128. There appears to be a system for licensing casinos as the Examiners were informed that there are fourteen (14) casinos licensed to operate in St. Maarten. However, the Team was not informed of any requirement or procedure for licensing or any regulatory measures to prevent criminals or their associates from being involved in the ownership, management or operations of casinos.

##### **DNFBP supervised by FIU (MOT)**

1129. FIU has been designated as responsible for supervising DNFBP for compliance with the NOIS and the NORUT. However, the supervisory department is not operational at FIU (MOT).

##### **DNFBP supervised by the Central Bank**

1130. Administrators and TSP are subject to the same AML/CFT supervisory regime as the financial institutions. Based on the provision of article 11, first paragraph, sub a of the NOIS, the Central Bank is the AML/CFT supervisor for the following DNFBP: administrators and company (trust) Service Providers. According to the third paragraph of mentioned article, the Central Bank is authorized to issue P&G in order to further promote compliance with the NOIS. As such, the Central Bank has issued P&G for SAI & AII and P&G for TSP.

1131. Company (trust) service providers and administrators are required to comply with the compulsory requirements set out in the NORUT and/or NOIS and the P&G. Breaches of the obligations set out under aforesaid regimes are punishable and will result in disciplinary action(s) by the Central Bank.

1132. In 2007 the Central Bank began conducting on-site examinations on TSP. Since the beginning, all on-site examinations have included AML/CFT components. The Investment Institutions (IIs) and Trust Supervision Department of the Central Bank is entrusted with the supervision of IIs, Administrators and TSPs, and hence, with the conduct of on-site examinations at these (legal) persons. The allocation of the department's resources for the conduct of on-site examinations occurs on a risk basis. Factors such as size of the institution, date of last visit, high risk issues identified in (financial) reports, are among other things, taken into consideration while developing the on-site examination planning for the year.

1133. There are not administrators. There are currently 4 TSPs, one of which is a natural person with a dispensation, operating on Sint Maarten. There are no administrators established on Sint Maarten

	2008	2009	2010	2011
Incomplete manual	1	1	0	1
Insufficient training for employees	1	1	0	1
Compliance officers not appointed to supervise	1	0	0	1

Total number incomplete manual, insufficient training and Compliance Officers not appointed at Company (Trust) Service Providers.

1134. The Central Bank found four cases with respect to TSPs where unusual transactions were not reported to the FIU(MOT) during 2008-2011, and three cases where reports to the FIU(MOT) were not made on a timely basis.

	2008	2009	2010	2011
Unusual transactions not reported to MOT TSP	4	0	0	0
Not timely reported to MOT	3	0	0	0

Unusual Transactions not reported to FIU (MOT)

1135. The on-site examinations conducted by the Central Bank are either full scope or targeted (which entails AML/CFT compliance). The Central Bank gives instructions in the examination reports to the supervised institutions/persons to take corrective measures within a stipulated timeframe. The timeframe to remedy the violation/issue is dependent among other things upon the gravity and frequency of occurrence of the violation issue. For the most serious violations/issues, the supervised institution/person is requested to file on a periodic basis a progress report with the Central Bank until the violation /issue is corrected or resolved. The Central Bank also conducts follow-up examinations to determine the status of progress made relative to the correction/resolution of the violation/issue. Meetings with the management of the supervised institution or the supervised person are at times in that respect also held at the Central Bank or at the supervised institution/person.

1136. Failure to adhere to the instructions of the Central Bank or to take corrective measures in a timely manner may result in further actions, such as imposing of fines or withdrawal of the license.

1137. With regard to the powers and sanctions, please be referred to section 3.10 recommendation 17 above.

1138. With regard to sufficient technical and other resources to perform its functions it is to be noted that FIU (MOT), currently there is not staff available to perform supervision of the DNFBPs. Also references are made in section 2.6 of this Report. With regards to Central Bank: reference is made to recommendation 30 of section 3.

**Recommendation 25 (Guidance for DNFBPs other than guidance on STRs)**

1139. The supervisory authority may issue P&Gs to the entities which are placed under its supervision based upon a legal basis that has been created in both the NOIS and the NORUT.

The Central Bank has issued P&G for SAI & AII and P&G for TSP. However, at present there are no P&Gs applicable for DBFBPs supervised by the FIU (MOT).

1140. The FIU (MOT) has indicated that while they issue their own guidance, they have provided to the DNFBPs, the Curacao P&Gs for the relevant sector as a guidance/Best practices

#### 4.3.2 Recommendations and Comments

##### **Recommendation 24**

1141. The Authorities in St. Maarten should immediately implement adequate AML/CFT regulation and supervision of casinos in compliance with E.C. 24.1. Casinos in St. Maarten are not effectively regulated or monitored.

1142. The Authorities should implement an AML/CFT regime for Internet casinos.

1143. The FIU (MOT) should implement an effective supervisory regime and should be given resources to fulfil their supervisory role for the relevant DNFBP sector.

1144. The deficiency identified in section 3.10 (R. 29 and R17) with regard to the supervisory function of the Central Bank should be cured.

##### **Recommendation 25**

1145. The Competent Authorities in Sint Maarten should provide adequate guidance to DNFBPs supervised by the FIU and Casinos regarding AML/CFT requirements

1146. FIU (MOT) should issue its own P&Gs.

#### 4.3.3 Compliance with Recommendations 24 and 25 (criteria 25.1, DNFBP)

	<b>Rating</b>	<b>Summary of factors relevant to s.4.3 underlying overall rating</b>
<b>R.24</b>	<b>NC</b>	<ul style="list-style-type: none"> <li>• There is no adequate AML/CFT regulation and supervision of casinos</li> <li>• No supervisory regimen for Internet casinos.</li> <li>• The FIU (MOT) as supervisory authority has not started yet.</li> <li>• The FIU (MOT) does not have adequate resources to fulfil their supervisory role.</li> <li>• The deficiency identified in section 3.10 (R. 29 and R17) with regard to the supervisory function of the Central Bank applied.</li> </ul>
<b>R.25</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• DNFBPs supervised by the FIU and do not receive sufficient guidance to DNFBPs on complying with AML/CFT requirements</li> </ul>

#### **4.4 Other non-financial businesses and professions Modern secure transaction techniques (R.20)**

##### 4.4.1 Description and Analysis

1147. The Government has decided to include car dealers under the reporting obligations and supervision of the FIU (MOT).

1148. Recommendations 5, 10, 13, 14 and 17 apply equally to car dealers as is the case with for example dealers in precious stones and precious metals. As is the case for dealers in precious stones and precious metals, for car dealers a rule-based approach to ML/TF issues has been



chosen. These DNFBP are relatively small and have no organizational infrastructure yet to apply a risk-based approach.

1149. Sint Maarten has taken any measures to encourage the development and use of modern techniques for conducting transactions that are less vulnerable to ML.

1150. Total number of credit card issued over the last three years:

2011: 7665

2010: 7630

2009: 7201

1151. Total number of institutions providing internet banking services:

2011: 7

2010: 7

2009: 7

1152. Total number of ATMs in St. Maarten over the last three years:

2011: 48

2010: 47

2009: 46

#### 4.4.2 Recommendations and Comments

#### 4.4.3 Compliance with Recommendation 20

	Rating	Summary of factors underlying rating
R.20	C	This Recommendation has been fully observed.

## 5. LEGAL PERSONS AND ARRANGEMENTS & NON-PROFIT ORGANISATIONS

### 5.1 Legal Persons – Access to beneficial ownership and control information (R.33)

#### 5.1.1 Description and Analysis

1153. The statutory regulations with regard to legal entities under Sint Maarten private law are contained in Book 2 of the CC. The following legal entities are explicitly regulated in Book 2 of the CC:

- limited liability company (‘*naamloze vennootschap*’); (Title 5 articles 100 -113)
- private limited liability company (‘*besloten vennootschap*’);
- foundation (‘*stichting*’),
- private foundation (‘*stichting particulier fonds*’),
- association (‘*vereniging*’),
- cooperation (‘*coöperatie*’) (Title 4) and
- mutual insurance association (Title 4) (‘*onderlinge waarborgmaatschappij*’).

1154. For further and detailed information on legal persons please be referred to Section 1.4.

1155. Sint Maarten has mechanisms to prevent the unlawful use of legal persons in relation to ML and TF.

#### Central registration

1156. Sint Maarten has a system of central registration in place, which is regulated through the Commercial Register Act (CRA) (N.G. 2009, no. 51). The Commercial Registers are public

registries containing only public records, which are available to the general public. CRA and National Decree containing general measures of December 22, 2009 for the execution of article 20 of the CRA (N.G. 2009, no. 71) (Trade Register Decree 2009; Dutch: Handelsregisterbesluit 2009).

1157. The current CRA has been introduced as per January 1<sup>st</sup>, 2010 and has undergone modernization following the modernization of Book 2 of the CC. Separate registers have all been substituted by one central register, while the existing filings with other registry have been mandatorily incorporated in the Commercial Register as of January 1<sup>st</sup>, 2010.
1158. Article 3 of the CRA reflects that corporations, legal persons, companies which are partnership firms established in Sint Maarten must (mandatory) be registered with the Commercial Register at the Chamber of Commerce.
1159. This includes all legal persons established in the Sint Maarten and also foreign entities legal or natural person whom have whatever type of establishment in the Sint Maarten; there are no exceptions.
1160. The CRA prescribes the filing of changes with regards to each and every aspect of the registration of the business and/or legal person. Articles 7 and 8 of the CRA speak to the requirement to ensure the prescribed data is registered correctly and completely and within the timelines required by the Act.
1161. Information relating to the Company (name of the company, date of incorporation, place of business, articles of association and any amendments thereto) as well as the information of the managing director(s), supervisory director(s) (if any) and proxy holders (if any) needs to be registered and this information is publicly available and may be reviewed by any person. Refer to Articles 13, 14, 15, 19 of the National Decree on the Commercial Register (NG 2009, no. 71).
1162. In addition, changes with regard to every aspect of the registration of the business and/or legal person should be informed. Articles 15 through 32 of the National Decree on the Commercial Register prescribes that personal information and every person involved with management, supervision, representation, liquidation, transfer or bankruptcy must be mandatorily filed with the Commercial Register. Article 1, defines personal information as: surname and name, gender, private address, date, place and country of birth, the nationality, the signature and initials.
1163. From the CRA and the Decree National Decree on the Commercial Register (NG 2009, no. 71), there is not requirement for the registration of the details of UBOs. Additionally the Chamber of Commerce has also indicated that it does not have the power or ability to have access to UBO information and such details are not necessary for registration in the commercial register. In this case registration would occur with the details of the Director or whomever is reflected in the Articles as the responsible individual for that legal person.
1164. Pursuant the NOIS, FIs and DNFBPs are required to ascertain UBO information on their clients. In addition, the NOIS and P&Gs require that all CDD information is kept for a period of five (5) years. The CC, Book 2, Article 15 stipulates requirements for records of the financial condition of a legal person and the books, documents and other data carriers in respect thereof.
1165. As has been mentioned, Central Bank supervises FIs and some DNFBPs (TSP and SAI & AII). FIU supervises the rest of the DNFBPs (except casinos); however the FIU has not started its functions as a supervisor. Other legal persons (such as NPOs) are not monitored. Therefore, it cannot be confirmed that information on the UBO held by institutions is

adequate and accurate due to the lack of supervision and monitoring of record keeping requirements.

Access to information

1166. The Chamber of Commerce indicated that law enforcement authorities have full and unrestricted access to the Commercial Register and there is a contact person at the Chamber who facilitates this access and no complaints have been received in this regard. Information is shared with the FIU (MOT) and the PPO by providing access to the physical files. The database is computerised but online access to provide live updated information is not yet in place. The Chamber of Commerce also indicated that interaction with the law enforcement is however not formalised and is therefore not recorded.
1167. On payment of the requisite fee anyone can either obtain an excerpt of the registration, or a full and certified copy of all records registered in the file of the entities. (CRA, Article 11). Statistics of the movements in the registry are provided monthly to the general public, based on legal form or branch in which the entities operate. This practice is not however formalized in either the CRA or the National Decree on the Trade Register.
1168. Article 22 of the CRA reflects that the investigative authorities at article 184 of the Penal Code will be responsible for the investigation of acts which are punishable under the CRA. The article also reflects that such persons will be appointed by National Decree and that this appointment will be announced. At the time of the onsite visit this aspect of the regime was not confirmed with the team.
1169. However as indicated the Registry at the Chamber of Commerce does not have UBO information of legal persons.
1170. The Authorities have indicated that if in a (criminal) investigation information on the UBO and control of legal persons is needed (on short term) by the investigating officers, it can be obtained within hours through a court order. However no specific examples were provided to the Team and considering the current lack of resources that the law enforcement agencies are facing, one cannot assume that the information can be obtain in a timely manner.
1171. If the information is needed for foreign investigations the same procedures can be followed (through a request to the local authorities) and the information can also be obtained on short term. However no specific examples were provided to the Team and as expressed above there is a similar concern about information being obtain in a timely manner
1172. As indicated above, the supervisory authorities can for supervisory tasks obtain information on UBOs in accordance with the provisions on in the supervisory ordinances. During on-site examinations the Central Bank assesses compliance with the requirements on the UBOs. Central Bank can share information with the PPO if required based on the MOU. However, this would not be the case for the FIU (MOT) as it has not yet started its role as supervisor.

Preventive measures regarding bearer shares

1173. This immobilization policy of bearer shares has been codified in the National Decree Custody Bearer Share Certificates enacted on June 16, 2010 (N.G. 2010 no. 36). This Decree is based on the NOSTSP and requires that bearer share certificates are kept in custody in order to know the ultimate beneficial owner of these bearer shares and thus the owner of the limited liability company (see article 2 of the National Decree Custody Bearer Share Certificates). The custodians that are eligible are limited to certain identified groups of professionals (see article 2 paragraph 4, of the National Decree Custody Bearer Share Certificates). The monitoring and enforcement of compliance with this decree is entrusted with the Central Bank.

1174. It must also be noted that pursuant to article 12 paragraph 1, sub 2 of the NOSTSP the information on the beneficial owner of international companies must be available with the TSP
1175. This information is to be made available to the Central Bank being the regulatory authority. Fines may be imposed in case of non compliance (see above). It is observed that the data retention obligations reflected at article 2 subparagraph 3(a) states that the information to be retained is the identity and the address of the natural or legal person in whose behalf the bearer securities are held as well as notice of any change in the aforementioned data without delay. This wording captures the requirement that beneficial ownership information be captured but does not appear to extend the requirement to the ultimate beneficial owners of the legal person on whose behalf the bearer shares are kept or held. It is also noted that in the CC (Book 2) Article 105 3<sup>rd</sup> paragraph reflects that bearer shares shall be transformed by the company into registered shares if this is requested by the holder of the bearer shares that this be done. This gives the distinct impression that this aspect of the immobilization framework operates at the discretion of the holder of the bearer shares.
1176. In the P&Gs issued by the Central Bank, requirements are set forth prescribing how to proceed in case of nominee (bearer) services, bearer policies, bearer shares and shareholder services.
1177. For administrators of investment institutions and self-administered investment institutions. The following provisions are applicable and are mentioned in the P&G for AI and SII (page 20) related to the issuance of bearer shares “For supervised investment institutions, the Central Bank discourages the issuance of bearer shares, except for the shares which are listed on public securities exchanges. The financial service providers in Curaçao and Sint Maarten must always know the beneficial owners of bearer shares of companies to whom they renders services, which are not listed on a public securities exchange. Certificate of bearer shares must be held in custody by the administrator or self-administered investment institution or a party assigned by the administrator or self-administered investment institution”.
1178. For Company (Trust) Service Providers. The following provisions are applicable and are mentioned in the P&G for TSP (page 14) related to shareholder services and/or provision of custodial services of bearer shares: “All company service providers that provide nominee shareholder services and/or provide custody of bearer shares must know the true identity of the person/persons (resident or non-resident) for whom assets are held or are to be held, including the (ultimate) beneficial owner (s). The identity of these clients must be established in accordance with the identification procedures previously mentioned.”
1179. However in relation to Sint Maarten’s beneficial ownership data capture framework, the fact that the bearer share certificates has UBO information requirements which are enforceable through the NOIS does not heal the deficiencies identified in the broader framework especially those entities that are not TSPs or Private foundations

#### **Additional Elements**

1180. The P&Gs state, among other things, that the institution must have a formal system of internal control to identify and verify the identity of the (prospective) clients (and if applicable their ultimate beneficiaries). Guidance is also given in the P&G on the verification sources that can be consulted.
1181. From the Commercial Register Act and the National Decree for the implementation of article 20 of the Trade Register Ordinance, there does not appear to be a requirement for the registration of the details of UBOs. Additionally the Chamber of Commerce has also indicated

that it does not have the power or ability to insist on having access to UBO information and such details are not necessary for registration in the commercial register. The Chamber further indicated that currently no approval process exists for the registration of the Deed of Incorporation or Articles of Incorporation, however, this omission is now being addressed.

1182. Given the limitations of the Chamber of Commerce in this regard, it is not likely that there is substantial reliance on the Chamber to verify the customer identification data for customers which are also legal persons. Additionally the Chamber also indicated that document quality checks are now in progress however this is a very recent initiative

#### 5.1.2 Recommendations and Comments

1183. Sint Maarten should establish a system to ensure access to the UBO information of legal persons.

1184. There should be mechanisms in place to guarantee that competent authorities are able to obtain and have access in a timely manner to accurate and current UBO information.

1185. Article 105 3<sup>rd</sup> paragraphs reflects that bearer shares shall be transformed by the company into registered shares if this is requested by the holder of the bearer shares that this be done. This aspect of the CC must be amended to either make the transformation mandatory or mandate the registration of the UBO details in relation to the bearer shares and express mechanisms incorporated either in the Code or elsewhere to achieve this registration.

1186. Amend the NDCBSC so that the wording requires that beneficial ownership information must also be captured for the ultimate beneficial owners of the legal person on whose behalf the bearer shares are kept or held.

#### 5.1.3 Compliance with Recommendations 33

	Rating	Summary of factors underlying rating
R.33	NC	<ul style="list-style-type: none"> <li>• There is no system in place to ensure access to the UBO information</li> <li>• Not all competent authorities have access in timely fashion to adequate, accurate and current UBO information.</li> <li>• The requirement for bearer shares to be transformed into registered shares operates at the discretion of the shareholder and is therefore not mandatory.</li> <li>• The NDCBSC does not require the capture and retention of the ultimate beneficial ownership details of the legal person on whose behalf the bearer shares are kept or held</li> </ul>

## 5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34)

### 5.2.1 Description and Analysis

#### *Registration*

1187. As indicated in section 5.1, all businesses established in Sint Maarten must register with the Commercial Register at the Chamber of Commerce. However there is no obligation to register UBO information at the Commercial Register.

#### *Trusts Services*

1188. As at 2011 there are 4 TSPs operating in Sint Maarten (3 by license 1 by dispensation) among these 4 operators the activities undertaken cover the safekeeping and administration of cash or liquid securities on behalf of persons; otherwise investing, administering or managing funds on behalf of other persons.
1189. NOSTSP establish the requirements to provide TSP services. They can only be offered by the persons who either licensed or allowed by dispensation to offer the service given by the Central Bank. From Sint Maarten's framework it appears no other person would be authorized to undertake TSP services.
1190. NOSTSP, the P&Gs and the NOIS require to TSP identify the UBO of their clients. It should also be noted that TSP are required to identify their clients being international companies (including trust and private foundations) prior to requesting a foreign exchange license on behalf of these international companies from the Central Bank. The change of UBO of such a company must also be communicated to the Central Bank as soon as possible.
1191. To prove that the (financial) service provider has met this requirement, the (financial) service provider should provide the Central Bank with copies of the due diligence documents or with a declaration stating that the identification of the natural persons was performed pursuant to the NOIS and P&G and that the legally stipulated identification documents are in the file. For the latter, a standard declaration form should be used.
1192. With regard to trust, the P&Gs, establish provisions for identification of beneficiaries of a trust as the (ultimate) beneficiaries of a client for 'bare trust/fixed trust' and 'discretionary trust'.
1193. 'Bare or fixed trust'. In this case "it is the settler that must be identified as the person exercising effective control over the trust and the trustees as the ultimate beneficiaries of the trust. Therefore, CCD measures as previously described must be applied to both the trustee, being the ultimate beneficiary, and the settler of the trust" (P&G for TSP page 15)
1194. 'Discretionary trust'. When referring to 'discretionary trust' the ultimate beneficiary is not previously established. "In this case a distinction must be made between applicable CDD measures at time of establishing the trust and CDD measures applicable at the time of appointment of beneficiaries of the trust. When the trust is established and thereby the client relationship is created, in case of a discretionary trust, CDD measures apply to the settler of that trust. As soon as the beneficiaries of the trust are appointed, the company (trust) service provider is required to perform proper CDD on the beneficiary (ies)"
1195. The officials of the Central Bank entrusted with the supervision TSPs, have the power to require any information and have access to all data, including information and data relative to the clients of the company (trust) service providers, for the execution of their tasks. It appears then, that the access to this information is immediate for the regulator.
1196. The Authorities indicated that the law enforcement authorities have compulsory powers to obtain information and have full access to the client files of the company (trust) service providers upon receipt of a court order. It is the view of the Team that timely accessibility could be hampered in such cases.
1197. As was mentioned earlier, the Authorities have indicated that if in a (criminal) investigation information or foreign request where is needed UBO information it can be obtained within hours through a court order. As no specific examples were cited for this, there is a concern as to whether the UBO information can be obtained in a timely manner as indicated earlier.

## Additional Elements

1198. As indicated the P&G state, among other things, that the institution must have a formal system of internal control to identify and verify the identity of the (prospective) clients (and if applicable their ultimate beneficiaries). Guidance is also given in the P&G on the verification sources that can be consulted

1199. Refer also to the discussion above regarding measures in place to facilitate access by financial institutions to beneficial ownership and control information.

### 5.2.2 Recommendations and Comments

1200. There should be mechanisms in place to guarantee that competent authorities are able to obtain and have access in a timely manner to accurate and current UBO information.

### 5.2.3 Compliance with Recommendations 34

	Rating	Summary of factors underlying rating
<b>R.34</b>	<b>LC</b>	<b>There is no certainty that all Competent Authorities have timely access to UBO information</b>

## 5.3 Non-profit organisations (SR.VIII)

### 5.3.1 Description and Analysis

1201. Although, there is no specific supervisory framework for the NPO sector the Authorities indicated that monitoring of the non-profit sector in Sint Maarten occurs in various ways.

#### **Nature of the non-profit sector in Sint Maarten**

1202. The non-profit sector in the Sint Maarten consists of two types of entities that meet the FATF definition of NPOs: foundations and associations. The difference between foundations and associations is mainly that foundations have no members. Associations are accountable to their members and often serve a purpose that is directly related to the activities of their members (e.g. sports and cultural clubs).

#### **Foundations with a public interest**

1203. The conventional foundations in Sint Maarten are in general non-profit institutions with a public interest, like schools, other educational initiatives, healthcare organizations and social- or cultural organizations. In many cases these organizations receive financial support from the government of Sint Maarten or the government of the Netherlands.

1204. The foundation called ‘Stichting Ontwikkeling Nederlandse Antillen’ (SONA) that receives development funds from the Netherlands plays a fundamental role in the financing of foundations in Sint Maarten. SONA is responsible for legitimate and appropriate management and control of the funds which the Netherlands donates for development projects.

1205. Another important foundation is called the ‘Antilliaanse Mede Financierings Organisatie’ (AMFO). The donor of the foundation is the Dutch government. AMFO is financing projects of Non-Governmental Organizations in among others Sint Maarten. Main purpose of this foundation is: social development, independency and innovation.

1206. The Authorities have indicated that regarding foundations with a public interest, distributions to incorporators or to those, who constitute its bodies, are not allowed, and its distributions are

furthermore restricted by law to distributions with often an ideal or educational, social or cultural purpose.

**Foundations with a religious or charity purpose**

1207. The charity foundations registered in the register of the Chamber of Commerce of Sint Maarten have various purposes. The charitable activities can be performed both in and outside of Sint Maarten. The charities often have a local specific purpose, e.g. giving support to animals, environment, people with a handicap, sport- or music activities. The charitable sector in Sint Maarten is a vital component in the economy; it supplies and complements in many ways the activities of the government and the business sector. In general, the financial funding is done by private persons, companies, sponsoring activities and religious groups.

**Two categories of foundations in Sint Maarten: local and international**

1208. At the Chamber of Commerce in Sint Maarten a division of two categories is made in the registration, namely *local and international*. An international foundation, which is directed by a local company (trust) service provider, is a foundation that is formed under the laws of Sint Maarten. These foundations in principle do not conduct substantial activities in the country of establishment (Sint Maarten).

1209. Foundations are founded by a notarial deed (article 50 of Book 2 of the CC ~~Civil Code~~). The deed of incorporation has to contain the articles of association of the foundation. The articles of association should contain the following mandatory information:

- The name of the foundation;
- The purpose of the foundation;
- The regular procedures to appoint and dismiss directors and the board;
- The island where the foundation is seated;
- And the manner in which the foundation must re-distribute its assets in case the foundation is dissolved.

1210. The notary public who establishes the foundation bears the responsibility to set up the foundation in accordance with the CC and that all required documents are in place. The notary public also bears the responsibility that the newly established legal entity is registered forthwith at the Chamber of Commerce; simultaneously the original acts and deeds should be deposited by the notary.

1211. The notary's primary role is to supervise and judge if the articles of association are compliant with the law. The 'supervisory' role of the notary is limited to judge if the newly established legal person does not conflict with the public order, good public morals and or the law. In fact according to the law 'the National Ordinance on the Notary Office' (N.G. 1994, no. 6) it is mandatory for the notary to create a legal person when such a request is made. Identification by the notary is also regulated in the 'National Ordinance on the Notary Office' this law states that the notary has to make sure who he is dealing with. Also the NOIS obliges the notary to identify his clients, including the beneficial owners/founders, when rendering services as described in the NOIS.

1212. The notaries in Sint Maarten must notify the PPO and report to the FIU (MOT) when they suspect an indictable offence.

**The Association**

1213. According to Article 70 of Book 2 of the CC the association is a legal body with members that is founded to serve a given purpose. The law does not require an association to be founded by a notary act. It is common practice that for example a sports club without a statute grows into an association. In such a case the doctrine speaks of an 'informal association'. If necessary the



court can make these kinds of associations formal. When an association is founded by a notary act, statutes have to be deposited with the registry at the Courthouse.

1214. On request of the Minister of Finance of the former Netherlands Antilles in 2007, Compliance Services Caribbean (CSC) initiated a study on NPOs. The study started in February 2008 and ended in July 2008. The results of this study are presented in the document “Report of findings towards the Special Recommendation VIII regarding entities that can be used for the financing of terrorism in the Netherlands Antilles” (The Report refers to both Curacao and Sint Maarten). This report focused on the potential misuse of non-profit organizations (NPOs) for terrorist financing in the Netherlands Antilles. The adequacy of existing laws and regulations was also reviewed.

1215. The study conducted by CSC focused particularly on the following topics:

- The statutory requirements to found a foundation or an association;
- The statutory requirements to keep financial records;
- The supervision and monitoring authority power that the authorities have regarding to foundations and associations;
- The authority power the authorities have to supervise and monitor the foundations and associations;
- The possibilities to abuse foundations or associations for the financing of terrorism;
- The number of foundations and associations that are known in the Netherlands Antilles;
- The current legislation for NPOs in the Netherlands Antilles;
- The familiarity of the authorities with the director(s), board, members and contributors of the foundations and associations; and
- The Private Foundation (SPF).

1216. In order to address the scope of the Study a survey was conducted. The primary competent supervisory and law enforcement authorities were consulted. Other relevant parties were consulted as well.

1217. No information was given by the Authorities with respect to their ability to obtain timely information on the activities, size, and other relevant features of the non profit sectors. A reassessment has not been conducted since 2008

1218. As there is no supervision or monitoring of NPOs, it cannot be assessed whether or not there are any NPOs that account for a significant portion of the financial resources under control of the sector or substantial share of the sector’s international activities.

1219. As indicated earlier NPOs have to register at the Chamber of Commerce. The information relating to NPOs (such as name, date of establishment, registered address, Articles of Association, including purpose and objectives, and any amendments thereto as well as the information of the managing director(s), supervisory director(s) (if any) and proxy holders (if any))

1220. No outreach has been made to the NPO sector with a view to protecting the sector from terrorist financing abuse.

1221. No evidence has been provided to suggest that NPOs are being effectively supervised or monitored.

1222. The information relating to NPOs (such as name, date of establishment, registered address, articles of association, including purpose and objectives, and any amendments thereto) as well as the information of the managing director(s), supervisory director(s) (if any) and proxy holders (if any) needs to be registered with the Chamber of Commerce. This is a requirement

contained in articles 3 and 4 of the Commercial Register Act (PB 2009, no. 51). This information is publicly available and may be reviewed by any person at any time. However, information on trustees is kept.

1223. The Public Prosecutor can initiate proceedings to dissolve the NPO when its activities are in violation with public order (article 57, paragraph 1, of Book 2 of the CC). However, specifically for NPOs there are no different levels of sanctions for preventive measures to avoid the misuse of NPOs
1224. NPOs are obliged to register with the Chamber of Commerce and to file any registration information changes with the Chamber of Commerce, as stipulated in the CRA. The information relating to NPOs is publicly available and may be reviewed by any person at any time.
1225. Pursuant to article 15 of Book 2 of the CC, entities like foundations are required to keep financial records. However, the Recommendation calls of records of domestic and international transactions, not financial records (balance sheet and income statement).
1226. There is no requirement for NPOs to submit information on records of transactions to any competent authorities. In order to access information on NPOs there should be a request by the authorities through a Court order.
1227. The mechanism for domestic cooperation and coordination is hampered by the lack of an agency responsible for the monitoring of NPOs. There are no requirements for NPOs to keep records of domestic and international transactions for at least five (5) years
1228. All authorities, including law enforcement authorities, have the legal power to obtain information from NPOs, whether or not by means of a court order. In addition, they have full and unrestricted access to the Commercial Register.
1229. Pursuant to the NORUT the FIU (MOT) exchanges information with all law enforcement agencies and since the amendment of the NORUT can also exchange information with the other supervisors (Central Bank). However there is no evidence that information was exchanged with regard to NPO issues.
1230. The office of the Attorney General receives all foreign requests for information through the minister of justice. Requests for mutual legal assistance will be dealt by the PPO. There is no evidence that information was exchanged with regard to NPO issues.

#### 5.3.2 Recommendations and Comments

1231. Sint Maarten should conduct a new assessment on the risk with regard NPO sector.
1232. The Authorities should consider designating an authority to monitor and supervise the NPO sector.
1233. Sint. Maarten should institute an outreach program which provides adequate AML/CFT awareness about the risk of NPOs to terrorist financing.
1234. There should be appropriate sanctions available for those NPOs.
1235. NPOs should be required to maintain transaction records for a minimum period of five (5) years.

1236. The Authorities in St. Marten should be procedures in place to ensure that they are able to effectively investigate and gather information on NPOs.

1237. There should be procedures in place which allow for timely and effective sharing of information on NPOs both domestically and internationally.

1238. The Authorities should consider issuing guidance specifically pertain to the NPO sector.

### 5.3.3 Compliance with Special Recommendation VIII

	Rating	Summary of factors underlying rating
SR.VIII	NC	<ul style="list-style-type: none"> <li>• No recent assessment on the on the risk with regard NPO sector</li> <li>• There is no oversight or supervisory regime for NPOs</li> <li>• No requirement for NPO sector to keep financial information</li> <li>• No procedures in place to ensure that they are able to effectively investigate and gather information on NPOs</li> <li>• No training sessions or sensitization forum held for NPOs.</li> </ul>

## 6. NATIONAL AND INTERNATIONAL CO-OPERATION

### 6.1 National co-operation and coordination (R.31 and 32)

#### 6.1.1 Description and Analysis

#### **Recommendation 31**

##### *National co-operation and coordination*

1239. In Sint Maarten several authorities are involved in the combating of ML and TF.

- FIU (MOT);
- Police Force of Sint Maarten (KPSM);
- Recherche Samenwerkingsteam (RST);
- Special Investigation Unit (Landsrecherche);
- Customs;
- PPO;
- Central Bank;
- Security Service of Sint Maarten (VDSM);
- Tax Inspectorate;
- Bureau Foundation of the Government Accountants (Stichting Overheids Accountants Bureau).

1240. Cooperation between these authorities is indispensable for an effective and efficient system. The authorities state that the cooperation takes place at ministerial level. However, information must be supplied to support this comment. The authorities state that there is cooperation additionally on the operational level. They are of the view that there are various mechanisms to coordinate the policy and to jointly investigate certain cases (e.g. by sharing information). In some situations cooperation is focused on a specific subject, for instance with regard to the combating of fraud of immovable property, in other situations on a broader scope.

1241. Pursuant to articles 6 and 7 of the NORUT the FIU exchanges information with all law enforcement agencies and since the amendment of the NORUT can also exchange information with the other Supervisor (Central Bank). It is uncertain whether the MOT has actually exchanged information with the Central Bank.

1242. The Authorities indicated that before the disintegration of the Netherlands Antilles by 10-10-10, the FIU (MOT) periodically (approximately every two months) met with the PPO to discuss the disseminated transactions, the quality of the reports and the follow up needed with regard to the reporting entities. The FIU organized several informative sessions for Customs and for law enforcement agencies, with regard to the work of the FIU (MOT) and the cooperation with the respective law enforcement agencies. After 10-10-10 the FIU (MOT) on Sint Maarten has not yet been able to fully subsume the tasks that were executed by the NA FIU.

**1243. *Mechanism for cooperation and coordination***

1244. The CIWG will be installed by the Governor of Sint Maarten. This CIWG will be chaired by the Attorney-General and further built up with representatives of the PPO, the Tax Office, the Justice Department, the Central Office for Legislation and Legal Affairs, the Office for Foreign Affairs, the Central Bank, the FIU and the private sector (banking, insurance). As the CIWG has not been established, it is not possible to measure the effectiveness of the mechanism for cooperation at this national level.

1245. Besides the national coordination that will occur through the CIWG the Authorities have indicated that national cooperation and coordination will also take place through the following mechanisms:

- The PPO will chair a two monthly national steering group in which information results on crime will be discussed and targets will be pointed to be investigated. In this steering group information on ML and TF will be examined and prioritized for further investigation.
- Twice per month meetings with the PPO entrusted with the processing of the disclosed suspicious transactions received from the FIU (MOT) will be organized from January 1<sup>st</sup> 2012;
- Special trainings are planned for 2012 on fraud and money-laundering to be organized by the PPO.

Currently coordination occurs through -

- The PPO attends on a six-weekly basis a similar steering group (consisting of RST and representatives of the Police forces of Aruba, Curaçao, the Dutch Caribbean islands and Sint Maarten) in regards to the investigations on organized crime by RST. RST's efforts are mainly focussed on cross-border organized crime. Part of the standard and obligatory goals in these investigations is the freezing, seizure and subsequent forfeiture of criminal proceeds. For that reason money-laundering investigations nearly automatically result from these large scale investigations. Anti-money laundering activities are amongst the priorities of RST.
- all trainings organized by RST;

1246. The evaluation team was informed that there are there is also periodically (every 6-8 weeks) an "investigation officers meeting" (opsporingsdienstenoverleg), where Customs officers, tax officers, police, FIU (MOT) and the prosecutor meet to discuss matters on an operational level

**Additional Elements**

**FIU (MOT)**

1247. The FIU (MOT) has a general mandate to disseminate information under Article 7 of the NORUT to national and international law enforcement agencies and regulatory agencies with a similar role as the FIU (MOT).

1248. The FIU(MOT) is in contact with the other supervisors, being the Central Bank regarding the operational cooperation between the supervisors.

1249. The Authorities indicated that there are four Ministries of Justice in place within the Dutch Kingdom and these Ministers meet twice per year to, among other things, coordinate plans to address matters that must be uniformly addressed within the Kingdom.

### **Recommendation 32**

1250. The national laws are reviewed regularly in order to enhance effectiveness of the AML/CFT system. Possible bottlenecks for the implementation of AML/CFT measures, the execution of AML/CFT laws or the prosecution of ML/TF cases are identified and new legislation is prepared to address the issues (e.g. safekeeping of bearer shares). At the moment the NOIS and NORUT are subject to revision.

### **Recommendation 30 –Resources (Policy makers)**

#### **With regard to the FIU (MOT):**

1251. The full discussion of the FIU (MOT)'s resources is found in Section 2 of the document.

#### **With regard to the Central Bank:**

1252. The supervisory activities of the Central Bank are partially funded through fees charged to the supervised sector. The fees charged to the supervised institutions are based on different criteria. Credit institutions are, for example, charged monthly fixed fees. Insurance companies are charged a certain percentage of their premium income, whereas investment institutions are charged a fee based on their total assets. Administrators and company (trust) service providers are charged a fee based on the number of clients serviced by them.

1253. The remaining funds to cover the expenses pertaining to the supervisory activities of the Central Bank are generated from the operational results of the Central Bank.

1254. Financial resources are annually budgeted to hire staff in the supervision departments and to train the staff of the supervision departments.

1255. The overall anti- money laundering and counter-terrorist financing level of knowledge and expertise of the Central Bank's examiners are considered to be adequate and assigned staff is capable of maintaining a helicopter view on the situations encountered. The staff is well trained and capable of understanding and acting upon critical situations that may arise in the sector.

1256. The prudential supervision departments of the Central Bank have computerized databases and analytical software tools e.g. Business Objects enabling them to periodically analyze the financial position and result of the supervised institutions and verify their compliance with legal stipulations

#### **With regard to the PPO:**

1257. The PPO is in charge of the control of the compliance with the legal regulations of Sint Maarten and in dealing with criminal cases against suspects (persons or entities). The PPO gives direction to the criminal investigations by the police, it decides which cases are brought before the court and which cases have to be or can be dismissed. The PPO can settle minor cases itself. Furthermore the PPO is in charge of the enforcement (execution) of all court decisions in criminal cases such as the freedom restricting punishments, the obligation to perform community service and the payment of fines. The Minister can give instructions to the Public Prosecutor about the prosecution policy to be pursued, but should adopt a reticent

attitude in individual criminal cases. At the moment there are 5 persons serving as Public Prosecutor, supervised by one Chief Public Prosecutor and assisted by 4 Public Prosecutor's clerks. All Public Prosecutors are appointed by the government, except for the Chief Public Prosecutor who is appointed by the Queen.

## Policy Makers

### **With regard to the FIU:**

1258. The FIU (MOT) requires a minimum standard of education/training at Higher Vocational Education-level when recruiting members of the staff. The level of expertise of the different fields is high. All employees must observe, article 20 of the NORUT which prohibits anyone who, pursuant to the application of the law or of decisions taken pursuant to the law, performs or has performed any duties to make use thereof or to give publicity to such further or otherwise than for performing his duties or as required by the law.
1259. There have been few opportunities for training as described earlier in this document. The authorities should ensure that there are adequate financial resources dedicated to staff training. The authorities advised that it is planned for the future to ensure that the employees attend more training sessions.

### **With regard to the Central Bank:**

1260. The prospective staff members of the Central Bank are carefully selected based on their educational background, training, expertise, and integrity. The integrity screening entails that a thorough background check is performed on the candidate. The Central Bank has a code of conduct for its personnel. Moreover, the supervision staff members are also subjected to a separate code of conduct for supervision personnel (Besluit beroepsregels toezichtfunctionarissen).
1261. As for confidentiality purposes, all staff members are required to sign a confidentiality agreement at the beginning of their working relationship with the Central Bank. According to article 31 of the Central Bank Statute, the Supervisory directors, President and directors of the Central Bank are required to keep confidential all information obtained during the execution of their function, in so far disclosure of such information is not prescribed by or pursuant to national ordinance. Furthermore, in the employee hand book "Reglement arbeidsvoorwaarden personeel van de Bank van de Nederlandse Antillen" it is also mentioned that staff members should maintain confidentiality on all information that they are exposed to in connection with their work. In addition, according to article 40 of the NOSBCI, article 78 of the NOSSI, article 20 NOIB, article 28 of the NOSPF, article 10 of the NOSSE, and article 25 NOSIIA no information obtained from a financial institution may be disclosed further or any other manner than as required for the performance of tasks or decisions taken pursuant to the application of the national ordinances.
1262. For all supervisory staff members there is a career development plan in place and (local and international) training is provided. Ongoing AML training for the Central Bank personnel takes place through local and international programs. These trainings comprise of both internal training, specifically tailored to the examiners of the aforementioned departments, or external training organized by other foreign supervisory authorities, international standard setting bodies, such as the IAIS, IOSCO, or other regional groups, such as the Offshore Group of Collective Investment Schemes Supervisors, Commission of Securities Regulators of the Americas, the Caribbean Group of Securities Regulators, and the Offshore Group of Banking Supervisors (for trust-related trainings).
1263. In addition, some of the Central Bank's personnel annually attend FATF and or CFATF and other relevant local or international conferences where current trends and typologies in AML and CFT are discussed and reported upon. A number of the Central Bank's personnel are accredited CFATF assessors.

**With regard to the PPO:**

1264. The common norms for the recruitment of civil servants are also applicable when recruiting new staff members at the PPO. A selection committee will investigate if the candidate meets the requirements for the specific vacancy. For policy makers an academic degree (for instance a law or economics degree) is required. New staff members are required to swear confidentiality. Their credentials will be checked before they will be recruited.

1265. The PPO has staffed with highly trained prosecutors from the Netherlands. They will work on Sint Maarten for a fixed period of time (three years). In the Netherlands they are usually trained on combating all sorts of crime, including money laundering. The Public Prosecution Service for Curaçao, Sint Maarten and the Dutch Caribbean islands will conduct a series of trainings in the years to come, either amongst themselves or assisted by the Dutch Attorney-General's Office. The latter has committed to organising two two-day training programs each year. At least one of all these trainings in 2011 will focus on money-laundering and anti-fraud investigations.

1266. The Public Prosecutors yearly attend a RST-training program that is organised by the FIU from the Netherlands and focuses on the latest developments on money-laundering, financial constructions etc.

6.1.2 Recommendations and Comments

1267. The CIWG needs to be formally established

1268. The Authorities should ensure the implementation of the mechanism for coordination that were informed to the Team.

6.1.3 Compliance with Recommendation 31

	Rating	Summary of factors underlying rating
<b>R.31</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• <b>The CIWG needs to be formally established.</b></li> <li>• <b>Many of the national coordination mechanisms (such as the national AML Committee - CIWG; and Trainings to be undertaken by the PPO) are not yet in operation.</b></li> </ul>

**6.2 The Conventions and UN Special Resolutions (R.35 & SR.I)**

6.2.1 Description and Analysis

**Recommendation 35**

1269. The Authorities indicated that Sint Maarten is participant to many treaties to combat crime and that as a small country a lot of emphasis is being put on international cooperation to effectively combat organised crime and terrorism. The Authorities have also advised that Sint Maarten is party to the following Conventions and bilateral treaties -

The Vienna Convention	Sint Maarten: as of October 10, 2010
The Palermo Convention	Neth. Antilles: as of September 9 2010
	Sint Maarten: as of October 10, 2010
The Financing of Terrorism Convention	Sint Maarten: as of October 10, 2010

**Treaty Table**

<b>Treaty</b>	<b>Articles</b>	<b>Sint Maarten's situation</b>
Vienna Convention (1988)	3 (Offences and Sanctions)	<i>State Ordinance on Narcotic Substances articles 3, 11, 11a, 11b, 11c, 11d and related Ministerial Regulations. Penal Code articles 47, 48a, 49, 50, 72, 435(a) and (c). Book 3 Title IX Penal Procedures Code 555, 559 and 579a.</i>
	4 (Jurisdiction)	<i>Penal Code articles 2, 3, 4, 4a, 5 and 7. Penal Procedures Code 559</i>
	5 (Confiscation)	<i>Penal Code articles 35 and 38 a-e. Penal Procedures Code articles 119, 119a, 177a-g, 555 – 565, 579a, 597. Extradition Decree of Curacao, Aruba and Sint Maarten (EDAC).</i>
	6 (Extradition)	<i>Extradition Decree of Curacao, Aruba and Sint Maarten (EDAC). Penal Code Book 7 Title VIII &amp; IX</i>
	7 (Mutual Legal Assistance)	<i>Penal Procedures Code articles 119, 119a, 555 – 565, 579a, 597. Book 7 Title VIII &amp; IX</i>
	8 (Transfer of Proceedings)	<i>Penal Code article 4a(1) and (2) Book 7 Title VIII 7&amp; IX</i>
	9 (Other forms of co-operation and training)	<i>Penal Code article 70 Penal Procedures Code article 564 See Mutual Legal Assistance above. Training is addressed administratively.</i>
	10 (International Co-operation and Assistance for Transit states)	<i>No provisions or processes identified or advised.</i>
	11 (Controlled Delivery)	<i>Addressed in practice.</i>
	15 (Commercial carriers)	<i>Penal Code articles 3, 4(a)(b)(c)(d) NOOCMT article 5(2)(d)</i>
	17 (Illicit Traffic at sea)	<i>Penal Code articles 3 and 7 to some extent. No specific provisions identified otherwise.</i>
	19 (Use of mail)	<i>Penal Procedures Code articles 127, 555, 561.</i>
<b>Palermo Convention</b>	5 (Criminalization of participation in an organized criminal group)	<i>Penal Code articles 146, 146a, also articles 47, 49 and 50.</i>
	6 (Criminalization of laundering of the Proceeds of Crime)	<i>Penal Code article 435 (a) and (c), Penal Procedures Code articles 204, 255-258</i>
	7 (Measures to combat money laundering)	<i>NOSBCI articles 40 &amp; 41 NOSH NOIB NOSTSP article 14 RFETCSM article 28 NOOCMT article 2 NOIS articles 2, 3, 6, 7, 9 NORUT articles 3, 11, 15, 22 Provisions &amp; Guidelines Issued by the CBCS</i>
	8 (Criminalization of corruption)	<i>Penal Code article 204 Amendments to the Code pending as well.</i>



	9 (Measures against corruption)	<i>Code of Conduct (Integrity Policy) for the Office of the PPO.</i>  <i>Code of Conduct for Sint Maarten Police Force</i>  <i>Legislation Government Organization (extract) article 35 &amp; 36</i>
	10 (Liability of Legal persons)	<i>Penal Code article 53</i>
	11 (Prosecution and Adjudication and sanction)	<i>Penal Procedures Code article 72</i>
	12 (Confiscation and Seizure)	<i>Penal Code article 35</i> <i>Penal Procedures Code article 177</i> <i>See also Penal Code article 38a-e.</i>  <i>Penal Procedures Code articles 119, 119a, 177a-g, 555 – 565, 579a, 597.</i>
	13 (International Co-operation for the purposes of confiscation)	<i>Penal Procedures Code articles 119, 119a, 177a-g, 555 – 565, 579a, 597.</i> <i>Authorities indicate this also occurs on basis of treaties of the Kingdom with other States.</i>
	14 (Disposal of confiscated proceeds of crime or property)	<i>Cross border matters are handled by Treaty. In relation to local matters this is handled administratively.</i> <i>National Ordinance on the Crime Funds</i>
	15 (Jurisdiction)	<i>Penal Code articles 2, 3, 4, 4a, 5 and 7.</i> <i>Penal Procedures Code 559</i>
	16 (Extradition)	<i>Extradition Decree of Curacao, Aruba and Sint Maarten (EDAC). Authorities indicate this also occurs on basis of treaties of the Kingdom with other States.</i>
	17 (Transfer of sentenced persons)	
	18 (Mutual Legal Assistance)	<i>Penal Procedures Code articles 119, 119a, 555 – 565, 579a, 597.</i> <i>Authorities indicate this also occurs on basis of treaties of the Kingdom with other States.</i>
	19 (Joint Investigations)	<i>Penal Procedures Code article 564</i> <i>Authorities indicate this also occurs on basis of treaties of the Kingdom with other States and joint working agreements with other islands in the region.</i>
	20 (Special Investigative Techniques)	
	21 (Transfer of Criminal Proceedings)	
	22 (Establishment of criminal record)	
	23 (Criminalization of obstruction of justice)	<i>Penal Code article 204</i>
	24 (Protection of witnesses)	<i>Penal Procedures Code article 232, 246, 261.</i>
	25 (Assistance and protection of victims)	<i>Partially addressed - Penal Procedures Code articles 15, 206, 374</i>
	26 (Measures to enhance cooperation with law enforcement authorities)	<i>Kingdom Law PPO – chapter 6 collaboration – article 33</i> <i>To some extent Protocol regarding specialized research cooperation among nations of the Kingdom paragraph 6.1 5<sup>th</sup> sub-paragraph.</i> <i>Authorities indicate this is to be implemented via</i>

		<i>working processes of the FIU.</i>
	27 (Law Enforcement cooperation)	<i>Refer section 2.3 of this Report. Authorities indicate close cooperation between FIU and PPO Kingdom Law PPO – chapter 6 collaboration – article 33 To some extent Protocol regarding specialized research cooperation among nations of the Kingdom paragraph 6.1 5<sup>th</sup> sub-paragraph</i>
	28 (Collection, exchange and analysis of information on the nature of organised crime)	
	29 (Training and technical assistance)	<i>Partially Addressed in practice. Authorities position is this is implemented within the framework and working processes of the FIU and via close relations with and mutual interests of the other countries within the Kingdom.</i>
	30 (Other measures)	<i>No provisions identified. Authorities indicated this is to be implemented via policy development.</i>
	31 (Prevention)	<i>RFETCSM NOSBCI National Decree Custody Bearer Shares Refer also to section 1.1 of this Report</i>
	34 (Implementation of the Convention)	<i>As per above.</i>
Terrorist Financing Convention	2 (Offences)	<i>Penal Code articles 84a, 84b; 48a, 146a. No specific offence for Terrorist Financing seen. No offence seen regarding the indirect or unlawful provision of funding for the commission of a terrorism offence. No offence seen for the wilful provision of funds etc. to individual terrorists. Assessment against the TF Convention done but not all relevant articles were provided</i>
	4 (Criminalization)	<i>Terrorist Financing is not independently criminalized and accordingly no penalty is specified for the offence of terrorist financing. Penal Code articles 84a, 84b; 48a, 146a. See section 2.2 of this Report.</i>
	5 (Liability of legal persons)	<i>Penal Code – article 53 No penalty specified for legal person for offence of participation under article 146a of the Penal Code. Refer to above re: criminalization.</i>
	6 (Justification for commission of offence)	<i>Penal Code – article 84b.</i>
	7 (Jurisdiction)	<i>Penal Code – articles 2, 3, 4, 4a, 7 re: offences in St. Maarten; on board NA vessel or on board NA aircraft. and article 5.  See section 2.1 of this Report.</i>
	8 (Measures for identification, detection, freezing and seizure of funds)	<i>See section 2.4 of this Report. The Sanctions National Ordinance (N.G. 1997, no. 336) and 2001 (N.G. 2001, no. 80). The National Decrees, providing for general measures, of September 28, 2010 (N.G. 2010, no. 93) FATT Protocols re: Resolution 1267 (1999) &amp; 1373 (2001) Penal Procedures Code – articles 119, 119a; 555-565</i>

		<i>No measures identified for use of forfeited funds to compensate victims of terrorist offences.</i>
	9 (Investigations & the rights of the accused).	<i>Penal Code articles 4a, 559. Penal Procedures Code article 564. EDACS articles 2 and 6 -</i>
	10 (Extradition of nationals)	<i>Extradition Decree of Curacao, Aruba and Sint Maarten (EDACS).</i>
	11 (Offences which are extraditable)	<i>Extradition Decree of Curacao, Aruba and Sint Maarten (EDAC). Book 7 title VIII &amp; IX Penal Code</i>
	12 (Assistance to other states)	<i>Penal Procedures Code articles 119, 119a, 555, 561, 563-565, 558, 559, 579a, 597. RFETCSM article 28(1)</i>
	13 (Refusal to assist in the case of a fiscal offence)	<i>No provision identified that prohibits assistance on this basis. See also Penal Procedures Code article 560(2).</i>
	14 (Refusal to assist in the case of a political offence)	<i>No provision identified that prohibits assistance on this basis. See also Penal Procedures Code article 560(1). Book 7 title VIII &amp; IX Penal Code</i>
	15 (No obligation if belief that prosecution based on race, nationality, political opinions, etc.)	<i>Penal Procedures Code article 559(1)(c). Book 7 title VIII &amp; IX Penal Code</i>
	16 (Transfer of prisoners)	<i>No provision identified in the Penal Procedures Code. Book 7 title VIII &amp; IX Penal Code Relevant articles not provided by the Authorities</i>
	17 (Guarantee of fair treatment of persons in custody)	<i>No provisions were identified on this subject in the extracts provided of the Penal Code or the Penal Procedures Code. Book 7 title VIII &amp; IX Penal Code Relevant articles were not provided by the Authorities</i>
	18 (Measures to prohibit persons from encouraging, organising the commission of offences and STRs, record keeping and CDD measures by financial institutions and other institutions carrying out financial transactions) and facilitating information exchange between agencies)	<i>Penal Code articles 47, 49 and 50; NOIS article 2(1), 3, 5; NORUT, article 11; Provisions &amp; Guidelines issued by the CBCS.</i>
	19 Communication of outcomes to UN Secretary General	

1270. Sint Maarten's position with regard to Vienna Convention is reflected in the foregoing Treaty Table

1271. Alternative disciplinary measures described at paragraphs 4b), c) and d) of the Convention (i.e. education, rehabilitation, social reintegration) were not identified in the laws provided to the Team.

1272. From the information provided by the Authorities, paragraphs 5 f) and g) of the Vienna Convention (i.e. victimization or use of minors; use of educational institutions to commit offences) do not appear to be covered by the enforcement framework.
1273. Paragraphs 6 (discretionary legal powers regarding prosecutions), 7; 9 (measures to ensure an offender or convicted person who is found in a jurisdiction's territory, is present at criminal proceedings) and 11 (offences shall be prosecuted and punished in accordance with the domestic law of a Party) of article 3 of the Vienna Convention appear to be covered by the enforcement framework as discussed above in sections 2.1 to 2.4 of this Report.
1274. Article 4a, second paragraph of the Penal Code establishes Sint Maarten's jurisdiction over anyone whose extradition relates to a terrorist offence or one of the crimes described in articles 230 , third paragraph, as well as 330 second paragraph and article 325(2), second paragraph, has been declared inadmissible, rejected or declined.
1275. However, it should be noted that under the Penal Procedures Code dual criminality is a prerequisite for mutual legal assistance requiring the use of specific investigative measures by the Sint Maarten Authorities.
1276. Additionally, for the criminalization of money laundering there must be a treaty between the requesting State and Sint Maarten or the perpetrator must be a resident of Sint Maarten or he must have taken up residence in Sint Maarten after having committed the crime in the foreign country.
1277. The collective impact of the foregoing appears to be that where the proceeds of crime are derived from conduct that occurred in another country, which is not an offence in that other country but which would have constituted a predicate offence had it occurred in Sint Maarten, this would not constitute a money laundering offence.
1278. Article 559 of the Penal Procedures Code lists the circumstances in respect of which assistance will not be provided.
1279. In relation to Article 7 of the Vienna Convention paragraphs 9 -19 (Mutual Legal Assistance Processes), there is an internal PPO guideline on the execution of international requests for mutual legal assistance. The internal guideline outlines the procedures to be followed for minor assistance (requests for interrogation of witnesses, confiscation with or without a house search, arresting suspects etc.) and requests for extradition. Refer also to discussion on R.30 at section 6.3 of this report.
1280. In relation to article 7(8) of the Vienna Convention (designated Authority for Mutual Legal Assistance) the Authorities have indicated that an international request for mutual legal assistance is sent to the Attorney General (under whose authority the request for legal assistance must be carried out), unless a treaty indicates otherwise (from prosecutor to prosecutor). Similar requests within the Kingdom of the Netherlands are sent directly to the Chief Public Prosecutor. After having determined that there are no legal restrictions the request is handed over to a Public Prosecutor, who shall determine the further course of action and who will act accordingly under the responsibility of the Chief Public Prosecutor. In most cases the Public Prosecutor charges the police with the execution of the investigation. The registration (the date of entry, execution and handling) of the requests is taken care of by a specially designated assistant to the prosecutor. The duration of the procedures and the execution of the requests are supervised by the coordinating Public Prosecutor. The Team was also informed that in relation to mutual legal assistance, the Department of Foreign Affairs (DFA) provides protocol details and advice but assistance is initiated directly between law enforcement authorities.

1281. No specific provision was identified in the Penal Procedures Code or the EDAC in relation to paragraphs 3(non-treaty based extradition), and 7(expediting procedures for extradition) of Article 6 of the Convention. Article 9 of the EDAC addresses paragraph 8 (taking the subject of extradition proceedings into custody) of Article 6 of the Convention. Some aspects of paragraphs 10(enforcing sentence in lieu of extradition), 11 (bilateral and multilateral agreements to extradite or enhance effectiveness of extradition), and 12 (transfer of sentenced persons to complete sentences) of Article 6 are addressed by the Penal Procedures Code.
1282. It appears that Sint Maarten has done more than is required by the Convention which speaks to Parties giving consideration to the possibility of transferring proceedings for criminal prosecution to one another.
1283. Article 564 of the Penal Procedures Code specifically reflects that in case the cooperation of foreign officers of justice and police is permitted on the country's own territory, within the context of honoring the request, such officers shall act under the actual control and responsibility of the competent authorities and the questioning of suspects or witnesses by foreign officers shall be conducted in the presence of the examining judge or in a manner determined by him.
1284. The Authorities have also indicated that the Minister of Justice is the central authority for international cooperation in criminal cases and that he has criteria that help decide which country is preferred for the prosecution. Based on the discretionary principle the Public Prosecutor's Office, for reasons of efficiency, can decide to participate in an agreement with the prosecution authorities of another nation concerning the prosecution of a person, if Sint Maarten, based on its own legislation, has the right to prosecute that person. The Authorities have further advised that the discretionary principle is executed on a 'case by case' basis and it allows cooperating prosecutorial authorities to determine which jurisdiction will prosecute individuals. Informal arrangements can be facilitated as such MOUs are not used or required. The Authorities have further advised that this exercise of discretion allows the PPO to dismiss a case, it also allows for a case to be restarted but this must be expressly agreed to subject to the double jeopardy protections in article 70 of the Penal Code.
1285. The framework is not indicative of Sint Maarten having the ability to extend cooperation and assistance as contemplated by article 10 of this Convention.
1286. No specific provisions have been identified from the laws provided or advised in relation to the matters contemplated by article 15(1) (measures including special arrangements with commercial carriers to prevent their use to commit offences) and 15(2)(Reasonable precautions) of this Convention.
1287. No provisions have been identified which specifically cover the matters raised in article 17 of the Vienna Convention.
1288. There is no indication that the measures described in paragraph 1 of this Convention (Adoption of measures to suppress the use of mails for illicit traffic and cooperating with other States) are in place.
1289. In relation to the Palermo Convention Sint Maarten's situation is set out in the Table above
1290. In relation to participation in an organized criminal group, the offence in the Penal Code does not appear to extend to the matters discussed in paragraph (a) (i) of article 5(1) of the Convention – *Agreeing with one or more persons to commit a serious crime for a purpose directly or indirectly ...*” which offence the Convention reflects must be distinct from offences involving attempt or completion of the criminal activity.

1291. In relation to article 8 offences in this Convention (Criminalization of Corruption), the the Penal Code contains provisions which penalize corruption, (articles 378, 379 and 380) and bribery of civil servants and government officials and (articles 183, 184). The Authorities noted that several persons have been convicted in the past for corruption, including bribery, based on these provisions. Examples of the referenced caselaw were not provided to the Team.
1292. Articles 255-258 of the Penal Procedures Code outline the steps that can be taken against a witness who refuses without any grounds to answer the questions asked of him by the examining judge. (i.e. detention for 12 days for failing answer questions asked or to make a statement or take an oath requested of the witness. The detention can be extended for successive periods of 12 days each until the witness either complies or a Court orders otherwise. This appears to be dissuasive.
1293. Paragraph 5 of article 11 (Prosecution, Adjudication and Sanction) to this Convention appears to be covered by article 72 of the Penal Code which outlines that period within which prosecution of offences must take place.
1294. Apart from the asset sharing arrangements Sint Maarten has a “Crime Fund” which is administered by the Ministry of Justice and the Ministry of Finance. Confiscated assets are paid into this fund and the proceeds of that fund can be used to finance law enforcement activities. This Fund is governed by the National Ordinance covering the establishment of fund for crime prevention dated November 16, 1995.
1295. No measures were identified in the Penal Code or Penal Procedures Code in relation to having appropriate measures to encourage persons who have participated in organized criminal groups to cooperate with law enforcement.
1296. Sint Maarten’s training and technical assistance programme do not appear to address the matters raised at paragraphs 1(f)(g) (control techniques in free trade zones and free ports) and (h) (combating organized crime through the use of computers, telecommunications networks or other forms of modern technology), and 4 (bilateral and multilateral arrangements to maximize operational and training activities of article 29 of the Palermo Convention).
1297. No measures were identified in the Penal Code or Penal Procedures Code or any of the Ordinances or Decrees provided and no measures were advised in relation to the matter of coordinated efforts bilaterally and multilaterally to provide assistance to developing countries in their efforts to combat transnational organized crime.
1298. No specific provisions have been identified in the Penal Code, Penal Procedures Code, Ordinances or Decrees provided regarding:
- Prevention of the misuse by organized criminal groups of Government tender processes and of subsidies and licenses granted by public authorities.
  - The disqualification of persons convicted of offences covered by this Convention from acting as directors of legal persons incorporated in Sint Maarten. The Authorities have however indicated that article 32 of the Penal Code gives the judge the opportunity in his sentence to disqualify the guilty person from acting in public positions or certain records. The content of this aspect of the Penal Code was not reviewed as it has not been provided to the team to facilitate assessment, however the Penal Code reflects that additional measures can be imposed on a person convicted of an offence under the Penal Code. These include deprivation of specific rights and publication of the judicial verdict. For example, a conviction for the offence of illicit trafficking in stolen goods can in addition to the stated penalty, also result in the deprivation of rights specified in article 32 (1)-(4) of the Code and the accused may be prevented from exercising the profession

in the course of which he committed the offence. These additional measures are also available for the offence of trafficking in human beings.

- The establishment of national records of persons disqualified from acting as directors of legal persons, and
- The exchange of information contained in the abovementioned national records with the competent authorities of other State Parties. The Authorities have indicated that there is a National Ordinance on criminal records on all convictions, and that this database also reflects, along with the convictions, disqualification of certain public positions or certain professions as well. The content of this Ordinance was not verified as it has not been provided to the team to facilitate assessment

1299.No specific provisions have been identified in the Penal Code, Penal Procedures Code, Ordinances or Decrees provided and no specific indications have been made by the Authorities regarding-

- The promotion of public awareness regarding the existence, gravity of and threat posed by transnational organized crime;
- Informing the Secretary General of the UN of the authority/authorities that can assist other State Parties in developing measures to prevent transnational organized crime, and
- Collaboration with other States (apart from the already advised joint cooperation and other collaborative efforts discussed above) including participation in international projects aimed at the prevention of transnational organized crime.

1300.Refer to sections 2.1 and 2.2 of this report in relation to the criminalization of money laundering, terrorism and terrorist financing

1301.Refer to the Table above regarding compliance with the Palermo and Vienna Conventions and the TF Convention.

1302.Sint Maarten has a national freezing of assets framework in place. The SNO empowers the government to implement international freezing orders such as the UN resolutions on terrorists. Since 2002 the national decrees freezing assets from Taliban c.s. and Osama bin Laden were issued. In addition the Central Bank instructed the supervised institutions to match their client data with the UN terrorist lists moreover other lists (see P&G) in order to detect whether assets must be frozen.

1303.The Sanctions National Decree Al-Qaida c.s.,the Taliban of Afghanistan c.s., Osama bin Laden c.s. and terrorists to be designated locally (N.G. 2010, no. 93) based on the SNO implements UN resolutions 1267 (October 15, 1999), 1333 (December 19, 2000), 1363 (July 30, 2001), 1368 (September 12, 2001), 1373 (September 28, 2001), 1390 (January 16, 2002) en 1526 (January 30, 2004). Assets of the terrorist indicated by the UN moreover other locally appointed terrorists must be “frozen” immediately when detected.

1304.Refer also to Table III above in relation to the implementation of the TF Convention as well as to Section 2.2 of this report which discusses levels of compliance with the requirement to criminalize TF and Section 2.4 of this report which discusses levels of compliance with SRIII (freezing of funds used for TF).

## **Additional Elements**

1305. The Authorities have indicated that the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (November 1990) entered into force for the Netherlands Antilles (and now also for Sint Maarten) on August 1, 1999.
1306. The Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland to supplement and facilitate the operation of the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (November 1990) entered into force for the Netherlands Antilles (and now also for Sint Maarten) on August 7, 2006.
1307. The Government of Sint Maarten has finished a draft legislation<sup>15</sup> in order to implement and ratify the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (May 2005).
1308. The Convention on offences and certain other acts committed on board aircraft, September 14, 1963, Tokyo entered into force for the Netherlands Antilles on September 2, 1974 (and now also for Sint Maarten).
1309. The Convention for the suppression of unlawful seizure of aircraft, December 16, 1970, The Hague entered into force for the Netherlands Antilles on September 2, 1974 (and now also for Sint Maarten).
1310. The Convention for the suppression of unlawful acts against the safety of civil aviation, September 23, 1971 Montreal, entered into force for the Netherlands Antilles on September 2, 1974 (and now also for Sint Maarten).
1311. The Convention on the prevention and punishment of crime against internationally protected persons, including diplomatic agents, December 14, 1973 New York, entered into force for the Netherlands Antilles on January 5, 1989 (and now also for Sint Maarten).
1312. The International Convention against the taking of hostages, December 17, 1979, New York, entered into force for the Netherlands Antilles on January 5, 1989 (and now also for Sint Maarten).
1313. The International Convention for the suppression of terrorist bombings, December 12, 1997 New York, entered into force for the Netherlands Antilles on March 22, 2010 (and now also for Sint Maarten).
1314. Also, for the execution of UN Resolutions 1737 (December 23, 2006), 1747 (March 24, 2007) and 1803 (March 3, 2008) of the Security Council the Sanctions National Decree Islamic Republic of Iran (N.G. 2010, no. 92) has been implemented and for the execution of UN Resolutions 1695 (July 15, 2006) en 1718 (October 14, 2006) the Sanctions National Decree Democratic People's Republic of Korea (N.G. 2010, no. 91).

#### 6.2.2 Recommendations and Comments

1315. Authorities must ensure the EDACs expressly addresses the matters of non-treaty based requests for extradition; expedition of extradition procedures and simplification of evidentiary requirements,

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<sup>15</sup>As indicated, subsequent to the On-Site, the Team was advised that the new Penal Code was passed in June 2012; however this amendment falls outside the assessment period.



1316. The international cooperation framework under the criminal laws should expressly address Sint Maarten's ability to extend cooperation and assistance to Transit States as contemplated by article 10 of the Vienna Convention.
1317. The criminal laws must expressly impose obligations on Commercial Carriers to ensure these carriers are not used for the commission of article 3 offences set out in the Vienna Convention.
1318. The criminal laws must expressly address mechanisms required by article 17 (illicit traffic at sea) and required by article 19 (illicit use of mails) of the Vienna Convention.
1319. The Penal Code and Penal Procedures Code should be revised to address the shortfalls identified in the ratings Table below in relation to the Palermo Convention.
1320. The Penal Code should be revised to expressly criminalize the indirect or unlawful provision of funding for the commission of a terrorism offence, as well as the wilful provision of funds etc. to individual terrorists set out in article 2(a) of the Terrorist Financing Convention.
1321. The Penal Procedures Code and/or Penal Code should be amended to expressly address
- the matter of reciprocal confidentiality (as required by article 12 (Assistance to other States) of the TF Convention;
  - establishing mechanisms whereby forfeited funds are used to compensate the victims of terrorist offences or their families, and
  - matters of custody arrangements, terms under which an offender transferred to Sint Maarten from a State will be returned to that State from which the offender was transferred, credit for time spent in custody of State to which the offender was transferred

#### 6.2.3 Compliance with Recommendation 35 and Special Recommendation I

	Rating	Summary of factors underlying rating
R.35	PC	<p><b><i>Implementation in accordance with the Vienna Convention</i></b></p> <ul style="list-style-type: none"> <li>• No specific provision was identified in relation to non-treaty based requests for extradition, expedition of extradition procedures and simplification of evidentiary requirements,</li> <li>• The framework under the criminal laws provided is not indicative of Sint Maarten having the ability to extend cooperation and assistance to Transit States as contemplated by article 10 of this Convention.</li> <li>• No evidence of implementation of controlled delivery techniques by the Authorities.</li> <li>• No specific provisions have been identified from the laws provided or advised in relation to special arrangements with Commercial Carriers precautionary measures implemented to ensure commercial carriers are not used for the commission of offences</li> <li>• No provisions have been identified in the laws provided which cover the Illicit Traffic at Sea</li> <li>• No provisions identified regarding measures to suppress the use of mails for illicit traffic.</li> </ul> <p><b><i>Implementation in accordance with the Palermo Convention</i></b></p> <ul style="list-style-type: none"> <li>• No measures were identified in the law in relation to having appropriate measures to encourage persons who have participated in organized criminal groups to cooperate with law enforcement.</li> <li>• The advised training initiatives do not appear to cover control techniques</li> </ul>

		<p>in free trade zones and free ports; modern law enforcement equipment and techniques, electronic surveillance, combating organized crime through the use of computers, telecommunications networks or other forms of modern technology and bilateral and multilateral arrangements to maximize operational and training activities of article 29 of the Palermo Convention.</p> <ul style="list-style-type: none"> <li>• No laws or measures identified regarding the matter of coordinated efforts bilaterally and multilaterally to provide assistance to developing countries in their efforts to combat transnational organized crime.</li> <li>• Verification of whether the laws addressed – <ul style="list-style-type: none"> <li>a) The establishment of national records of persons disqualified from acting as directors of legal persons, and</li> <li>b) The exchange of information contained in the abovementioned national records with the competent authorities of other State Parties.</li> </ul> <p>Could not be done as the relevant articles were not provided for assessment.</p> </li> <li>• Laws do not address Prevention of the misuse by organized criminal groups of Government tender processes and of subsidies and licenses granted by public authorities.</li> <li>• Laws and framework do not address <ul style="list-style-type: none"> <li>a) The promotion of public awareness regarding the existence, gravity of and threat posed by transnational organized crime;</li> <li>b) Informing the Secretary General of the UN of the authority/authorities that can assist other State Parties in developing measures to prevent transnational organized crime, and</li> <li>c) Collaboration with other States (apart from the already advised joint cooperation and other collaborative efforts discussed above) including participation in international projects aimed at the prevention of transnational organized crime.</li> </ul> </li> </ul> <p><i>Implementation in accordance with the Terrorist Financing Convention</i></p> <ul style="list-style-type: none"> <li>• Wilful provision of funds etc. to individual terrorists does not appear to be covered by the approach to terrorist financing in the Penal Code.</li> <li>• No specific penalty is indicated for the offence of TF, appropriateness of this penalty in relation to this Article therefore cannot be assessed.</li> <li>• TF is not criminalized in accordance with the FT Convention. There is some doubt as to whether freezing mechanism could be invoked in response to a requesting foreign State's freezing requirement arising in relation to a terrorist financing offence.</li> <li>• No law or measure identified regarding the use of forfeited funds to compensate the victims of terrorist offences or their families.</li> <li>• Not all terrorism offences referenced in Annex 1 to the TF Convention are criminalized as required.</li> <li>• Reciprocal confidentiality (as required by article 12 (Assistance to other States) is not addressed in the Penal Code or Penal Procedures Code.</li> <li>• No provisions addressing the matters of custody arrangements, terms under which an offender transferred to Sint Marten from a State will be returned to that State from which the offender was transferred, credit for time spent in custody of State to which the offender was transferred, were identified in the Penal Code or Penal Procedures Code.</li> <li>• No laws were identified on the matter of the guarantee of fair treatment of persons in custody</li> </ul>
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		<ul style="list-style-type: none"> <li>• <b>There is a strong possibility therefore that the TCSP owners, directors and some managers not falling within the definition of staff, may be exposed to criminal liability for breaches of the NOSTSP in respect of reports made by the TCSP pursuant to the NORUT</b></li> </ul>
<b>SR.I</b>	<b>PC</b>	<b>Refer to the ratings Table at Sections 2.2. and 2.4 of this Report.</b>

### 6.3 Mutual Legal Assistance (R.36-38, SR.V)

#### 6.3.1 Description and Analysis

##### **Recommendation 36 and SR. V**

1322. Sint Maarten can provide international legal assistance in a criminal investigation on the basis of the Penal Procedures Code and existing Treaties.

1323. International legal assistance is regulated in Book 7, Title VIII of the Penal Procedures Code articles 555 up to and including 565.

1324. In a summary the following topics are dealt with in this title:

- As “requests for legal assistance” are qualified, those requests to perform criminal investigations or to cooperate in this, the forwarding of documents, files or documentary evidence, the supply of information or the serving or issuing of documents or giving notice or information to third parties (article 555, paragraph 2 of the Penal Procedures Code).
- The execution of the legal assistance requests is the responsibility of the Public Prosecutor, for as far it concerns the execution of a criminal investigation;
- This title also stipulates in which cases the execution of foreign requests will not be carried out (article 559 of the Penal Procedures Code). The reasons for not doing so, have been separately laid down in this title. Requests with regard to an investigation into criminal offences that can be qualified as political or fiscal by nature, can only be met with after authorisation by the Minister of Justice and only after consultation with the Minister of General Affairs. This authorisation is limited to those requests that are treaty-based (article 560 of the Penal Procedures Code). Authorities of the requesting nation will be informed about the decision of these kind of investigations through diplomatic channels (article 560, first paragraph of the Penal Procedures Code).

1325. Treaties covering international legal assistance:

1326. As of the 10<sup>th</sup> of October 2010 Sint Maarten is a semi-autonomous part of the Kingdom of the Netherlands. Before that time Sint Maarten was part of the Netherlands Antilles. As was the case under the Netherlands Antilles regime, under this new political structure, Sint Maarten is able to enter into treaties, conventions and other international agreements with other countries by itself. Treaties are entered by the Kingdom of the Netherlands, and during the ratification process Sint Maarten may indicate if it wants the treaty to be applicable to its jurisdiction. In the case of the Vienna Convention, the Palermo Convention and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism (the Terrorist Financing Convention), the Netherlands Antilles, and subsequently Sint Maarten indicated its willingness to have them applied. The Conventions and Treaties were applied to the Netherlands Antilles, and subsequently to Sint Maarten as follows:

**Name of the treaty**

**Party to the treaty / convention**

The Vienna Convention	Sint Maarten: as of October 10 <sup>th</sup> 2010
The Palermo Convention	Neth. Antilles: as of September 9 <sup>th</sup> 2010 Sint Maarten: as of October 10 <sup>th</sup> 2010
The Financing of Terrorism Convention	Sint Maarten: as of October 10 <sup>th</sup> 2010
European Convention on Mutual Legal Assistance in Criminal Matters	Netherlands Antilles: as of July 21 <sup>st</sup> 1993 Sint Maarten: as of October 10 <sup>th</sup> 2010
Mutual Legal Assistance Treaty with the United States of America	Netherlands Antilles: as of June 12 <sup>th</sup> 1981 Sint Maarten: as of October 10 <sup>th</sup> 2010
Mutual Legal Assistance Treaty with the Republic of Suriname	Neth. Antilles: as of December 17 <sup>th</sup> 2004 Sint Maarten: as of October 10 <sup>th</sup> 2010
Mutual Legal Assistance Treaty with Australia	Neth. Antilles: as of June 1 <sup>st</sup> 1991 Sint Maarten: as of October 10 <sup>th</sup> 2010
Mutual Legal Assistance Treaty with Hong Kong and China	Neth. Antilles: as of the 1 <sup>st</sup> of December 2003 Sint Maarten: as of October 10 <sup>th</sup> 2010

1327. The Authorities are of the view that Sint Maarten can offer all of the mentioned forms of legal assistance, if they are requested in a criminal investigation. The legal assistance is then based on the Penal Procedures Code and related treaties. The basic principle hereby is that according to the local legislation it must be allowed to perform specific investigative measures or methods. In any case certain conditions must be met, namely:

- 1) There should be a treaty, a bilateral agreement or a one-time consent of the Attorney General (on behalf of the Minister of Justice) whereby on a reciprocal basis legal assistance is granted;
- 2) According to the local law the offence must be a criminal offence, (this is not a problem as both money laundering and terrorist financing have been criminalized);
- 3) When requesting mutual legal assistance it is required that the act is punishable in both countries. This dual criminality should be seen in a broad perspective, which means that the Government will ascertain if the offences (or the case) will lead to a criminal offence.
- 4) The investigations and the measures or methods that are requested to be executed must have a legal basis in Sint Maarten.

1328. The PPO submits request by a foreign judicial authority that can be complied with and that is based on a treaty to the examining judge if:

- a) it is the intention to interview or interrogate persons who are not willing to appear as witnesses and submit the requested statement;
- b) a sworn statement has been explicitly requested, or a statement made before a judge;
- c) in view of the desired effect it is necessary to enter premises other than the public ones without the explicit permission of the entitled party, or that evidence has to be seized;
- d) it is the intention to wiretap the data traffic.

1329. The average time to deal with a request for legal assistance depends on the size of the investigation and/or the complexity of the request and/or if there are more requests for legal assistance. The intention for 2011 is to have deal with a request within 6 months after having received it with an average processing time of 90 days (3 months). The Public Prosecutor who has received the request shall decide without delay about a follow-up (article 557 of the Penal Procedures Code). In so far as the request is based on a treaty the desired follow-up is applied

as much as possible. In cases concerning a reasonable request that is not based on a treaty, as well as in cases whereby the compliance of the applicable treaty is not compulsory, the request will be granted, unless the compliance is in conflict with legal stipulations or with an instruction by the Minister of Justice (article 558 of the Penal Procedures Code).

1330. Requests that have been submitted for the investigation of criminal offences related to fees, taxes, customs, foreign exchange, or related offences and whose compliance can be of interest for the tax authorities and the Central Bank or for requests concerning data that are held by the Tax authorities or the Central Bank or by officials of this service and institutions that have become known in the execution of their services can only be met with after authorisation by the Minister of Justice and only after consultation with the Minister of Finance. This authorisation is limited to those requests that are treaty-based (article 560, section 2 of the Penal Procedures Code).

1331. As TF is not criminalized in accordance with the TF Convention there is some doubt as to whether freezing mechanisms could be invoked in response to a requesting foreign State's freezing requirement arising in relation to a terrorist financing offence. Refer also to section 2.4 of the report.

1332. In principle, all requests will be dealt with unless the request is unclear or the investigations asked for are not allowed according to local legislation; or if there is no treaty or bilateral agreement in place where the assistance requires investigative acts, or if there is no permission from the Attorney General. There will also be no follow up on requests made in the circumstances set out in article 559 of the Penal Procedures Code.

1333. According to article 559 of the Penal Procedures Code there will be no follow-up on ~~those~~ the following requests:

- a) in cases whereby the requesting country lacks jurisdiction according to the rules of international law;
- b) in so far as the suspect has been brought in or lured into the territory of the requesting country, or has been arrested and deprived of his freedom in a manner that is contrary to or unlawful according to international law;
- c) in so far as there is the suspicion that the request was issued for the purpose of an investigation that was instituted with the intention to prosecute, punish or hurt the suspect because of his religious or political conviction, his nationality, his race or the ethnic group to which he belongs;
- d) in so far as compliance would lead to the rendering of assistance to proceedings or adjudication that is incompatible with the principle on which article 70 of the Penal Code (double jeopardy) and article 282, first paragraph of the Penal Procedures Code is based;
- e) in case the request was issued for the benefit of an investigation of offences for which the defendant is already being prosecuted in Sint Maarten.

1334. There is an internal PPO guideline on the execution of international requests for mutual legal assistance. The Authorities have indicated that an international request for mutual legal assistance is sent to the Attorney General (under whose authority the request for legal assistance must be carried out), unless a treaty indicates otherwise (from prosecutor to prosecutor). Similar requests within the Kingdom of the Netherlands are sent directly to the Chief Public Prosecutor. After having determined that there are no legal restrictions the request is handed over to a Public Prosecutor, who shall determine the further course of action and who will act accordingly under the responsibility of the Chief Public Prosecutor. In most cases the Public Prosecutor charges the police with the execution of the investigation. The registration (the date of entry, execution and handling) of the requests is taken care of by a specially designated assistant to the prosecutor. The duration of the procedures and the

execution of the requests are supervised by the coordinating Public Prosecutor. Because of this the requests are dealt with rapidly and efficiently.

1335. A request cannot be refused because it involves fiscal matters. Requests for mutual legal assistance can also concern fiscal matters. Apart from the general conditions applicable to all requests for mutual legal assistance the special conditions are also applicable to the issuance of fiscal data (as described in article 560, paragraph 2, of the Penal Procedures Code). If a request refers to the investigation of criminal offences related to fees, taxes, customs, foreign exchange, or related offences and whose compliance can be of interest for the tax authorities and the Central Bank or for requests concerning data that are held by the Tax authorities or the Central Bank or by officials of this service and institution that have become known in the execution of their services, the request can only be dealt with after the authorization of the Minister of Justice. Such an authorization can only be issued after consultation with the Minister of Finance and only if the request is based on a treaty (see above).
1336. For mutual legal assistance information can be obtained from the commercial banks. The Authorities have indicated that if the required information concerns a criminal investigation neither confidentiality nor secrecy can obstruct a request for legal assistance. No provisions imposing obligations of secrecy or confidentiality on banks and credit institutions were identified in the NOSBCI. Interviews with the Authorities and credit institutions (banks) revealed that demands by law enforcement for information from these institutions are generally complied with on the basis of court orders being served.
1337. Article 177a –g of the Penal Procedures Code provides the Authorities with the requisite powers to demand the production or handing over of records pertaining to the financial position of the persons who are the subject of a criminal financial investigation in relation to-
- a) a criminal offence which is punishable by imprisonment for a term not exceeding years or more, or
  - b) an offence by which a benefit of some significance capable of being expressed in money, is acquired.
1338. Article 559 of the Penal Procedures Code does not contain grounds for refusal of mutual legal assistance on the basis of the laws that impose secrecy or confidentiality demands on the financial institutions or DNFBP. Additionally no provision was identified in the extracts of the Penal Code, Penal Procedures Code (Criminal Procedures Code) that were provided or the National Ordinance for Banks and Credit Institutions (NOSBCI) (Part VIII - ) expressly prohibiting reliance on secrecy or confidentiality obligations to avoid complying with such demands. However it was also noted that no provisions imposing obligations of secrecy or confidentiality on banks and credit institutions were identified in the NOSBCI. Interviews with the Authorities and credit institutions (banks) revealed that demands by law enforcement for information from these institutions are generally complied with on the basis of court orders being served.
1339. Article 252 of the Penal Procedures Code exempts from giving evidence or answering certain questions, persons who, on account of their status, profession or their office, are subject to a duty of confidentiality but solely with regard to information entrusted to them in their aforementioned capacity. Interviews with the DNFBPs (law firm, Notary and Accounting Profession) revealed that demands by law enforcement for information from these persons would be complied with on the basis of court orders being served.
1340. The Authorities have indicated that there are no provisions in the applicable laws that limit the powers of competent authorities when responding to requests for mutual legal assistance. The required competences, under Recommendation 28 are available for mutual legal assistance. Refer also to above regarding discussions on article 7 (mutual legal assistance) of the Vienna Convention and discussions on article 12 (Assistance to other states) to the TF Convention.

1341. The Authorities have indicated that in general there are no mechanisms to prevent jurisdiction disputes.

1342. If a request for legal assistance is granted and the cooperation of foreign legal officers and police is allowed in Sint Maarten, their actions will take place under the actual supervision and responsibility of the competent authorities for that purpose.

#### **Additional Elements**

1343. Based on the discussions above on mutual legal assistance reflect that generally the R28 powers of competent authorities are available for use when there is a direct request from foreign judicial or law enforcement authorities to the Sint Maarten counterparts, provided the circumstances in article 559 of the Penal Procedures Code do not exist; and provided there is dual criminality, where the request pertains to or involves the use of criminal investigative techniques.

#### **Special Recommendation. V**

1344. Apart from the existence of a treaty with the requesting foreign state (article 558 Penal Procedures Code), assistance can also be provided based on the existence of dual criminality, i.e. the offence the person is suspected of committing in the foreign State must also be an offence in NA (see articles 555 – 558 and 579a Penal Procedures Code). It should be noted that where the mutual legal assistance involves the Sint Maarten Authorities undertaking a criminal financial investigation, the seizure of objects in accordance with article 119 (criminal investigation) second paragraph 119(a) second paragraph (execution of a future (value based) dispossession order or payment of a fine) (i.e. provisional measures aimed at the freezing and seizure of proceeds of crime ) if there are grounds to expect that the requesting foreign State will file a request for the implementation of a seizure or of a sanction aimed at confiscation of illicitly acquired proceeds. (article 579a(2) Penal Procedures Code) (Refer also to discussions on SR.III - EC III.3 at section 2.4 of this report)

1345. A country can only enjoy mutual legal assistance or exchange of information and the like as long as criminal offences are criminalized according to the local law (the principle of dual criminality). The principle of dual criminality entails that the one country will only proceed to the rendering of legal assistance when the conduct, for which legal assistance is requested, has been criminalized both by the law of the requesting country and by the law of the requested country. So, a state will only be willing to assist another country in the prosecution and/or adjudication of offences that have (also) been criminalized by its own law. The Authorities have also indicated that as long as there is/ or can be a question of dual criminality the criteria 36.1 -36.6 in R 36 should also apply to obligations under SR.V.

1346. Accordingly, Sint Maarten can provide international legal assistance in a criminal investigation on the basis of the Penal Procedures Code and existing Treaties. International legal assistance is regulated in Book 7, Title VIII of the Penal Procedures Code articles 555 up to and including 565. (This position is of course subject to -

- The circumstances outlined at article 559 of the Penal Procedures Code;
- The requirement of dual criminality, and
- It should also be noted that article 597 of the Penal Procedures Code (Criminal Procedures Code) stipulates that unless the Minister (interpreted to mean Minister of Justice) is of the opinion that the request from a foreign authority to transfer the execution of a sanction imposed to the NA (read Sint Maarten) must be rejected, he shall seek advice of the court that has imposed the sanction in the highest fact finding

instance and the advice of the Attorney General, regarding whether the request must be declined in the interest of the proper administration of justice.

1347. Notwithstanding the foregoing, dual criminality is not compulsory for less radical and non-compulsory measures pursuant to article 558 of the Penal Procedures Code.

#### **Additional Elements**

1348. The mechanisms for determining the best venue for prosecution of defendants in connection with financing terrorism, terrorist acts and terrorist organisations as discussed in respect of criterion 36.7, and the powers of competent authorities required under R.28, as discussed in respect of criterion 36.8 apply to terrorism related offences as they do to ML and other predicate offences. Refer also to the foregoing discussions at paragraph 1692 above

#### **Recommendation 37 and SR. V**

1349. The Authorities have indicated that based on article 558 of the Penal Procedures Code the desired request will be honored as much as possible in so far as it is based on a treaty. In cases concerning a reasonable request that is not based on a treaty, as well as in cases whereby the applicable treaty does not include a compulsory compliance, the request will be met, unless the compliance is in violation of a legal regulation or of an instruction by the Minister of Justice.

1350. The MLA statistics provided by the Authorities are in respect of cases involving ML as no TF cases have yet arisen and no Terrorism or TF related requests for MLA appear to have been received or responded to, by the Authorities. It is however not clear whether the assistance provided by Sint Maarten as reflected by these statistics occurred regardless of the existence of dual criminality

1351. Dual criminality is not compulsory for less radical and non-compulsory measures pursuant to article 558 of the Penal Procedures Code. Dual criminality is required if special investigative measures and investigative powers have to be used in so far as the request for legal assistance covers the seizure of eligible (documentary) evidence and the wire-tapping of data traffic (article 562 of the Penal Procedures Code)

1352. In general, extradition is possible if the criminal offence for which extradition is requested is also a criminal offence in Sint Maarten. There are no legal or practical impediments to render assistance for the extradition and those forms of mutual legal assistance where dual criminality is required. Legal assistance can also consist of the so-called 'minor legal assistance', which can refer to the execution of certain investigative activities. Sint Maarten recognizes and accepts that there are different systems to categorize criminal offences. When considering dual criminality it is the underlying material conduct and not the legal title of the conduct that is taken into account.

1353. Under the Extradition Decree of Curacao, Aruba and Sint Maarten (EDACS) extradition is possible in relation to an offence which carries a minimum sentence of one year. (Refer to discussion on R.39 at section 6.4 of this report).

1354. The conditions on which extradition will be granted are contained in articles 2 and 6 of the EDACS and that the EDACS gives various time frames, for instance with regard to the assessment of the requests and the deferment period (articles 10, 15, 19 of the EDACS).

1355. Article 559 lists the circumstances in respect of which assistance will not be provided. Refer to discussion at EC36.2 at section 6.2 of this report. Assistance will not be provided if there is a suspicion the request for assistance is for an investigation instituted with the intention to



prosecute, punish or otherwise hurt the suspect because of his religion, political conviction, his nationality, his race or the group of the population to which he belongs. (article 559(1)(c))

1356. The Kingdom of the Netherlands, and consequently also Sint Maarten, does not extradite nationals to countries where the death penalty or corporal punishment can be imposed and will be executed (article 3 European Convention on Human Rights).

**Special Recommendation. V**

1357. Refer to the discussion above at section 6.3 of this report.

**Recommendation 38 and SR. V**

1358. It is regulated by law that investigative authorities can proceed to the identification and seizure of laundered assets, proceeds of the underlying offences or instrumentalities that have been used or are intended for the use when committing criminal offences or similar cases. All this in conformity with seizure and confiscation procedures.

1359. If a treaty request of a foreign state so asks for, article 579a of the Penal Procedures Code offers the possibility to open a so-called criminal financial investigation. This enables the police to gather information, ask financial institutions for information and seize objects. In brief, to execute various actions aimed at the forfeiture of illegal proceeds. These actions can only be executed if there are sufficient reasons to believe that the state in question will formally request the execution of a confiscation or expropriation measure.

1360. As mentioned before, article 579a of the Penal Procedures Code offers the possibility of a criminal financial investigation, which gives the authorities more freedom to trace the money. In Sint Maarten a criminal financial investigation can be conducted, pursuant to the stipulations of Title XVI of the third book of the Penal Procedures Code, in connection with a request based on a treaty by a foreign state, aimed at the stipulation of unlawfully obtained benefits, present or obtained in this country by a person who is subject to an investigation in the requesting state. The criminal financial investigation can only be conducted if this would have been possible if the offence or offences of which the person is suspected in the requesting state, would have been committed in Sint Maarten. During the criminal financial investigation the seizure of objects pursuant to article 119, second paragraph and article 119a, second paragraph of the Penal Procedures Code, can only take place if it can reasonably be expected that the requesting country will issue a request for the execution of a confiscation or a sanction aimed at the dispossession of illegal proceeds.

1361. There are specific requirements for the use of seizure in the scope of mutual legal assistance. Subject to seizure are objects that can serve as evidence if the action, for which mutual legal assistance is requested, has been committed in Sint Maarten and based on that action objects can be handed to the requesting state. In most cases seizure will need the consent of the examining judge, and the request of the Public Prosecutor because of the frequent contacts between the examining judge and the Public Prosecutors, this phase of the procedure will hardly take extra time.

1362. In addition to article 579a of the Penal Procedures Code, a foreign state, that has agreed to execute its own sanctions abroad, can submit a treaty request for (i.a.) the forfeiture of objects, even without Sint Maarten having to open a criminal financial investigation. If a judgment has been pronounced in a foreign country, this judgment can be (partially) executed in Sint Maarten with the consent of the Joint Court of Justice (articles 583 of the Penal Procedures Code).

1363. Refer also to discussion above at Recommendation 36

1364. The Authorities have indicated that in the scope of the mutual legal assistance request, seizure can also take place by instituting the corresponding conditions of 38.1. It is possible to determine the value based on article 38e of the Penal Code: stipulations concerning dispossession of unlawfully obtained benefits. There are roughly three ways to assess the economic profit (based on case law):
- Transaction based on calculation (in case of a criminal offence), or (in case more than one offence has been committed)
  - cash statements, or
  - asset comparisons.
1365. The Authorities indicated that this has not been established legally. The prosecution authorities among themselves come up with arrangements based on mutual legal assistance.
1366. The Authorities have also indicated that there are no provisions in the applicable laws that limit the powers of competent authorities when responding to requests for mutual legal assistance and that the required competences, under Recommendation 28 are available for mutual legal assistance.
1367. Additionally article 564 of the Penal Procedures Code specifically reflects that in case the cooperation of foreign officers of justice and police is permitted on the country's own territory, within the context of honouring the request, such officers shall act under the actual control and responsibility of the competent authorities and the questioning of suspects or witnesses by foreign officers shall be conducted in the presence of the examining judge or in a manner determined by him.
1368. As earlier indicated in section 6.2 of this report (refer discussions under R. 35). The Authorities have indicated that Sint Maarten has a "Crime Fund". The fund was instituted by law. This law remained applicable for Sint Maarten after October 10<sup>th</sup> 2010. The fund, which has as a main purpose to fund all sorts of initiatives to fight crime. After the disintegration of the Netherlands Antilles by October 10<sup>th</sup> 2010, Sint Maarten created its own fund. Shortly before that date an amount of over 4,5 million dollars, seized in a very successful Sint Maarten investigation including money laundering, was transferred to Curaçao. In the division of assets after the disintegration, Sint Maarten was only awarded with just over \$ 1 million. These funds are managed by the Ministry of Finance. Seized proceeds are deposited directly in this fund once the criminal case is irrevocable.
1369. The Authorities further informed the team that the "Crime Fund" is administered by the Ministry of Justice which reflects the fund is administered by the Ministry of Finance. The Authorities also informed the team that confiscated assets are paid into this fund and the proceeds of that fund can be used to finance law enforcement activities. There is no indication that this fund can be used for purposes such as health, education or for other appropriate purposes
1370. The Authorities indicated that Sint Maarten adheres to a system of "asset-sharing" which is not covered by special legal provisions. In Sint Maarten the Minister of Justice has the final say about "asset sharing". The distribution of "assets" is done as much as possible on the basis of a treaty (for instance a treaty between Sint Maarten and the United States

#### **Additional Elements**

1371. It is noted that in addition to article 579a of the Penal Procedures Code, a foreign state, that has agreed to execute its own sanctions abroad, can submit a treaty request for the forfeiture of objects, even without Sint Maarten having to open a criminal financial investigation. If a

judgment has been pronounced in a foreign country, this judgment can be (partially) executed in Sint Maarten with the consent of the Joint Court of Justice (articles 583 and further of the Penal Procedures Code)

**Special Recommendation. V**

1372. Refer to section 6.3.1 of this report regarding criminal financial investigations conducted seizures effected and sanctions imposed pursuant to international requests for assistance and compliance with R 38.

**Additional Element**

1373. Some of the terrorism offences and TF are not criminalized in accordance with the TF Convention, the international cooperation obligations at SRV would, in the case of Sint Maarten, only be possible to the extent that the criminalization of terrorism and TF have been effected in accordance with the TF Convention.

**Recommendation 30 – Resources (Central Authority for receiving/sending mutual legal assistance requests)**

1374. In Sint Maarten all request for mutual legal assistance are registered in a special registration system at the Public Prosecutor's Office. In those cases where the treaty requires that the request should be addressed to the Attorney-General, the request is forwarded, both by mail and in hard-copy, from the Attorney-General's Office to the PPO in Sint Maarten. In both offices it will be registered. Due to the size of the country, requests for legal assistance are dealt with under the coordination of the Public Prosecutor's Office according to the order of receipt/according to the order of importance by an investigation section of KPSM or by the RST, depending on the kind of request and the scale of the investigation.

1375. Police handling the requests for mutual legal assistance and extradition requests work directly under the supervision of the Public Prosecutor in charge of this portfolio. A request for mutual legal assistance is immediately sent to the Public Prosecutor pursuant to articles 555, 556 and 557 of the Penal Procedures Code. The Public Prosecutor who has received the request will decide without delay about the steps to be taken. The PPO works independently of the political decision making process.

**Structure**

1376. Duties of the Public Prosecution Service have been laid down in the Consensus Kingdom Law on the Public Prosecution Services. Just like the Joint Court of Justice the Public Prosecution Service forms part of the 'judiciary'. The Public Prosecution Service is in charge of the supervision of the enforcement of the legal regulations of Sint Maarten and of the settling of criminal cases against persons. The Public Prosecutor is the leader of the investigations by the police, and decides which cases are brought before the criminal court or which cases have to or will be dismissed. Moreover the Public Prosecutor's Office is charged with the execution of the judicial decisions in criminal cases both with regard to custodial sentences and community service as well as financial sanctions. The Public Prosecution Service is subdivided into the Office of the Attorney General and the Office of the Public Prosecutor at the Court of First Instance. The Attorney General is the head of the Public Prosecution Service. He is based in Curaçao but has offices on Sint Maarten and on Bonaire (on behalf of the Dutch Caribbean Islands). He is in charge of the judicial police. In the Attorney General's Office the Solicitor General, who serves as a prosecutor in the Court of Appeal, is a substitute for the Attorney General in his absence and is in charge of the prosecution in appeal cases. There are two Solicitor Generals working within the Attorney General's Office, one of which is designated to Sint Maarten. He is in charge of the Sint Maarten Office of the Attorney General. The

operational management of the Public Prosecution Service (controller, HRM, IT etc.) falls under the Office of the Attorney General. The Chief Public Prosecutor is the head of the Public Prosecutor's Office with the Court in First Instance. He is subordinated to the Attorney General. The Chief Public Prosecutor is assisted by a staff of Public Prosecutors, assisting lawyers, paralegals and other supporting staff members. At the Public Prosecutor's Office there are 5 Public Prosecutors under the supervision of a Chief Public Prosecutor and assisted by 4 assisting lawyers/paralegals. The Chief Public Prosecutor is appointed by the Queen while the Public Prosecutors are appointed by the Governor.

**Staff**

1377. At the moment there are 4,5 Public Prosecutors under the supervision of a Chief Public Prosecutor and assisted by 4 Public Prosecutor assistants (paralegals). All Public Prosecutors are appointed by the government, except for the Chief Public Prosecutor, who is appointed by the Queen. There is one Public Prosecutor specifically charged with the execution of requests for mutual legal assistance. He is assisted by a specially designated paralegal. The Attorney General is the central authority for the sending and receiving of mutual legal assistance requests and the extradition requests on behalf of the Minister of Justice. The Attorney General is the highest prosecution authority. The Attorney General is the head of the Public Prosecutor Service, existing of a first line PPO and the Office of the Attorney General.

**Funding:**

1378. The PPS receives its funds from the Government and, since the Consensus Kingdom law on the Public Prosecution Services is in place (by October 10<sup>th</sup> 2010) it is in command of its own budget. Therefore the PPS is not depending on any government influence on making its spending decisions, as long as it does not exceed the preset budget.

**Operational independence:**

1379. All criminal investigations are executed under the guidance and responsibility of the PPO. The PPO decides independently if and when to investigate or prosecute criminal cases. This is a fundamental principle of the criminal investigation and procedure. The Public Prosecutor's Office gives account about its pursued policy to the Minister of Justice. The Minister of Justice can give general guidelines with regard to prosecution policies to be pursued but the Minister of Justice cannot give orders/instructions to the PPO in specific criminal cases. He should adopt a reticent attitude in individual criminal cases
1380. The staffs of the PPO, including those involved in the sending and receiving of mutual legal assistance and extradition requests, maintain high professional standards, including the confidentiality standards. The staff is of high integrity and has been adequately trained. The same can be said of other government ministries and authorities involved in handling of mutual legal assistance requests and extradition requests. The Public Prosecutor's Office is an autonomous organization with sufficient knowledge on how these requests must be dealt with, if necessary in cooperation with other government services and agencies. See further paragraph 2.6.1, criteria 30.2 for training
1381. If it concerns a request for legal assistance to investigate money laundering and terrorist financing the Public Prosecutor will instruct the specialists of KPSM (including the criminal intelligence section and the information desk) and RST to investigate the matter. The staff of the Public Prosecutor's Office, including those who are involved in sending and receiving of requests for mutual legal assistance and extradition requests, are sufficiently trained to combat money laundering and terrorist financing.
1382. Knowledge transfer mostly takes place via the twinning-model. This means that less experienced staff members and investigators are paired with staff members and investigators with more experience in the field.

### **Recommendation 32**

#### ***Statistics***

1383. Sint Maarten maintains comprehensive statistics on matters relevant to the effectiveness and efficiency of systems for combating money laundering and terrorist financing. This includes annual statistics on mutual legal assistance or other international requests for co-operation, all mutual legal assistance and extradition requests (including requests relating to freezing, seizing and confiscation) that are made or received, relating to ML, the predicate offences and FT, including the nature of the request, whether it was granted or refused, and the time required to respond.

1384. The MLA statistics provided by the Authorities are in respect of cases involving ML as no TF cases have yet arisen and no Terrorism or TF related requests for MLA appear to have been received or responded to, by the Authorities. It is however not clear whether the assistance provided by Sint Maarten as reflected by these statistics occurred regardless of the existence of dual criminality.

<b>Request for Mutual Legal assistance</b>		<b>2009</b>	<b>2010</b>	<b>2011</b>
ML ML TF TF	Received (gen)	<b>25</b>	<b>53</b>	<b>81</b>
	Sent (gen)	<b>29</b>	<b>32</b>	<b>53</b>
	Received (gen)	-	-	<b>8</b>
	Sent (gen)	-	-	-
	Received (gen)	<b>0</b>	<b>0</b>	<b>0</b>
	Sent (gen)	<b>0</b>	<b>0</b>	<b>0</b>

#### **Preliminary reporting International/Interregional Legal Assistance Public Prosecutor's Office.**

##### **Status report**

1385. In 2011 81 requests for legal assistance were received, of which **36** have been handled **42** are pending and **3** were withdrawn by the petitioning State. Only by 2011 the sort of crime was registered in the system.

##### **Execution**

1386. At this moment the average execution duration is under 90 days as of the day of receipt of the request for legal assistance at the department of the Public Prosecutor in Sint Maarten up and to its execution.

##### **Expectation**

1387. Based on the number of received requests up till now the expectation is that approximately 90 requests will be received in 2012.

##### **Targets**

1388. The aim is to complete all requests for legal assistance within 6 months after receipt with an average processing time of 90 days (3 months). An application for the automatic calculation of the time needed for the execution of requests will be in place by January 2012.

#### **Source of the requests for Legal assistance**

Country of the applicant	2009	2010	2011
The Netherlands incl. BES	0	11	14
Aruba	1	2	1
Curacao	0	0	7
France	10	29	32
United States of America	8	7	18
Belgium	1	1	1
Barbados	0	0	1
BVI	0	1	0
Canada	0	0	2
Croatia	0	0	1
Germany	1	1	1
Great Britain / Scotland	1	0	0
Italy	1	0	0
Saint Lucia	0	0	1
Sweden	0	1	1
Venezuela	1	0	1
Switzerland	1	0	0
Grand Total	25	53	81

#### 6.3.2 Recommendations and Comments

1389. Amend the Penal Code to address the deficiencies set out in the ratings table below.

#### 6.3.3 Compliance with Recommendations 36 to 38 and Special Recommendation V

	Rating	Summary of factors relevant to s.6.3 underlying overall rating
<b>R.36</b>	<b>PC</b>	<p><b>The extent of Mutual Legal Assistance that may be extended by Sint Maarten is limited by the following deficiencies identified:</b></p> <ul style="list-style-type: none"> <li>• The indirect or unlawful provision of funding for the commission of a terrorism offence is not criminalized.</li> <li>• Terrorist financing is not criminalized in accordance with the FT Convention.</li> <li>• There is a doubt as to the extent of assistance that could be provided in relation to matters which have not been confirmed as predicate offences (i.e. Illicit Arms Trafficking, Smuggling, Insider Trading market manipulation).</li> </ul>
<b>R.37</b>	<b>LC</b>	<b>It is not clear whether the assistance provided by Sint Maarten as reflected by these statistics occurred regardless of the existence of dual criminality.</b>
<b>R.38</b>	<b>PC</b>	<b>The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance.</b>
<b>SR.V</b>	<b>PC</b>	<b>The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance.</b>

#### 6.4 Extradition (R.37, 39, SR.V)

##### 6.4.1 Description and Analysis

**Recommendation 39 and SR. V**

1390. The Authorities have indicated that extradition is a Kingdom affair pursuant to article 3, paragraph 1 sub h of the Charter for the Kingdom of the Netherlands. The Extradition Decree of Aruba, Curaçao and Sint Maarten (EDACS) and the Kingdom Act regarding cassation jurisdiction in extradition affairs for Aruba, Curacao and Sint Maarten are issued pursuant to mentioned article of the Charter for the Kingdom of the Netherlands. Extradition by Sint Maarten can only take place based on a treaty. Sint Maarten participates in various extradition treaties. The relevant laws and treaties concerning extradition are:

- The Extradition Decree of Aruba, Curaçao and Sint Maarten (N.G. 1926, no. 61 as lastly amended by Stb. 2010/343);
- Kingdom act regarding cassation jurisdiction in extradition affairs for Aruba, Curacao and Sint Maarten (Stb. 2003/204 as lastly amended by Stb. 2010/339);
- The European Convention on Extradition (Trb. 1965, 9);
- The Extradition Treaty between the Kingdom of the Netherlands and the United States (Trb. 1980, 111);
- The Extradition Treaty between the Kingdom of the Netherlands and Australia (Trb. 1985, 137); and
- The Extradition Treaty between the Kingdom of the Netherlands and Canada (Trb. 1991, 169).

1391. According to the Authorities, the extradition conditions are:

- It must be a case of dual criminality (article 2 paragraph 1 sub a of the EDACS);
- The offence is liable to punishment at the moment of the request and the extradition decision (article 2 paragraph 1 of the EDACS);
- The offence carries a minimum imprisonment of 1 year (article 2 paragraph 1 sub a of the EDACS);
- In both Sint Maarten and in the requesting state the right to prosecute must not have expired (article 5 of the EDACS). The time limits for all offences have been inserted in article 72 of the Penal Code;
- Extradition is possible as long as they wanted person is not currently being prosecuted, or has been sentenced in Sint Maarten with regard to another criminal offence than the one for which extradition is requested. Extradition is possible after the person in question has served his sentence or if he is granted a pardon for the crime he committed (article 6 of the EDACS).
- Extradition will not be granted if they wanted person has been prosecuted and sentenced and the sentence has been executed for the same material facts as the ones for which his extradition is being asked for (no “double jeopardy”). (See Article 70 of the Penal Code). (See also article 559 (1)(e) of the Penal Procedures Code).

1392. The Authorities have indicated that extradition is possible on the basis of a treaty and the principle of dual criminality. Extradition because of money laundering is possible, as the EDACS in article 2 allows extradition of all offences in so far as:

- A criminal investigation has been instituted concerning money laundering;
- The offence carries a maximum imprisonment of one year or longer according to the law in both the requesting state and in Sint Maarten. This makes money laundering an extraditable offence

1393. According to the Authorities, Dutch citizens are not extradited unless extradition is requested for the purpose of a criminal investigation that had been instituted against him and in the Governor’s opinion there are guarantees that, in case he is sentenced to a non-suspended prison sentence in the requesting state concerning the offences for which his extradition was granted,

he will be allowed to serve this sentence in his own country (Sint Maarten or somewhere else in the Kingdom of the Netherlands (article 4 of the EDACS).

1394. Pursuant to article 4a of the Penal Code, Sint Maarten can adopt the criminal prosecution of the requesting state. If a criminal offence (such as money laundering or terrorist financing) is committed abroad by a Dutch citizen, Sint Maarten, pursuant to article 4a, has jurisdiction to prosecute this person. For such adoption of the prosecution no treaty is required. The Authorities indicated that the Public Prosecutor shall then be charged with the assessment of the file and in so doing, the Public Prosecutor will follow the same procedures as in local criminal cases

1395. The Authorities have indicated that in general, if the extradition is refused, Sint Maarten can adopt the criminal prosecution of the requesting state. In that situation the cooperation between the central authorities is therefore of great importance and must take place for the smooth running of events.

1396. According to the Authorities the EDACS gives various time frames, for instance with regard to the assessment of the requests and the deferment period (articles 10, 15, 19 of the EDACS). Such measures are justifiable. The applicable procedure is similar to the one for mutual legal assistance requests.

#### **Additional Elements**

1397. The Authorities have indicated that as for the first question reference can be made (for example) to article 11, section 1 of the Extradition Treaty between the Kingdom of the Netherlands and the United States of America. A request for provisional detention of the requested person can be submitted through diplomatic channels or through direct communication between the United States Department of Justice and the Ministry of Justice in Sint Maarten. Usually a request is received by the Public Prosecutor's Office and is addressed to the Attorney General. An extradition request must be accompanied by the indictment and/or the warrant for arrest.

1398. According to the Authorities as for the second and third question two scenarios can be distinguished:

- 1) The requested person does not object to his/her extradition. In this case the abbreviated procedure of article 16 of the Extradition Treaty between the Kingdom of the Netherlands and the United States of America can be followed, meaning that only the examining magistrate will have to be involved in order to ascertain the wanted person's statement that he chooses for the abbreviated procedure. The court will not be involved. The requesting state is informed accordingly and a date is set for the requesting state to pick up the person.
- 2) The requested person objects to his extradition. In this case the examining magistrate and the Joint Court of Justice are involved. The examining magistrate will have to decide whether the arrest was lawful and the person can be longer detained. Subsequently the case will have to be brought before the Joint Court of Justice that, on a request of the Attorney General, will have to determine if extradition is permissible. It will advise the Governor accordingly. The Governor decides if the requested person can be extradited or not. The requested person may begin a cassation appeal procedure at the Supreme Court pursuant to the Kingdom act regarding cassation jurisdiction in extradition affairs for Aruba, Curaçao and Sint Maarten

#### **Special Recommendation. V**

1399. The view of the Authorities is that as terrorist financing is also a criminal offence in Sint Maarten (article 48a of the Penal Code) the requirement of dual criminality should be met when extraditing a person.



1400. As already indicated, there is no confirmation that terrorist financing was independently criminalized in accordance with the TF Convention. Accordingly, there is some doubt as to whether a MLA extradition request can be facilitated by Sint Maarten in relation to TF offences. Given the inability to verify whether the criminalization of terrorist acts fully accords with the Terrorism Financing Convention, there is uncertainty regarding the extent of assistance that can be rendered in relation to extradition requests for offences involving terrorism.

1401. The extradition of citizens is possible for the purpose of prosecution but under the condition that an imprisonment can be served in Sint Maarten or within the Kingdom of the Netherlands.

1402. If the extradition is refused, Sint Maarten can adopt the criminal prosecution of the requesting state.

#### **Additional Element**

1403. Applicable as in criteria 39.5.

#### **Recommendation 37 and SR. V**

1404. For less intrusive and non-compulsory measures the mutual legal assistance can be rendered in absence of dual criminality.

1405. For Sint Maarten the offence (for which extradition is requested) must be a criminal offence. The Authorities have indicated that a difference in legislation between Sint Maarten and the requesting state is not an impediment to the extradition and that when determining dual criminality the underlying conduct is taken into account and not the judicial title of the conduct.

1406. The extradition of citizens is possible for the purpose of prosecution but under the condition that an imprisonment can be served in Sint Maarten or within the Kingdom of the Netherlands. If the extradition is refused, Sint Maarten can adopt the criminal prosecution of the requesting state.

#### **Additional Elements**

1407. The position of the Authorities is that simplified procedures of extradition are in place. This position could not be ascertained from the EDACS

#### **6.4.2 Recommendations and Comments**

1408. Implement the recommended actions outlined in relation to SR II

#### **6.4.3 Compliance with Recommendations 37 & 39, and Special Recommendation V**

	<b>Rating</b>	<b>Summary of factors relevant to s.6.4 underlying overall rating</b>
<b>R.39</b>	<b>PC</b>	<b>The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance through extradition.</b>
<b>R.37</b>	<b>LC</b>	<b>It is not clear whether the assistance provided by Sint Maarten occurred regardless of the existence of dual criminality.</b>
<b>SR.V</b>	<b>PC</b>	<ul style="list-style-type: none"> <li><b>The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance through extradition.</b></li> </ul>

		<ul style="list-style-type: none"> <li>• <b>The deficiencies in SRII impact Sint Maarten's ability to extend assistance in connection with combating TF and terrorist acts.</b></li> </ul>
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## 6.5 Other Forms of International Co-operation (R.40 & SR.V)

### 6.5.1 Description and Analysis

#### **FIU (MOT)**

1409. Pursuant to Article 7 of the NORUT, the FIU (MOT) can exchange information with other FIUs. This information refers not only to information in its database but also information from law enforcement that the other FIU may require relating ML and TF. Pursuant to Article 5 of the NORUT the FIU (MOT) has direct access to law enforcement databases and registers. Pursuant to article 12 NORUT the FIU (MOT) can request information from all reporting entities, that are obliged to answer within a given time period.
1410. The authorities advise that that MOU's were signed with FIU Grenada and FIU Sint Kitts and Nevis. Currently FIU (MOT) has made with forty-five (45) other FIU's with the aim of establishing MOUs. The FIU (MOT) is currently seeking to become member of the Egmont Group.
1411. Pursuant to Article 21 of the NORUT the FIU (MOT) is authorized to provide information to institutions within the Kingdom of the Netherlands having tasks that overlap the activities of the FIU (MOT).
1412. The FIU (MOT) states that whenever another FIU (MOT) wants to use the received information for other purposes (police investigation, legal proceedings), the other FIU (MOT) needs to request authorization from the FIU (MOT). The FIU (MOT) first confers with the PPO, before giving the requested clearance to use the information for other purposes than purely gathering intelligence.
1413. The authorities did not provided statistics to the Examiners in support of the contention that the FIU (MOT) has conducted enquiries on behalf of the foreign counterparts or information exchanges with other FIUs.
1414. Pursuant to article 20, paragraph 2 of the NORUT, the information received is confidential and may only be used in the manner as described in this provision. Furthermore, pursuant to article 4 of the NORUT, only the Minister, the Head and designated personnel of the FIU can access the database
1415. By ministerial decree, controls and safeguards have been put into place for the use of the database. These controls and safeguard include: that only authorized personnel can access the database; the type of information that can be kept; when information can be deleted; and how long information can be stored.
1416. With regard to the FIU (MOT) in its role as supervisor it is not clear whether the FIU will be able to exchange information with its foreign supervisory counterparts.

#### **Customs**

1417. The Authorities have indicated that cooperation within the Kingdom is regulated in the Kingdom Law on Administrative Assistance of the Customs, and that article 3 provides for the exchange of information between the Customs authorities within the Kingdom. All requests

will be dealt with once there is a treaty, bilateral agreement or an MOU in place. The Authorities further indicated that Customs authorities may share received information with other authorities with the consent of the authorities that provided the information. The verification of this aspect of Sint Maarten's framework was not done as the required laws were not made available for this assessment.

1418. Customs is member of the Caribbean Customs Law Enforcement Council (CCLEC). CCLEC is a multilateral regional organization dedicated to improving the overall professionalism of its members.

1419. In 1989, the members of the Council agreed to formalize their exchange of information through the adoption of a Memorandum of Understanding (MOU) regarding mutual assistance and cooperation for the prevention and repression of customs offences in the Caribbean zone. At that time 21 countries signed the MOU but this number has increased to 36 signatories.

1420. The CCLEC comprises 38 Customs Administrations of which 36 are signatories to the CCLEC Memorandum of Understanding. Customs Netherlands Antilles, now Customs Sint Maarten, is very active within the CCLEC. The examiners were however not provided statistics evidencing international cooperation with other Customs authorities.

1421. The Extract of the General Regulation Import, Export and Transit of 1908 NG 1949 No. 62 provided by the Authorities does not include any provision speaking to the ability of the Customs Authorities to cooperate with its overseas counterparts, particularly those that are not members of CCLEC.

## **PPO**

1422. The Authorities have indicated that the exchange of information can be dealt with on a police-police basis. If needed as evidence or as essential information to start an investigation, requests will be dealt with promptly, especially when information can be provided without any further involvement of a judge. For example, requests from France (the French side of Sint Maarten) are usually dealt with within a few days.

1423. The authorities advice that in principle, all requests will be dealt with unless the request is unclear or the investigations asked for are not allowed according to local legislation; or if there is no treaty or bilateral agreement in place where the assistance requires investigative acts, or if there is no permission from the Attorney General. There will also be no follow up on requests made in the circumstances set out in article 559 of the Penal Procedures Code.

## **The Central Bank**

1424. Article 17, paragraph 1, of the Central Bank statute states that "In order to be able to carry out the tasks of the Bank, the Bank shall collect the required statistical data, either from the competent national authorities or directly from the economic subjects. For this purpose the Bank will cooperate with the competent authorities of the Countries or third countries and with international organizations." However, no further information is given with respect to the scope or conditions under which such cooperation will occur

1425. As long as the conditions of the relevant exchange of information provisions of the supervisory ordinances (article 41 NOSBCI, article 78, paragraph 2 NOSII, article 24 NOSTSP, article 28 NOSIIA, article 20, paragraph 5 NOIB, RFETCSM - Article 28(1)) are met, the Central Bank is able to exchange information without disproportionate or unduly restrictive conditions. Some of the standard conditions seen in the legislation were that –

- a) the objective for which such data or information is going to be used is insufficiently specified;
- b) the intended use of the data or information is not compatible with the supervision of financial markets or natural persons and legal persons active in such markets;
- c) the furnishing of the data or information would not be in keeping with the laws of the Netherlands Antilles or with public order or the data or information relates to individual investors;
- d) the non-disclosure of the data or information is not sufficiently guaranteed;
- e) it is reasonable to assume that the furnishing of the data or information will or could conflict with the interest that this ordinance attempts to protect; or
- f) there is insufficient guarantee that the data or information will not be used for any other objective than the one for which it is furnished

1426. The Central Bank has established formal arrangements (such as MOUs) with foreign supervisors to facilitate and promote information sharing between the Central Bank and the supervisor in the host country. Information sharing arrangements with host country supervisors include being advised of adverse assessments of qualitative aspects of the institution's operations, such as aspects related to the quality of risk management and controls at the offices in the host country. MOUs entered into thus far include:

- Superintendency of Banks of the Republic of Venezuela 1(997)
- De Nederlanscher Bank NV (1997)
- Central Bank of Aruba (1998)
- Pensionioen & Verzekeringskamer (2002)
- Central Bank of Aruba (Insurance ) (2003)
- National Commission for Banks and Insurance of Honduras (2006)
- Trilateral MOU with Aruba and the Kingdom of the Netherlands (2008)
- Regional MOU – financial institutions i.e. banks, non-bank financial institutions, insurance company, pension fund and any other institutions that provides financial services

1427. Under the MOUs that are in place, the Central Bank directors and staff have contact with the supervisory authorities of said countries. During these contacts, the status and the expertise of the local management of the relevant foreign operations are discussed, which also helps to evaluate the oversight of the licensed institution's management of its foreign operations. The MOUs also state that branches and subsidiaries established in the country of one of the parties may be inspected on-site by the home supervisor, provided adequate notification procedures and procedures to communicate results of such examinations are established.

#### International Requests for Assistance from Regulatory Bodies

Requests From	2006	2007	2008	2009	2010	2011
Supervisory departments of the Central Bank	0	1	1	1	2	0
Foreign Regulators (and completed)	16	30	7	23	54	0
Total	16	31	8	24	56	0

1428. Information can be obtained from the commercial banks. If it concerns a criminal investigation neither confidentiality nor secrecy can obstruct a request for legal assistance. Article 40 of the NOSBCI determines that the Central Bank has a duty of confidentiality, however at the request of the Public Prosecutor this can be diverged from in case of a criminal investigation. A similar

provision is included in all the other supervisory national ordinances. In general, confidential information can always be obtained through a court order, on a very short term.

1429. The Authorities have indicated that in accordance with the internal guidelines of the Central Bank, the formal response to request for exchange of information must occur within two weeks, with the exception of the more intricate requests. However information with regard to exchange of information was not provided to the team.

1430. Pursuant to the confidentiality provisions of the supervisory ordinances (article 40 NOSBCI, article 78 NOSII, article 20 NOIB, article 25, NOSIIA, article 23 NOSTSP, article 28 NOSCPF, article 10 NOSSE, article 27 RFETCSM) the information received can only be used in the manner as described in these provisions. Furthermore, in the MOUs concluded by the Central Bank, there are controls and safeguards with regard to the use of the provider's information. For instance the MOUs signed by the CBCS with its regulatory counterparts reflect that the mutual exchange of information is done on the basis of, among other things, reciprocal confidentiality.

### **Law Enforcement**

1431. The law enforcement entities provided information with respect to mechanisms used to share information internationally with their counterparts.

1432. The Coast Guard authorities reported that Substation Sint Maarten regularly shares information with the other substations in the Dutch islands as well as with French Sint Maarten. The examiners were not informed whether there was a specific piece of Kingdom legislation for the basis of the international cooperation amongst Coast Guards of the Kingdom. The KPSM reported that while information was shared with the Police of French Sint Maarten, that the two entities are in the process of formalising an agreement pursuant to the same. Information is shared and received through Interpol, the Drug Enforcement Administration of the US as well with Drug Commanders through the Pre-IDECE meetings. The VDSM has informed that they have shared information with countries and that there are in the process of making contact with the Special Branches of the Police in several jurisdictions. RST regularly shares information with other RST entities based on the other Dutch islands and the French entity OCTRIS (the Central Office for the Suppression of Illicit Trafficking in Drugs), Serious Organised Crime Agency (UK), DEA and United States Immigration and Customs Enforcement (ICE). With respect to Customs, Customs Sint Maarten is one of the 36 signatories of CCLEC as previously mentioned.

1433. The Authorities have indicated that within their mandate all competent authorities can both spontaneously and upon request, in relation to ML and the underlying predicate offences cooperate with their foreign counterparts. The law enforcement authorities have not provided information with respect to the exchanges of information with their international counterparts either spontaneously or in response to a request.

1434. According to the Authorities, within their mandate all competent authorities are able to conduct enquiries on behalf of their foreign counterparts. However, apart from the FIU (MOT) and the PPO, the authorities have not provided information to support this contention.

1435. Based on articles 555 up to and including 565 of the Penal Procedures Code, law enforcement authorities through the PPO are authorised to conduct investigations on behalf of foreign counterparts. No provisions have been identified under NOSBCI, RFETCSM, NOSIIA or the NOSTCSP which reflect that the Central Bank can undertake investigations on behalf of their foreign counterparts.

1436. Whenever a request for information is received, in general, this is immediately answered. In the cases of lawyers, notaries, tax consultants and accountants secrecy laws prohibit the exchange of information with regard to the determining of the legal position of a client, the legal assistance before, during or after legal proceedings, or advising with regard to starting or preventing legal proceedings
1437. Article 559 of the Penal Procedures Code does not contain grounds for refusal of mutual legal assistance on the basis that the laws impose secrecy or confidentiality demands on the financial institutions or DNFBP. Article 252 of the Penal Procedures Code exempts from giving evidence or answering certain questions, persons who, on account of their status, profession or their office, are subject to a duty of confidentiality but solely with regard to information entrusted to them in their aforementioned capacity. Interviews with some DNFBPs revealed that demands by law enforcement for information from these persons would be complied with on the basis of court orders being served
1438. A request cannot be refused because it involves fiscal matters. Requests for cooperation can also concern fiscal matters. Apart from the general conditions applicable to all requests for mutual legal assistance the special conditions are also applicable to the issuance of fiscal data (as described in article 560, paragraph 2, of the Penal Procedures Code). If a request refers to the investigation of criminal offences related to fees, taxes, customs, foreign exchange, or related offences and whose compliance can be of interest for the tax authorities and the Central Bank or for requests concerning data that are held by the Tax authorities or the Central Bank or by officials of this service and institution that have become known in the execution of their services, the request can only be honoured with the authorization of the Minister of Justice. Such an authorization can only be issued after consultation with the Minister of Finance and as long as the request is based on a treaty.

#### **Additional Elements**

1439. From the foregoing (section 6.2 R. 35, Treaty Table, R.36; R.40) it appears that in relation to cooperation between financial regulatory authorities, information is exchanged directly. In relation to law enforcement authorities the advised mechanisms were not specific as to whether cooperation is effected directly or indirectly as contemplated by EC40
1440. From the foregoing (section 6.2 R. 35, R.36; R.40) it appears that in relation to cooperation between financial regulatory authorities, requests for information must conform with the parameters settled for such cooperation and it would appear that such confirmations would include the matters raised at EC40.10.1.. In relation to law enforcement authorities while the advised mechanisms were not extensive the Authorities indicated that requests that were not clear would not be granted. It further appears from the advised mechanisms that the matters raised at EC.40.10.1 would be essential information that would need to be provided in order for the Authorities to know whether assistance can be granted in accordance with the laws of Sint Maarten or whether the matter falls within the circumstances in which assistance cannot or will not be provided as indicated at articles 559 of the Penal procedures Code and as otherwise indicated in this report.
1441. Among the tasks of the FIU set out in Article 3 of the NORUT are:-
- Collecting, registering, processing and analysing the data it obtains to determine its relevance for preventing and tracing ML, FT and the underlying criminal offences;
  - Giving information to the business sectors and professional groups, Public Prosecutions Department, Civil servants charged with tracing offences and to the public regarding manifestations and prevention of ML and TF.

- Maintaining contacts with foreign police and non-police agencies that have a task comparable to that of the Reporting Office

### ***Special Recommendation V***

1442. The Authorities have indicated that all the mechanisms and arrangements under 40.1 – 40.9 apply to international cooperation on terrorist financing.

1443. However the Authorities need to confirm that terrorism offences and TF are criminalized in accordance with the TF Convention. Until this is confirmed the elements 40.1-40.9 would only be applicable to the obligations at SRV in Sint Maarten to the extent that the criminalization of terrorism and TF have been effected in accordance with the TF Convention in relation to requests that require investigative acts and dual criminality in order for assistance to be provided.

### **Additional Elements**

1444. The Authorities have indicated that all the mechanisms and arrangements under 40.10 – 40.11 apply to international cooperation on terrorist financing.

1445. However again, the additional elements at R 40 would only be applicable in so far as the assistance required does not require dual criminality or investigative acts to be undertaken in order for assistance to be provided.

### **Recommendation 32**

1446. Statistics were not provided

#### **6.5.2 Recommendations and Comments**

1447. Authorities should consider revising the respective Ordinances (NOSBCI, RFETCSM, NOSIIA, NOSTCSP) to expressly allow for the CBCS to undertake investigations on behalf of their foreign counterparts. Consequential amendments to the Charter governing the powers of the CBCS may also be necessary to allow for the amendment of the Ordinances as recommended.

1448. The authorities should maintain statistics on entities' spontaneous referrals of information as well as information supplied as a result of a request. This system can be used at a policy and operational level to adequately assess the country's international cooperation efforts for AML/CFT.

1449. Sint Maarten's domestic legislation for all law enforcement entities should specifically provide for international cooperation with their foreign counterparts.

#### **6.5.3 Compliance with Recommendation 40 and Special Recommendation V**

	<b>Rating</b>	<b>Summary of factors relevant to s.6.5 underlying overall rating</b>
<b>R.40</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• <b>The Extract General Regulation Import, Export and Transit of 1908 NG 1949 No. 62 (In relation to Customs) and all domestic legislation with respect to the law enforcement entities should provide for international cooperation with their counterparts</b></li> <li>• <b>No provisions have been identified under NOSBCI, RFETCSM, NOSIIA or the NOSTCSP which reflect that the Central Bank can undertake</b></li> </ul>

		<p>investigations on behalf of their foreign counterparts.</p> <ul style="list-style-type: none"> <li>Statistics have not been provided with respect to spontaneous referrals of information as well as to information supplies on request in order that there can be an adequate assessment of the implementation of this criteria</li> </ul>
SR.V	PC	The deficiencies in R40 would impact Sint Maarten's to the exchange of information regarding TF.

## 7. OTHER ISSUES

### 7.1 Resources and statistics

	Rating	Summary of factors relevant to Recommendations 30 and 32 and underlying overall rating
R.30	PC	<ul style="list-style-type: none"> <li>The MOT lacks of staff to adequately perform its functions (including the Head of FIU)</li> <li>The staff of the FIU does not have adequate and relevant training for combatting ML &amp; TF.</li> <li>The FIU lacks of analytical tools such as Analyst Notebook to assist in the analysis of UTRs.</li> <li>The FIU lacks of resources to protect the FIU data, premises and staff; eg. Offsite electronic data fireproof safe, fire extinguishers, etc.</li> <li>Several of the law enforcement agencies possess a shortage of suitably qualified officers trained in ML investigations.</li> <li>Inadequate training for ML and TF</li> <li>No allocation of financial resources for ML and TF.</li> <li>Inadequate space for the Court of First Instance to properly execute its functions</li> </ul>
R.32	PC	<ul style="list-style-type: none"> <li>No statistics available relating to requests to overseas FIUs.</li> <li>No statistics available for requests for additional information by the FIU(MOT) to reporting entities.</li> <li>Several reporting entities have not filed UTRs for either subjective or objective indicators and appear not to understand or know their responsibility to report.</li> <li>The authorities should maintain statistics on entities' spontaneous referrals of information as well as information supplied as a result of a request. This system can be used at a policy and operational level to adequately assess the country's international cooperation efforts for AML/CFT.</li> </ul>

### 7.2 Other relevant AML/CFT measures or issues

Assessors may use this section to set out information on any additional measures or issues that are relevant to the AML/CFT system in the country being evaluated, and which are not covered elsewhere in this report.

### 7.3 General framework for AML/CFT system (see also section 1.1)

Assessors may use this section to comment on any aspect of the general legal and institutional framework within which the AML/CFT measures are set, and particularly with respect to any structural elements set out in section 1.1, where they believe that these elements of the general framework significantly impair or inhibit the effectiveness of the AML/CFT system.



## TABLES

**Table 1: Ratings of Compliance with FATF Recommendations**

**Table 2: Recommended Action Plan to improve the AML/CFT system**

**Table 3: Authorities' Response to the Evaluation (if necessary)**

**Table 1. Ratings of Compliance with FATF**

### Recommendations

The rating of compliance vis-à-vis the FATF Recommendations should be made according to the four levels of compliance mentioned in the 2004 Methodology (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC)), or could, in exceptional cases, be marked as not applicable (NA).

Forty Recommendations	Rating	Summary of factors underlying rating <sup>16</sup>
<b>Legal systems</b>		
1. ML offence	LC	<ul style="list-style-type: none"> <li>• No confirmation that illicit arms trafficking, smuggling, insider trading and market manipulation are criminalised as ML predicate offenses.</li> <li>• The Penal Code is not applicable to anyone who outside of Sint Maarten committed the crimes of ML; TF and most of the non-terrorist related predicate offences.</li> </ul>
2. ML offence – mental element and corporate liability	LC	<ul style="list-style-type: none"> <li>• No evidence that parallel civil and criminal proceedings are possible.</li> <li>• The manner in which the data was captured did not allow for proper assessment of the effectiveness of ML prosecutorial efforts</li> <li>• Penalty applicable to culpable ML is not sufficiently dissuasive</li> </ul>
3. Confiscation and provisional measures	PC	<p>Effectiveness issues</p> <ul style="list-style-type: none"> <li>• The powers to confiscate or take provisional measures in relation to terrorist financing or <b>some</b> predicate offences for ML are limited (please see ratings R1 and SR11)</li> <li>• Confiscation measures (under both pre-conviction and post-conviction circumstances) in the Penal Code do not allow for the measures to be imposed without notice.</li> <li>• Based on the insufficient statistics effectiveness of the confiscation regime could not be confirmed.</li> </ul>
<b>Preventive measures</b>		
4. Secrecy laws consistent with the Recommendations	LC	<ul style="list-style-type: none"> <li>• No clear provision for the FIU (MOT) as supervisor to exchange information with other foreign supervisors</li> </ul>
5. Customer due diligence	PC	<ul style="list-style-type: none"> <li>• The current version versions of the NOIS and NORUT do not adequately cover the scope of financial services activities and operations conducted by financial institutions that are subject to AML/CFT requirements. Activities and operations not covered include: <ul style="list-style-type: none"> <li>○ Lending (factoring)</li> <li>○ Financial leasing</li> <li>○ Financial guarantees and commitments</li> </ul> </li> </ul>

<sup>16</sup> These factors are only required to be set out when the rating is less than Compliant.

		<ul style="list-style-type: none"> <li>○ Trading in money market instruments</li> <li>○ Participation in securities issues and the provision of financial services related to such issues</li> <li>○ Individual and collective portfolio management</li> <li>• Certain categories of financial services providers are not covered in the scope of the NOIS and NORUT: <ul style="list-style-type: none"> <li>○ Intermediaries operating in the Curacao Stock Exchange (DCSX)</li> <li>○ Life insurance agents</li> </ul> </li> <li>• Ministerial Decree for the Implementation of the NOIS (N.G. 2010, no. 11) does not specify or cross-reference any threshold for occasional transactions that are wire transfers, and it is unclear whether Article 4 of the Ministerial Decree (referencing article 1, paragraph one, section b., under 7, of the NOIS) apply to wire transfers.</li> <li>• There are no provisions in law or regulation for a financial institution to undertake CDD measures when it has doubts about the veracity or adequacy of previously obtained customer identification data.</li> <li>• The basic obligation to conduct CDD when there is a suspicion of money laundering or terrorist financing, regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations is not set out in law or regulation.</li> <li>• The basic obligation to conduct ongoing due diligence is not specified in law or regulation</li> <li>• The requirement to verify the identity of customers and beneficial owners before the establishment of business relations is not always practical.</li> <li>• There are no provisions for insurance companies and insurance brokers to re-examine the relationship with the client to determine whether to terminate and whether to report to the MOT if doubts arise relating to the identity of the client after the client has been accepted and accounts have been opened</li> </ul>
6. Politically exposed persons.	LC	<ul style="list-style-type: none"> <li>• No clear requirements within the P&amp;Gs for financial institutions to put in place appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP.</li> </ul>
7. Correspondent banking	LC	<ul style="list-style-type: none"> <li>• Only the P&amp;G for CI contain specific provisions on correspondent banking activities. No similar provisions exist for other types of financial institutions.</li> <li>• There are no provisions for financial institutions to assess the respondent institution's AML/CFT controls, and to ascertain that they are adequate and effective.</li> </ul>
8. Non face to face and new technologies.	LC	<ul style="list-style-type: none"> <li>• There is no requirement for MTC to comply with criteria 8.2 and 8.2.1</li> </ul>
9. Third parties and introducers	PC	<ul style="list-style-type: none"> <li>• The “adequately supervised” criterion in the P&amp;Gs is not in line with the requirements of essential criteria 9.3.</li> <li>• The sources through which financial institutions should satisfy themselves that a third party is adequately regulated is limited to Mutual Evaluation Reports</li> <li>• There are no requirements for MTC to comply with Recommendation 9</li> </ul>

10. Record keeping	PC	<ul style="list-style-type: none"> <li>• The obligation under E.C. 10.1, which compels financial institutions to maintain all necessary records on transactions, is not clearly stipulated in law or regulation.</li> <li>• The obligation to maintain records of business correspondence for at least five years following the termination of an account or business relationship is not stated in law or regulation.</li> <li>• The obligation under E.C. 10.3 requiring that all customer and transaction records and information be available to competent authorities upon appropriate authority on a timely basis should be in law or regulation</li> </ul>
11. Unusual transactions	LC	There are no specific provisions in the P&Gs for financial institutions to keep documented findings regarding complex, unusual large transactions, or unusual patterns of transactions, available for competent authorities and auditors for at least five years.
12. DNFBP – R.5, 6, 8-11	NC	<ul style="list-style-type: none"> <li>• The threshold for identification requirements for casinos is not in accordance FATF standard.</li> <li>• No AML/CFT requirements for internet casinos.</li> <li>• No requirements, by law or regulation for DNFBPs regarding criteria 5.2.c, 5.2.d, 5.2.e and 5.7</li> <li>• No requirements for DNFBPs supervised by the FIU (MOT) and casinos regarding criteria 5.6 to 5.11, 5.16 and 5.17</li> <li>• The deficiencies in section 3.5 for Rec. 10 which are applicable to all DNFBPs</li> <li>• No legislation i.e. law or guidelines for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 6, 8, 9 and 11</li> <li>• No requirements for SAI and AII regarding criteria 6.21 and 9.3</li> </ul>
13. Suspicious transaction reporting	NC	<ul style="list-style-type: none"> <li>• The scope of UTR reporting may not be as extensive as required by FATF as some designated categories of predicate offenses for ML are not covered in Sint Maarten (see R1).</li> <li>• It is unclear that suspicious transactions apply regardless of whether they involve tax matters.</li> </ul> <p><i>Effectiveness issues</i></p> <ul style="list-style-type: none"> <li>• Heavy reliance on objective indicators (i.e threshold).</li> <li>• The burden of reporting subjective (rules based) indicators could detract from the FIs reporting genuine suspicious transactions.</li> </ul>
14. Protection & no tipping-off	PC	It is not clear that this prohibition covers financial institutions and their directors officers and employees (permanent or temporary).
15. Internal policies and controls	C	This Recommendation has been fully observed.
16. DNFBP – R.13-15 & 21	NC	<ul style="list-style-type: none"> <li>• The deficiencies identified for Recs. 13 and 14 in section 3.7 apply to all DNFBPs</li> <li>• No legislation i.e. law or guidelines for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 15 and 21</li> <li>• DNFBPs supervised by the Central Bank are not required to apply counter-measures to countries which do not or</li> </ul>

		<p>insufficiently apply FATF Recommendations.</p> <ul style="list-style-type: none"> <li>• UTR reporting by DNFBPs is ineffective</li> </ul>
17 Sanctions	PC	<ul style="list-style-type: none"> <li>• Outside of the Civil and Penal Codes, there are no indications that sanctions could apply to directors and senior management of financial institutions.</li> <li>• Sanctions not effective against MTCs that continue to operate without licenses</li> <li>• Sanctions appear to be used sparingly</li> </ul>
18. Shell Banks	C	This Recommendation has been fully observed.
19. Reports of Currency transactions	C	This Recommendation has been fully observed.
20. Other NFBP & secure transaction techniques	C	This Recommendation has been fully observed.
21. Special attention for higher risk countries	PC	<ul style="list-style-type: none"> <li>• Notices with respect to strategic deficiencies are limited to jurisdictions for which the FATF calls for action</li> <li>• Countermeasures are not clearly specified with respect to countries that do not apply or insufficiently apply the FATF Recommendations</li> </ul>
22. Branches and subsidiaries	C	This Recommendation has been fully observed.
23. Regulation, supervision and monitoring	PC	<ul style="list-style-type: none"> <li>• Unlicensed MTCs continue to operate within Sint Maarten, impacting on effectiveness with respect to E.C. 23.1, E.C. 23.5 and E.C. 23.6</li> <li>• Low number of on-site inspections for MTCs</li> <li>• Factoring services are yet to be subject to Central Bank supervision under the NOIS and NORUT.</li> <li>• The RBA is not calibrated for AML/CFT risks.</li> </ul>
24. DNFBP - regulation, supervision and monitoring	NC	<ul style="list-style-type: none"> <li>• There is no adequate AML/CFT regulation and supervision of casinos</li> <li>• No supervisory regimen for Internet casinos.</li> <li>• The FIU (MOT) as supervisory authority has not started yet.</li> <li>• The FIU (MOT) does not have adequate resources to fulfil their supervisory role.</li> <li>• The deficiency identified in section 3.10 (R. 29 and R17) with regard to the supervisory function of the Central Bank applied.</li> </ul>
25. Guidelines & Feedback	PC	<ul style="list-style-type: none"> <li>• Not much guidance is given to financial institutions on TF techniques and methods.</li> <li>• P&amp;G for providers of factoring services is not in place.</li> <li>• DNFBPs supervised by the FIU and do not receive sufficient guidance to DNFBPs on complying with AML/CFT requirements</li> </ul>
<b>Institutional and other measures</b>		
26. The FIU	NC	<ul style="list-style-type: none"> <li>• The legal basis for the establishment of the FIU (MOT) is not clear.</li> <li>• There is an absence of a permanent FIU Head physically present in the FIU on a daily basis.</li> <li>• Not all reporting entities are aware of the existence of the FIU (MOT) in Sint Maarten. Inadequate training and guidance sessions for reporting entities.</li> <li>• Articles 4, 8, 16 and 22 of NORUT present a risk to the</li> </ul>

		<p>operational autonomy of the FIU and create opportunities for undue interference and influence.</p> <ul style="list-style-type: none"> <li>• There is a low number of investigative reports forwarded by the FIU(MOT) to the PPO.</li> <li>• The security of the FIU(MOT) information, the premises and employees requires improvement.</li> <li>• The authorities should produce and publish the outstanding Annual Report for 2011 and ensure that it contains information relating to the typologies and trends for ML and TF for Sint Maarten.</li> <li>• Effectiveness of the FIU (MOT) could not be confirmed</li> </ul>
27. Law enforcement authorities	PC	<p><i>Effectiveness:</i></p> <ul style="list-style-type: none"> <li>• No financial resources have been allocated for ML and TF training for the local law enforcement agencies</li> <li>• There is a shortage of suitably qualified law enforcement officers generally to execute effective ML investigations.</li> <li>• No specific training for TF or ML for several of the law enforcement authorities.</li> <li>• Unlicensed MTCs continue to operate within Sint Maarten</li> </ul>
28. Document production, search and seizure	C	This Recommendation has been fully observed
29. Supervisors	LC	<ul style="list-style-type: none"> <li>• There are no explicit provisions in the NOIS or the NORUT for sanctions against directors or senior management of financial institutions.</li> <li>• Sanctions have not dissuaded money remitters from operating without a licence.</li> </ul>
30. Resources, integrity and training	PC	<ul style="list-style-type: none"> <li>• The MOT lacks of staff to adequately perform its functions (including the Head of FIU)</li> <li>• The staff of the FIU does not have adequate and relevant training for combatting ML &amp; TF.</li> <li>• The FIU lacks of analytical tools such as Analyst Notebook to assist in the analysis of UTRs.</li> <li>• The FIU lacks of resources to protect the FIU data, premises and staff; eg. Offsite electronic data fireproof safe, fire extinguishers, etc.</li> <li>• Several of the law enforcement agencies possess a shortage of suitably qualified officers trained in ML investigations.</li> <li>• Inadequate training for ML and TF</li> <li>• No allocation of financial resources for ML and TF.</li> <li>• Inadequate space for the Court of First Instance to properly execute its functions</li> </ul>
31. National co-operation	PC	<ul style="list-style-type: none"> <li>• The CIWG needs to be formally established.</li> <li>• Many of the national coordination mechanisms (such as the national AML Committee - CIWG; and Trainings to be undertaken by the PPO) are not yet in operation.</li> </ul>
32. Statistics	PC	<ul style="list-style-type: none"> <li>• No statistics available relating to requests to overseas FIUs.</li> <li>• No statistics available for requests for additional information by the FIU(MOT) to reporting entities.</li> <li>• Several reporting entities have not filed UTRs for either subjective or objective indicators and appear not to understand or know their responsibility to report.</li> </ul>
33. Legal persons – beneficial owners	NC	<ul style="list-style-type: none"> <li>• There is no system in place to ensure access to the UBO information</li> </ul>

		<ul style="list-style-type: none"> <li>• Not all competent authorities have access in timely fashion to adequate, accurate and current UBO information.</li> <li>• The requirement for bearer shares to be transformed into registered shares operates at the discretion of the shareholder and is therefore not mandatory.</li> <li>• The NDCBSC does not require the capture and retention of the ultimate beneficial ownership details of the legal person on whose behalf the bearer shares are kept or held</li> </ul>
34. Legal arrangements – beneficial owners	LC	<ul style="list-style-type: none"> <li>• There is no certainty that all Competent Authorities have timely access to UBO information</li> </ul>
<b>International Co-operation</b>		
35. Conventions	PC	<p><i>Implementation in accordance with the Vienna Convention</i></p> <ul style="list-style-type: none"> <li>• No specific provision was identified in relation to non-treaty based requests for extradition, expedition of extradition procedures and simplification of evidentiary requirements,</li> <li>• The framework under the criminal laws provided is not indicative of Sint Maarten having the ability to extend cooperation and assistance to Transit States as contemplated by article 10 of this Convention.</li> <li>• No evidence of implementation of controlled delivery techniques by the Authorities.</li> <li>• No specific provisions have been identified from the laws provided or advised in relation to special arrangements with Commercial Carriers precautionary measures implemented to ensure commercial carriers are not used for the commission of offences</li> <li>• No provisions have been identified in the laws provided which cover the Illicit Traffic at Sea</li> <li>• No provisions identified regarding measures to suppress the use of mails for illicit traffic.</li> </ul> <p><i>Implementation in accordance with the Palermo Convention</i></p> <ul style="list-style-type: none"> <li>• No measures were identified in the law in relation to having appropriate measures to encourage persons who have participated in organized criminal groups to cooperate with law enforcement.</li> <li>• The advised training initiatives do not appear to cover control techniques in free trade zones and free ports; modern law enforcement equipment and techniques, electronic surveillance, combating organized crime through the use of computers, telecommunications networks or other forms of modern technology and bilateral and multilateral arrangements to maximize operational and training activities of article 29 of the Palermo Convention.</li> <li>• No laws or measures identified regarding the matter of coordinated efforts bilaterally and multilaterally to provide assistance to developing countries in their efforts to combat transnational organized crime.</li> <li>• Verification of whether the laws addressed – <ul style="list-style-type: none"> <li>a) The establishment of national records of persons disqualified from acting as directors of legal persons, and</li> <li>b) The exchange of information contained in the</li> </ul> </li> </ul>

		<p>abovementioned national records with the competent authorities of other State Parties.</p> <p>Could not be done as the relevant articles were not provided for assessment.</p> <ul style="list-style-type: none"> <li>• Laws do not address Prevention of the misuse by organized criminal groups of Government tender processes and of subsidies and licenses granted by public authorities.</li> <li>• Laws and framework do not address <ul style="list-style-type: none"> <li>d) The promotion of public awareness regarding the existence, gravity of and threat posed by transnational organized crime;</li> <li>e) Informing the Secretary General of the UN of the authority/authorities that can assist other State Parties in developing measures to prevent transnational organized crime, and</li> <li>f) Collaboration with other States (apart from the already advised joint cooperation and other collaborative efforts discussed above) including participation in international projects aimed at the prevention of transnational organized crime.</li> </ul> </li> </ul> <p><i>Implementation in accordance with the Terrorist Financing Convention</i></p> <ul style="list-style-type: none"> <li>• Wilful provision of funds etc. to individual terrorists does not appear to be covered by the approach to terrorist financing in the Penal Code.</li> <li>• No specific penalty is indicated for the offence of TF, appropriateness of this penalty in relation to this Article therefore cannot be assessed.</li> <li>• TF is not criminalized in accordance with the FT Convention. There is some doubt as to whether freezing mechanism could be invoked in response to a requesting foreign State's freezing requirement arising in relation to a terrorist financing offence.</li> <li>• No law or measure identified regarding the use of forfeited funds to compensate the victims of terrorist offences or their families.</li> <li>• Not all terrorism offences referenced in Annex 1 to the TF Convention are criminalized as required.</li> <li>• Reciprocal confidentiality (as required by article 12 (Assistance to other States) is not addressed in the Penal Code or Penal Procedures Code.</li> <li>• No provisions addressing the matters of custody arrangements, terms under which an offender transferred to Sint marten from a State will be returned to that State from which the offender was transferred, credit for time spent in custody of State to which the offender was transferred, were identified in the Penal Code or Penal Procedures Code.</li> <li>• No laws were identified on the matter of the guarantee of fair treatment of persons in custody</li> <li>• There is a strong possibility therefore that the TCSP owners, directors and some managers not falling within the definition of staff, may be exposed to criminal liability for breaches of the NOSTSP in respect of reports made by the</li> </ul>
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		<b>TCSP pursuant to the NORUT</b>
36. Mutual legal assistance (MLA)	<b>PC</b>	<p>The extent of Mutual Legal Assistance that may be extended by Sint Maarten is limited by the following deficiencies identified:</p> <ul style="list-style-type: none"> <li>• The indirect or unlawful provision of funding for the commission of a terrorism offence is not criminalized.</li> <li>• Terrorist financing is not criminalized in accordance with the FT Convention.</li> <li>• There is a doubt as to the extent of assistance that could be provided in relation to matters which have not been confirmed as predicate offences (i.e. Illicit Arms Trafficking, Smuggling, Insider Trading market manipulation).</li> </ul>
37. Dual criminality	<b>LC</b>	It is not clear whether the assistance provided by Sint Maarten occurred regardless of the existence of dual criminality.
38. MLA on confiscation and freezing	<b>PC</b>	The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance
39. Extradition	<b>PC</b>	The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance through extradition.
40 Other forms of co-operation	<b>PC</b>	<ul style="list-style-type: none"> <li>• The Extract General Regulation Import, Export and Transit of 1908 NG 1949 No. 62 (In relation to Customs) and all domestic legislation with respect to the law enforcement entities should provide for international cooperation with their counterparts</li> <li>• No provisions have been identified under NOSCBI, RFETCSM, NOSIIA or the NOSTCSP which reflect that the Central Bank can undertake investigations on behalf of their foreign counterparts.</li> <li>• Statistics have not been provided with respect to spontaneous referrals of information as well as to information supplies on request in order that there can be an adequate assessment of the implementation of this criteria</li> </ul>
<b>Nine Special Recommendations</b>	<b>Rating</b>	<b>Summary of factors underlying rating</b>
SR.I. Implement UN instruments	<b>PC</b>	Refer to the ratings Table at Sections 2.2. and 2.4 of this Report.
SR.II. Criminalise terrorist financing	<b>NC</b>	<ul style="list-style-type: none"> <li>• No specific penalty is reflected in the Penal Code for the offence of TF.</li> <li>• The indirect or unlawful provision of funding for the commission of a terrorism offence is not criminalized.</li> <li>• The wilful provision of funds etc. to individual terrorists is not criminalized.</li> <li>• TF is not independently criminalized and therefore there is no comprehensive treatment of terrorist financing in the Penal Code as required by the TF Convention</li> <li>• The Penal Code does not specify a penalty for the legal person which participates in an organization aimed at committing terrorist offences.</li> <li>• Not all terrorism offences referenced in Annex 1 to the TF Convention are criminalized as required.</li> </ul>
SR.III. Freeze and confiscate terrorist assets	<b>PC</b>	<ul style="list-style-type: none"> <li>• The framework does not support an ability to invoke freezing mechanisms in response to a requesting foreign</li> </ul>



		<p>State's freezing requirement.</p> <ul style="list-style-type: none"> <li>• The substantive freezing mechanism for persons listed pursuant to UN Resolution 1267 (1999) would not meet the 'without delay' requirement based on the intervening legislative process between listing by the UN and issue of the requisite Sanctions National Decree which compels the freezing.</li> <li>• There is no clear guidance specially to other persons and entities concerning their obligations in taking action under the freezing mechanism</li> <li>• The Sanctions National Decree does not expressly refer to assets jointly held by designated persons, terrorists or terrorist organizations with third parties. The wording of the Decree also raises issues of enforceability of sanctions against the entire asset which is held "in part" by designated persons, terrorists or terrorist organizations.</li> <li>• There is no wording in the FATT Protocols which indicate compliance with these Protocols is mandatory or that breaches of the Protocols can be sanctioned by the Central Bank.</li> </ul>
SR.IV. Reporting suspicious transactions related to terrorism	NC	<ul style="list-style-type: none"> <li>• Rating factors in R13 apply to this Recommendation.</li> </ul>
SR. V International Cooperation	PC	<ul style="list-style-type: none"> <li>• The deficiencies in R36 impact Sint Maarten's ability to extend mutual legal assistance through extradition.</li> <li>• The deficiencies in SR11 impact Sint Maarten's ability to extend assistance in connection with combating TF and terrorist acts.</li> <li>• The deficiencies in R40 would impact Sint Maarten's to the exchange of information regarding TF.</li> </ul>
SR. VI. Alternative Remittance	NC	<ul style="list-style-type: none"> <li>• There continue to be MTCs operating within Sint Maarten without licenses from the Central Bank.</li> <li>• Provisions for MTCs to update the Central Bank on the number of agents and sub-agents should be formalised.</li> </ul>
SR. VII Wire transfers	PC	<ul style="list-style-type: none"> <li>• The E.C. for wire transfers are not detailed in the relevant P&amp;Gs.</li> <li>• There are no explicit provisions in the P&amp;G for CI to be risk-based.</li> </ul>
SR. VIII. Non-profit organisations	NC	<ul style="list-style-type: none"> <li>• No recent assessment on the on the risk with regard NPO sector.</li> <li>• There is no oversight or supervisory regime for NPOs.</li> <li>• No requirement for NPO sector to keep financial information.</li> <li>• No procedures in place to ensure that they are able to effectively investigate and gather information on NPOs.</li> <li>• No training sessions or sensitization forum held for NPOs.</li> </ul>
SR. IX. Cash couriers	NC	<ul style="list-style-type: none"> <li>• An ad hoc system is in place for the disclosure of the physical cross-border transportation of currency.</li> <li>• There is no system to restrain currency where there is a suspicion of ML or TF.</li> <li>• There are no statistics evidencing Customs' effectiveness in the area of international cooperation</li> <li>• There are no statistics regarding the number of false</li> </ul>

		<p>declarations and investigations forwarded to the PPO.</p> <ul style="list-style-type: none"><li>•There is no process for confiscating currency or negotiable instruments for persons listed in accordance with UNSCR 1373 and 1267.</li><li>•There are no statistics relating to shipments of gold or other precious metals and stones.</li><li>•There is no structure established for the training and targeted programmes for Customs.</li><li>•No current information available with respect to the timeliness of the dissemination of the information relating to suspicious cash declarations/disclosures.</li></ul>
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**Table 2: Recommended Action Plan to Improve the AML/CFT System**

AML/CFT System	Recommended Action (listed in order of priority)
<b>1. General</b>	<b>No text required</b>
<b>2. Legal System and Related Institutional Measures</b>	
2.1 Criminalisation of Money Laundering (R.1 & 2)	<p><b>Recommendation 1</b></p> <ul style="list-style-type: none"> <li>• The Authorities should ensure criminalization of the following predicate offenses: illicit arms trafficking, smuggling, insider trading and market manipulation.</li> <li>• The Penal Code should be amended to ensure that most of the non-terrorist related predicate offences for ML, ML and TF occurred in a foreign country can be prosecuted in Sint Maarten.</li> </ul> <p><b>Recommendation 2</b></p> <ul style="list-style-type: none"> <li>• Amend the Penal Code to ensure that parallel criminal and civil proceedings are possible The penalty applicable for a person convicted for culpable ML should be revised to ensure it is effective, dissuasive and proportionate</li> </ul>
2.2 Criminalisation of Terrorist Financing (SR.II)	<ul style="list-style-type: none"> <li>• Article 48a of the Penal Code should be revised to expressly criminalise the indirect or unlawful provision of funding for the commission of a terrorism offence as set out in article 2(a) of the Terrorist Financing Convention.</li> <li>• Article 48a of the Penal Code should be revised to expressly criminalize the wilful provision of funds etc. to individual terrorists.</li> <li>• Penal Code should be revised to independently criminalize Terrorism Financing should be effected without delay.</li> <li>• Penal Code should be amended to incorporate specific penalties for the offence of TF.</li> <li>• Article 146a of the Penal Code (which extends to participating in a terrorist organization) should be revised to specify a penalty for the legal person who participates in such an organization.</li> <li>• The Authorities should amend the Penal Code to criminalize all the offences referenced in the Conventions and Protocols referenced at Annex 1 to the TF Convention.</li> </ul>
2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)	<ul style="list-style-type: none"> <li>• The Penal Code should ensure the effective applicability of Sint Maarten's confiscation mechanisms to Terrorist Financing offences according to the TF Convention and all the designated categories of predicate offenses (refer to paragraph 277).</li> <li>• The Authorities should ensure that comprehensive statistics are maintained in relation to the investigation, prosecution, and conviction of ML related cases.</li> <li>• The confiscation measures under the Penal Code should be revised to allow for the pre-conviction and post-conviction measures to be imposed without notice.</li> </ul>
2.4 Freezing of funds used for terrorist financing (SR.III)	<ul style="list-style-type: none"> <li>• The substantive freezing mechanism for persons listed pursuant to UN Resolution 1267 (1999) should be reviewed and appropriate adjustments made to ensure that the requirement of acting 'without delay' will be met in relation to subsequent freezing obligations that arise pursuant to terrorist related UN Resolutions that are issued.</li> <li>• The Sanctions National Decree should also expressly refer to assets jointly owned or controlled by designated persons, terrorists or terrorist organizations with third parties, and should incorporate</li> </ul>

	<p>wording to clearly communicate the enforceability of sanctions against the entire asset which is held “in part” by a designated person, terrorist or terrorist organization.</p> <ul style="list-style-type: none"> <li>• Sint Maarten should provide guidance to all persons and entities with regard to obligations in taking action under the freezing mechanism</li> <li>• The FATT Protocols should incorporate wording to clearly reflect that compliance with these Protocols is mandatory and that breaches of the Protocols can be sanctioned by the Central Bank</li> </ul>
2.5 The Financial Intelligence Unit and its functions (R.26)	<ul style="list-style-type: none"> <li>• The authorities should ensure that the legal underpinnings for the establishment of the FIU (MOT) are sound. It should be clear in the law as to the Ministry under which it falls.</li> <li>• The authorities should move swiftly to appoint an FIU Head.</li> <li>• The FIU (MOT) should seek to clarify the manner and procedures for reporting, improve the relationship between itself and its stakeholders and provide guidance on the manner and procedures for reporting. The FIU (MOT) should increase awareness within its stakeholders of the existence of the MOT</li> <li>• Articles 4, 8, 16 and 22 of NORUT should be amended in order to ensure operational autonomy of the FIU and avoid opportunities for undue interference and influence.</li> <li>• As the number of investigative reports forwarded by the FIU (MOT) is low compared to the number of UTRs recovered, the FIU (MOT) should reassess its internal process to ensure an adequate number of investigative reports are forwarded to the PPO.</li> <li>• The FIU should implement measures to improve the physical security of manual files, electronic data, premises and the employees of the FIU (MOT).</li> <li>• The MOT should produce and publish Annual Reports and ensure that it includes full information on ML and TF trends and typologies</li> </ul>
2.6 Law enforcement, prosecution and other competent authorities (R.27 & 28)	<p><b>Recommendation 27</b></p> <ul style="list-style-type: none"> <li>• Relevant financial resources should also be directed to ensure that recruited officers are appropriately trained in ML and TF and are kept up to date in the recent developments in financial investigations. These challenges identified will therefore affect the proper investigation of ML and TF offences.</li> <li>• There should be a decisive approach with respect to the operation of certain MTCs without licenses in contravention of the law.</li> </ul>
2.7 Cross Border Declaration & Disclosure	<ul style="list-style-type: none"> <li>• The authorities should ensure that they pursue the proposed declaration system to be completed by all passengers instead of the ad hoc disclosure system currently in place.</li> <li>• The Authorities should consider implementing the system to restrain currency where there is a suspicion of ML or TF.</li> <li>• The authorities should maintain statistics evidencing Customs’ effectiveness in the area of international cooperation.</li> <li>• The Sint Maarten authorities should maintain the process for confiscating currency or negotiable instruments in implementing the UNSCR 1373 and 1267.</li> <li>• The authorities should maintain a system to identify the source, destination and purpose of movement of gold or other precious metals and stones.</li> </ul>

	<ul style="list-style-type: none"> <li>• A structure should be established for the training and targeted programmes for Customs.</li> <li>• The authorities should ensure that the relevant authorities possess timely access to suspicious cash declarations or disclosures, or intentional lack of disclosures information.</li> </ul>
<b>3. Preventive Measures – Financial Institutions</b>	
3.1 Risk of money laundering or terrorist financing	Sint Maarten should urgently amend the NOIS and NORUT to incorporate the full range of activities and operations of financial institutions, including explicit wording with respect to lending; financial leasing; financial guarantees and commitments; trading in a) money market instruments, b) foreign exchange, c) transferable securities, commodity futures; participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management; factoring services and insurance activities conducted by agents. Furthermore, all intermediaries operating in the Curacao Stock Exchange (DCSX) should be covered by these national ordinances
3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)	<p><b>Recommendation 5</b></p> <ul style="list-style-type: none"> <li>• There should be explicit requirements in law or regulation for CDD to be undertaken when carrying out occasional transactions that are wire transfers, as per the Interpretive Note to SR VII.</li> <li>• Require financial institutions, through law or regulation, to undertake CDD measures when they have doubts about the veracity or adequacy of previously obtained customer identification data.</li> <li>• Require financial institutions, through law or regulation, to conduct CDD when there is a suspicion of money laundering or terrorist financing, regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations.</li> <li>• Require financial institutions, through law or regulation, to conduct ongoing due diligence.</li> <li>• The requirement to verify the identity of customers and beneficial owners before the establishment of business relations is not always practical. Sint Maarten should amend the NOIS to allow for verification at after the establishment of a business relationship in specified circumstances.</li> <li>• Require insurance companies and insurance brokers to re-examine the relationship with the client to determine whether to terminate and whether to report to the MOT if doubts arise relating to the identity of the client after the client has been accepted and accounts have been opened</li> </ul> <p><b>Recommendation 6</b> Amend the P&amp;Gs to state that FIs should put in place appropriate risk management system to determine whether a potential customer, customer or beneficial owner is a PEP</p> <p><b>Recommendation 7</b></p> <ul style="list-style-type: none"> <li>• Correspondent activities provisions should be incorporated in all the other P&amp;Gs, similar to the P&amp;G for CI, which contains specific provisions on correspondent banking activities.</li> <li>• The P&amp;Gs should require the respondent institution's AML/CFT controls, and to ascertain that they are adequate and effective</li> </ul> <p><b>Recommendation 8</b> P&amp;Gs for MTCs should incorporate requirements regarding E.C 8.2</p>

	and EC 8.2.1
3.3 Third parties and introduced business (R.9)	<ul style="list-style-type: none"> <li>• Amend the “adequately supervised” provisions of the P&amp;Gs, in line with the requirements of essential criteria 9.2, which requires that financial institutions satisfy themselves that the third party is regulated and supervised (in accordance with Recommendation 23, 24 and 29) and has measures in place to comply with the CDD requirements set out in Recommendation 5 and Recommendation 10.</li> <li>• Amend the P&amp;G’s to require that financial institutions satisfy themselves that the third party adequately regulated and supervised by referring more broadly to reports assessments and reviews of reports produced by the FATF, IMF or FSRBs, rather than specifically to Mutual Evaluation Reports</li> <li>• P&amp;Gs for MTC should incorporate requirements to comply with Recommendation 9.</li> </ul>
3.4 Financial institution secrecy or confidentiality (R.4)	FIU (MOT) as supervisor should have the possibility to exchange information with other local and international supervisory authorities
3.5 Record keeping and wire transfer rules (R.10 & SR.VII)	<p><b>Recommendation 10</b></p> <ul style="list-style-type: none"> <li>• The NOIS should be amended to reflect the obligation to maintain all necessary records on transactions, both domestic and international for five years following the termination of an account or business relationship (or longer if requested by the competent authority in specific cases and upon proper authority).</li> <li>• The NOIS should be amended to reflect the obligation to maintain records of business correspondence for at least five years following the termination of an account or business relationship</li> </ul> <p><b>Special Recommendation VII</b></p> <ul style="list-style-type: none"> <li>• Sint Maarten should detail the requirements with respect to SR VII for the relevant financial institutions instead of relying on the general provision in the P&amp;G for CI to observe the latest Interpretive Note to SR VII.</li> </ul>
3.6 Monitoring of transactions and relationships (R.11 & 21)	<p><b>Recommendation 11</b></p> <ul style="list-style-type: none"> <li>• The P&amp;Gs should be amended to incorporate specific provisions for FIs to keep documented findings of their findings regarding complex, unusual large transactions, or unusual patterns of transactions, available for competent authorities and auditors for at least five years.</li> </ul> <p><b>Recommendation 21</b></p> <ul style="list-style-type: none"> <li>• Ensure that financial institutions are advised of concerns about weaknesses in the AML/CFT systems of all countries specified by the FATF, not only those countries for which the FATF calls for action.</li> <li>• Ensure that Sint Maarten has the ability to apply counter-measures to countries that continue not to apply or insufficiently apply the FATF Recommendations</li> </ul>
3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)	<p><b>Recommendation 13</b></p> <ul style="list-style-type: none"> <li>• Sint Maarten should ensure that all designated categories of predicate offenses for ML are covered in order to eliminate the restrictions in the UTR reporting system in this regard (refer to paragraph 277)</li> <li>• Sint Maarten should consider express provisions in law regulation or other enforceable means to require that suspicious transactions should be reported regardless of whether they involve tax matters.</li> <li>• The MDIUT should be amended to allow the reporting entities to</li> </ul>

	<p>identify suspicion of ML or FT and avoid reliance on the prescriptive indicators.</p> <p><b>Recommendation 14</b> Make it clear that financial institutions, their directors, officers and employees (whether permanent or temporary) are prohibited by law from disclosing (“tipping off”) the fact that an STR or related information is being reported or provided to the FIU.</p> <p><b>Recommendation 25</b>  <ul style="list-style-type: none"> <li>•The FIU should provide feedback with respect to typologies or sanitized cases, and on specific cases that have been closed.</li> <li>•FIU (MOT) is strongly encouraged to continue its outreach programme to <u>specifically</u> encompass both feedback and guidance related to UTRs</li> </ul> </p>
3.8. Internal controls, compliance, audit and foreign branches (R.15 & 22)	
3.9 Shell banks (R.18)	
3.10 The supervisory and oversight system - competent authorities and SROs. Role, functions, duties and powers (including sanctions) (R.23, 29, 17 & 25)	<p><b>Recommendations 17</b></p> <ul style="list-style-type: none"> <li>• Include explicit provisions in the NOIS and NORUT to indicate that sanctions apply to directors and senior management of financial institutions.</li> <li>• Take immediate action against directors and senior management of unauthorised MTCs.</li> <li>• The Central Bank should have a wide range of sanctions and should be prepared to use them.</li> </ul> <p><b>Recommendation 23</b></p> <ul style="list-style-type: none"> <li>• Take immediate action to close unlicensed MTCs.</li> <li>• Increase on-site inspections of MTCs.</li> <li>• Implement a regulatory and supervisory regime for factoring services.</li> <li>• Develop a risk based approach system to determine the AML/CFT focus of onsite inspections</li> <li>• Commit resources to having supervisory staff in Sint Maarten for greater onsite monitoring of licensees.</li> </ul> <p><b>Recommendation 25</b></p> <ul style="list-style-type: none"> <li>• Provide guidance to financial institutions with respect to terrorism financing.</li> <li>• Issue guidance to providers of factoring services.</li> </ul> <p><b>Recommendation 29</b></p> <ul style="list-style-type: none"> <li>• Include explicit provisions in the NOIS and NORUT to indicate that sanctions could be apply to directors and senior management of financial institutions</li> <li>• Ensure that there are no unauthorised MTCs.</li> </ul>
3.11 Money value transfer services (SR.VI)	<ul style="list-style-type: none"> <li>• Shut the operations of unauthorised MTCs operation in Sint Maarten.</li> <li>• Provisions for MTCs to update the Central Bank on the number of agents and sub agents should be formalised.</li> </ul>
<b>4. Preventive Measures – Non-Financial Businesses and Professions</b>	
4.1 Customer due diligence and record-keeping (R.12)	<ul style="list-style-type: none"> <li>• The threshold for identification requirements for casinos in legislation should be amended in accordance with the FATF standard.</li> </ul>

	<ul style="list-style-type: none"> <li>• AML/CFT requirements should apply to internet casinos.</li> <li>• DNFBPs should be required by law or regulation to comply with 5.2.c, 5.2.d, 5.2.e and 5.7 of Recommendation 5</li> <li>• Authorities should put legislation for DNFBPs supervised by the FIU (MOT) and casinos with the requirements of criteria 5.5.2, 5.6 to 5.11, 5.16 and 5.17 of recommendation 5.</li> <li>• The deficiencies in section 3.5 for Recommendation 10 which are applicable to all DNFBPs should be remedied.</li> <li>• The Authorities in Sint Maarten should issue legislation for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 6, 8, 9 and 11.</li> <li>• Central Bank should incorporate in the P&amp;Gs for SAI and AII requirements regarding E.C 6.2 of Recommendation 6 and E.C 9.3 of Recommendation 9.</li> </ul>
4.2 Suspicious transaction reporting (R.16)	<ul style="list-style-type: none"> <li>• The deficiencies identified for Recs. 13 and 14 in section 3.7 for all DNFBPs should be address</li> <li>• The Authorities in Sint Maarten should issue legislation for DNFBPs supervised by the FIU (MOT) and casinos that includes all the requirements of recommendations 15 and 21.</li> <li>• DNFBPs supervised by the Central Bank should be required to apply counter-measures to countries which do not or insufficiently apply FATF Recommendations</li> </ul>
4.3 Regulation, supervision and monitoring (R.24-25)	<p><b>Recommendation 24</b></p> <ul style="list-style-type: none"> <li>• The Authorities in St. Maarten should immediately implement adequate AML/CFT regulation and supervision of casinos in compliance with E.C. 24.1. Casinos in St. Maarten are not effectively regulated or monitored.</li> <li>• The Authorities should implement an AML/CFT regime for Internet casinos.</li> <li>• The FIU (MOT) should implement an effective supervisory regime and should be given resources to fulfil their supervisory role for the relevant DNFBP sector.</li> <li>• The deficiency identified in section 3.10 (R. 29 and R17) with regard to the supervisory function of the Central Bank should be cured</li> </ul> <p><b>Recommendation 25</b></p> <ul style="list-style-type: none"> <li>• The Competent Authorities in Sint Maarten should provide adequate guidance to DNFBPs supervised by the FIU and Casinos regarding AML/CFT requirements</li> <li>• FIU (MOT) should issue its own P&amp;Gs.</li> </ul>
4.4 Other non-financial businesses and professions (R.20)	
<b>5. Legal Persons and Arrangements &amp; Non-Profit Organisations</b>	
5.1 Legal Persons – Access to beneficial ownership and control information (R.33)	<ul style="list-style-type: none"> <li>• Sint Maarten should establish a system to ensure access to the UBO information of legal persons.</li> <li>• There should be mechanisms in place to guarantee that competent authorities are able to obtain and have access in a timely manner to accurate and current UBO information.</li> <li>• Article 105 3<sup>rd</sup> paragraphs reflects that bearer shares shall be transformed by the company into registered shares if this is</li> </ul>



	<p>requested by the holder of the bearer shares that this be done. This aspect of the CC must be amended to either make the transformation mandatory or mandate the registration of the UBO details in relation to the bearer shares and express mechanisms incorporate either in the Code or elsewhere to achieve this registration.</p> <ul style="list-style-type: none"> <li>• Amend the NDCBSC so that the is wording requires that beneficial ownership information must also be captured for the ultimate beneficial owners of the legal person on whose behalf the bearer shares are kept or held</li> </ul>
5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34)	There should be mechanisms in place to guarantee that competent authorities are able to obtain and have access in a timely manner to accurate and current UBO information.
5.3 Non-profit organisations (SR.VIII)	<ul style="list-style-type: none"> <li>• Sint Maarten should conduct a new assessment on the risk with regard NPO sector.</li> <li>• The Authorities should consider designating an authority to monitor and supervise the NPO sector.</li> <li>• Sint. Maarten should institute an outreach program which provides adequate AML/CFT awareness about the risk of NPOs to terrorist financing.</li> <li>• There should be appropriate sanctions available for those NPOs</li> <li>• NPOs should be required to maintain transaction records for a minimum period of five (5) years.</li> <li>• The Authorities in St. Marten should be procedures in place to ensure that they are able to effectively investigate and gather information on NPOs.</li> <li>• There should be procedures in place which allow for timely and effective sharing of information on NPOs both domestically and internationally.</li> <li>• The Authorities should consider issuing guidance specifically pertain to the NPO sector.</li> </ul>
<b>6. National and International Co-operation</b>	
6.1 National co-operation and coordination (R.31)	<ul style="list-style-type: none"> <li>• The CIWG needs to be formally established.</li> <li>• The Authorities should ensure the implementation of the mechanism for coordination that were informed to the Team.</li> </ul>
6.2 The Conventions and UN Special Resolutions (R.35 & SR.I)	<ul style="list-style-type: none"> <li>• Authorities must ensure the EDACs expressly addresses the matters of non-treaty based requests for extradition; ,expedition of extradition procedures and simplification of evidentiary requirements</li> <li>• The international cooperation framework under the criminal laws should expressly address Sint Maarten's ability to extend cooperation and assistance to Transit States as contemplated by article 10 of the Vienna Convention.</li> <li>• The criminal laws must expressly impose obligations on Commercial Carriers to ensure these carriers are not used for the commission of article 3 offences set out in the Vienna Convention.</li> <li>• The criminal laws must expressly address mechanisms required by article 17 (illicit traffic at sea) and required by article 19 (illicit use of mails) of the Vienna Convention.</li> <li>• The Penal Code and Penal Procedures Code should be revised to</li> </ul>

	<p>address the shortfalls identified in the ratings Table below in relation to the Palermo Convention</p> <ul style="list-style-type: none"> <li>• The Penal Code should be revised to expressly criminalize the indirect or unlawful provision of funding for the commission of a terrorism offence, as well as the wilful provision of funds etc. to individual terrorists set out in article 2(a) of the Terrorist Financing Convention.</li> <li>• The Penal Procedures Code and/or Penal Code should be amended to expressly address <ul style="list-style-type: none"> <li>• the matter of reciprocal confidentiality (as required by article 12 (Assistance to other States) of the TF Convention;</li> <li>• establishing mechanisms whereby forfeited funds are used to compensate the victims of terrorist offences or their families, and</li> <li>• matters of custody arrangements, terms under which an offender transferred to Sint marten from a State will be returned to that State from which the offender was transferred, credit for time spent in custody of State to which the offender was transferred</li> </ul> </li> </ul>
6.3 Mutual Legal Assistance (R.36-38 & SR.V)	Amend the Penal Code to address the deficiencies set out in the ratings table.
6.4 Extradition (R.39, 37 & SR.V)	Implement the recommended actions outlined in relation to SRII
6.5 Other Forms of Co-operation (R.40 & SR.V)	<ul style="list-style-type: none"> <li>• Authorities should consider revising the respective Ordinances (NOSBCI, RFETCSM, NOSIIA, NOSTCSP to expressly allow for the CBCS to undertake investigations on behalf of their foreign counterparts. Consequential amendments to the Charter governing the powers of the CBCS may also be necessary to allow for the amendment of the Ordinances as recommended.</li> <li>• The authorities should maintain statistics on entities' spontaneous referrals of information as well as information supplied as a result of a request. This system can be used at a policy and operational level to adequately assess the country's international cooperation efforts for AML/CFT.</li> <li>• Sint Maarten's domestic legislation for all law enforcement entities should specifically provide for international cooperation with their foreign counterparts.</li> </ul>
<b>7. Other Issues</b>	
7.1 Resources and statistics (R. 30 & 32)	<p>Recommendation 30</p> <ul style="list-style-type: none"> <li>•The authorities should increase the staff complement of the FIU (MOT.)</li> <li>•The authorities should acquire additional tools such as Analyst Notebook to assist in the analysis of UTRs.</li> <li>•Sufficient financial resources should be reserved that in order that the staff may be adequately trained for ML and TF.</li> <li>•The FIU should obtain the relevant resources eg. Offsite electronic data fireproof safe, fire extinguishers, etc to further protect its information, premises and employees.</li> <li>•The authorities should seek to quickly employ robust recruiting programmes to fill the vacancies in the law enforcement agencies such as the KPSM.</li> <li>•The authorities should ensure that all relevant entities including the Tax Department, Landsrecherche, Customs, Coast Guard and the KPSM are adequately and regularly trained in money laundering</li> </ul>

	<p>and counter financing of terrorism like the RST.</p> <ul style="list-style-type: none"> <li>• Improved facilities should be provided for the Courts of Justice</li> </ul> <p>Recommendation 32</p> <ul style="list-style-type: none"> <li>• The Authorities should ensure that comprehensive statistics are maintained in relation to the investigation, prosecution, and conviction of ML related cases</li> <li>• The authorities should ensure that relevant statistics are maintained for Sint Maarten with respect to requests for additional information by the FIU (MOT).</li> <li>• The FIU should host training sessions on ML and TF for the reporting entities to ensure that the financial entities report as required.</li> <li>• The FIU should also maintain statistics regarding the number of requests made to foreign FIUs.</li> </ul>
7.2 Other relevant AML/CFT measures or issues	
7.3 General framework – structural issues	

**Table 3: Authorities' Response to the Evaluation (if necessary)**

<b>Relevant sections and paragraphs</b>	<b>Country Comments</b>

## **ANNEXES**

**Annex 1: List of abbreviations**

**Annex 2: Details of all bodies met on the on-site mission - Ministries, other government authorities or bodies, private sector representatives and others.**

**Annex 3: Copies of key laws, regulations and other measures**

**Annex 4: List of all laws, regulations and other material received**

## LIST OF ABBREVIATIONS

AML	Anti-Money Laundering
BV	Private Limited Liability Company (Besloten vennootschap)
CDD	Customer Due Diligence
CFT	Combating Financing of Terrorism
CFATF	Caribbean Financial Action Task Force
CGC	Corporate Governance Code
CI	Credit Institutions
CIWG	National Committee on Money Laundering
DNFBPs	Designated Non Financial Businesses & Professions
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit/MOT
FT/TF	Financing of Terrorism/ Terrorist financing
II	Investment Institutions
MD	Ministerial Decree
ML	Money Laundering
MDIUT	Ministerial Decree Indication Unusual Transactions
MOT	Financial Intelligence Unit
MTC	Money Transfer Companies
NV	Limited Liability Company (naamloze vennootschap)
NOOTPLA	National Ordinance on transitional provisions for legislation and administration
NOCPF	National Ordinance on Corporate Pension Funds
NOOCMT	National Ordinance Obligation to Report Cross-Border Money Transportations
NORUT	National Ordinance on the Reporting of Unusual Transactions
NOIS	National Ordinance on Identification when rendering Services
NOIIA	National Ordinance on the Supervision of II Administrators
NOIBB	National Ordinance Insurance Brokerage Business
NOSBCI	National Ordinance on the Supervision of Banking and Credit Institutions
NOSII	National Ordinance on the Supervision of the Insurance Industry
NOSTSP	National Ordinance on the Supervision of Company (Trust) Service Providers
P&G	Provision and Guidelines
PPO	Public Prosecutors Office
R	Recommendation
RBA	Risk Based Approach
RST	Special Task Force Curaçao
SNO	Sanctions National Ordinance
SND	Sanctions National Decree
SNDATO	Sanction National Decree Al Quaida, Taliban, Osama bin Ladem
SR	Special Recommendation
STR	Suspicious Transaction Report
TSP	Company Trust Service Providers
UBO	Ultimate Beneficial Owner
UTR	Unusual Transaction Report
VDSM	Security Services of Sint Maarten

**Details of all bodies met on the Mission – Ministries, other government authorities or bodies,  
private sector representatives and others**

**1. Government**

Office of the Prime Minister  
Honourable Prime Minister

Office of the Minister of Justice  
Minister of Justice  
Secretary General of Justice

Office of the Minister of Finance  
Minister of Finance

Public Prosecutors Office  
Chief Public Prosecutor

Attorney General

CIWG  
Official Representatives  
Private Sector Representatives

Chamber of Commerce  
Department of Legal Affairs  
Court in First Instance  
Department of Foreign Affairs

**2 Operational Agencies**

Financial Intelligence Unit (MOT)  
Customs Department  
Special Police Taskforce (RST)  
Security Service (VDSM)  
Tax Department  
Police Department (KPSM)  
Coast Guard

**3 Financial Sector – Government**

Central Bank of Curacao and Sint Maarten

**4. Financial Sector – Associations and Private Sector entities**

- Windward Islands Bank
- Bank of Nova Scotia
- RBTT Bank
- RBC Royal Bank
- First Caribbean International Bank
- Sint Maarten Bankers Association
- Insurance Association

FINAL

January 8<sup>th</sup>, 2013

- FATUM
- Nagico Insurances
- DHL Western Union
- Union Caribe

**5. DNFBNs**

- Sint Maartens Real Estate Association
- F.W. Vlaun & Son B.V.
- Diamond International Jewelers
- Bergman Zwanikken Snow Essed law office
- Solemar Int'l Trust Company
- K.P.M.G.
- Maho Group of Casinos
- Boek Houdt Notary Office
- Atlantis Casino

## **Legal Instruments Description**

### **The Charter of the Kingdom of the Netherlands and Charter amendments**

The Charter is the highest Constitutional law in the Kingdom of the Netherlands and supersedes all other laws. The relation between Sint Maarten and the other countries of the Kingdom of the Netherlands is governed by this Charter. It regulates, among others things, the conduct of Kingdom affairs, the mutual assistance, consultation and cooperation and the constitutional organization of the countries. The current Charter was enacted in 1954 and has been amended several times since its enactment due to, among other things, constitutional reforms (1975: independence Suriname; 1986: separation of Aruba from the Netherlands Antilles; 2010: dissolution of the Netherlands Antilles).

### **Kingdom Acts and Executive General Measures for the Kingdom (Rijkswet and Algemene maatregel van Rijksbestuur)**

These laws/measures supplement the Charter by detailing subjects that are only dealt with generically in the Charter itself. Kingdom Acts and Executive General Measures of the Kingdom are permissible only in relation to those subjects expressly authorized by the Charter (article 14 of the Charter). They neither interfere with the Charter text itself, nor become an integral part of the Charter. Kingdom Acts that affect two or more Kingdom countries are enacted by consultation and approval by those countries of the Kingdom of the Netherlands and are thus more difficult to enact than other laws

### **Cooperation Agreement (Samenwerkingsregeling)**

Article 38 of the Charter also provides for the possibility for Kingdom countries to close cooperation agreements. For historical and practical reasons Sint Maarten cooperates with Aruba, and today also with Curaçao on various issues, of which cooperation on immigration and monetary and financial supervision legislation are noteworthy

### **Constitution (Staatsregeling)**

Every country within the Kingdom has its own Constitution (Grondwet or Staatsregeling). The basic rights of citizens, the institution and separation of the judiciary, legislative and executive branches, the organization of government and its tasks and obligations, along with related subjects are regulated in the Constitution of Sint Maarten. The Constitution can be amended by a National Ordinance; however, the National Ordinance containing such amendment needs to be approved by the Parliament by a majority vote of 2/3. In addition, it also needs the approval of the Government of the Kingdom of the Netherlands (article 44 of the Charter).

### **National Ordinance**

The National Ordinances are the primary and formal legislative instruments on national (country) level which are issued by the Government and the Parliament conjunctly and ratified by the Governor. Proposals for National Ordinances can be made by either the Government or the Parliament, although the former is usually the case. This is due to the fact that National Ordinances serve, among other things, as a basis and framework for policy and, related to this, as an instrument to regulate behavior. In a National Ordinance the legal authority to further regulate a subject can be delegated to the Government.

### **National Decrees (containing general measures)**

National Decrees are delegation instruments which are enacted by the Government (executive power). The National decrees are distinguished in National Decrees Containing General Measures and National Decrees which are directed to specific purposes/persons. The National Decrees Containing General



Measures regulate subjects mentioned in the National Ordinances. The purpose of a National Decree is often to discipline/regulate/detail an enacted law. For example, the administrative sanctions of the National Ordinance on the Reporting of Unusual Transactions (N.G. 2010, no 41) are supported/further detailed by the National Decree Penalties and Fines Reporters Unusual Transactions (N.G. 2010, no. 71). National Decrees can be issued or amended by the Government without the approval of the Parliament, but have to be submitted to the Council of Advice. Also, for these decrees a delegation ground must exist in a National Ordinance.

### **Ministerial Decrees with general scope**

Ministerial Decrees are legislative instruments issued by one or more Minister(s) who has/have competence over the subjects regulated in those decrees. The authority to issue such decree is delegated to the Minister by a National Ordinance or via a National Decree, based on a National Ordinance.

### **Provisions and Guidelines**

The Central Bank can issue Provisions and Guidelines (P&Gs) for the financial institutions under its supervision provided that the competence/authority to do so is delegated by the legislator, by means of a National Ordinance. This generally occurs through the Supervisory National Ordinances. Therefore the P&Gs are classified as regulation and are enforceable, even though they are not issued by the legislator. If these P&Gs are not adhered to by the institutions, sanctions can be imposed.

### **Explanatory Memorandum**

An Explanatory Memorandum is a companion document to a law which aids in the interpretation of that law. It outlines the intentions of the law and the meaning of the provisions as intended by the legislator. It provides useful background information about the purpose of the law. The Explanatory Memorandum is often used by a court to interpret legislation to:

- a) Confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the law and the purpose or object underlying the law; or
- b) Determine the meaning of a provision when the provision is ambiguous or obscure.

### **Other instruments**

Court rulings (jurisprudence), general principles of good governance and even common practice are also sources of law.

1. National Ordinance on the amendment of the Penal Code (penalization of terrorism, terrorist financing and money laundering) (N.G. 2008, no. 46) (replaced i.a.: The National Ordinance Penalization of Money Laundering (N.G. 1993, no. 52);
2. National Ordinance on the Reporting of Unusual Transactions (N.G. 1996, no. 21) as lastly amended by N.G. 2009, no 65 (NORUT ) (N.G. 2010, no 41)
3. National Ordinance on Identification of Clients when rendering Services (N.G. 1996, no. 23) as lastly amended by N.G. 2009, no 66 (NOIS) (N.G. 2010 no. 40)
4. National Ordinance on the Obligation to report Cross-border Money Transportation (NOOCMT) (N.G. 2002, no. 74)
5. National Ordinance of January 28, 1994 containing new rules on the notary office. (articles 30 and 31)
6. National Ordinance on the Supervision of Company (Trust) Service Providers (NOSTSP) December 2003 (N.G. 2003 no. 114).
7. National Ordinance on the Supervision of Banking and Credit Institutions 1994 (N.G. 1994, no. 4) (NOSBCI)
8. National Ordinance on the Supervision of the Insurance Industry (N.G. 1990, no. 77) (NOSII)
9. National Ordinance on the Supervision of Investment Institutions and Administrators (N.G. 2002, no. 137) (NOIIA)
10. National Ordinance on Corporate Pension Funds (N.G. 1985, no. 44) (NOCPE)
11. National Ordinance Insurance Brokerage Business (N.G. 2003, no. 113) (NOIBB)
12. The Regulations for Foreign Exchange Transactions for Curaçao and Sint Maarten (RFETCSM) (N.G. 2010, no. 112) formerly the National Ordinance on Foreign Exchange Transactions (N.G. 1981, no. 67)
13. Commercial Register Act (N.G. 2009, No. 51)
14. Business License Act.
15. National Decree containing general measures on the execution of articles 9, paragraph 2, and 9a, paragraph 2, of the National Ordinance on Identification of Clients when rendering Services. (National Decree containing general measures penalties and administrative fines for service providers) (N.G. 2010, no. 70)
16. National Decree containing general measures on the execution of articles 22a, paragraph 2, and 22b, paragraph 2, of the National Ordinance on the Reporting of Unusual Transactions.(National Decree penalties and administrative fines for reporters of unusual transactions( N.G. 2010 no. 71))
17. National Decree for the implementation of article 7 paragraph 1 of the NORUT (N.G. 2001 no. 69).
18. Sanctions National Decree Al-Qaida c.s., the Taliban of Afghanistan c.s., Osama bin Laden c.s. and locally designated terrorists (N.G. 2010, no. 93)
19. Sanctions National Decree Democratic People's Republic of Korea (N.G. 2010. No. 91);
20. Sanctions National Decree Islamic Republic of Iran (N.G. 2010. No. 92);
21. National Decree containing general measures of December 22, 2009 for the execution of article 20 of the Commercial Register Act (N.G. 2009, no. 71) (Trade Register Decree)
22. Ministerial Decree with general operation of May 21, 2010, laying down the indicators, as mentioned in article 10 of the National Ordinance on the Reporting of Unusual Transactions (Decree Indicators Unusual Transactions) (N.G. 2010, no. 27);
23. Ministerial Decree with general operations of March 15, 2010, implementing the National Ordinance on the Reporting of Unusual Transactions (N.G. 2010, 10);
24. Ministerial Decree with general operations of March 15, 2010, implementing the National Ordinance on Identification of Clients when Rendering Services (N.G. 2010, no.11);
25. Book 2 of the Civil Code (articles 80-113)
26. Penal Code (relevant sections)
27. Penal Procedures Code (relevant sections)
28. Protocol concerning the procedures to be followed when freezing terrorist funds appearing on the list of the U.N. (Protocol UN-lists);

29. Protocol concerning the procedures to be followed when freezing funds of locally designated terrorists (Protocol local terrorists or otherwise);
30. General Regulation Import, export and transit of 1908 N.G. 1949 no. 62 (articles 112-117, 217-232, 257-260b)
31. Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Credit Institutions;
32. Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Money Transfer Companies;
33. Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Company (Trust) Service Providers;
34. Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Administrators of Investment Institutions and Self-Administered Investment Institutions
35. Provisions and Guidelines on the Detection and Deterrence of Money Laundering and Terrorist Financing for Insurances Companies and Intermediaries (insurance brokers)
36. AML/CFT directives (provisions and guidelines) for lawyers, civil-law notaries, accountants, tax advisors and trust offices of Country Curacao
37. Provisions and Guidelines for Real Estate Agents of Country Curacao
38. Provisions and Guidelines for Car dealers and Jewellers of Country Curacao
39. (FIU) MOT NA Annual Report – 2005.
40. (FIU) MOT NA Annual Report - 2006
41. (FIU) MOT NA Annual Report - 2007
42. (FIU) MOT NA Annual Report - 2008
43. (FIU) MOT NA Annual Report – 2009
44. (FIU) MOT NA Annual Report - 2010
45. Warning Letter Central Bank
46. Guidelines – RR.
47. List AML-CFT Training Central Bank
48. General Regulation Import, export and transit of 1908 N.G. 1949 no. 62 (articles 112-117, 217-232, 257-260b)
49. Central Bank Statute (N.G. 2010, no. 101).
50. Policy Rule on Integrity Testing.
51. Policy Rule in the violation of the NOIS and NORUT legislations and the Provisions and Guidelines on AML/CFT.
52. Appendix I and II Policy Rule June 2011.
53. Sanctions National Ordinance (N.G 1997. No. 336)

2013