

Linette A. Gibs

Subject: FW: algemene vertaling antwoorden vragen behandeling in eerste instantie ontwerp Lvo bestuurlijke handhaving
Attachments: EnglishtranslationquestionsontwerpLvobestuurlijkehandhaving2232017.docx

From: Nancy R. Guishard-Joubert
Sent: Wednesday, March 22, 2017 1:00 PM

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Sent: Wednesday, March 22, 2017 1:00 PM
To: Nancy R. Guishard-Joubert
Cc: Boasman, Rafael; Rafael Boasman (boasmanr@gmail.com)
Subject: algemene vertaling antwoorden vragen behandeling in eerste instantie ontwerp Lvo bestuurlijke handhaving

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| STATEN VAN SINT MAARTEN | |
| Ingek. | 22 MAR 2017 |
| Volgnr. | 151 576 / 16-17 |
| Par. | by NB mes |

Geachte mevrouw Joubert, beste Nancy,

Wij hebben getracht bovenstaande vragen zo goed als mogelijk in het Engels te vertalen.

Deze vertaling gaat hierbij.

Met vriendelijke groet,

Mr. Len Dijkstra LL.M, MBA

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Answered Questions Posed about the draft National Ordinance administrative
enforcement

The Minister of Justice, His Excellence Rafael A. Boasman

MINISTRY OF JUSTICE

February 1, 2017

The Cabinet of the Minister of Justice and Department of Judicial Affairs

General Questions

To what extent does the draft Ordinance contain new sanctions and administrative enforcement powers?

In the present National Ordinance, no new sanctions or authoritative powers are created. This ordinance indicates how governing bodies should deal with granted powers by or under existing and future national ordinances. The aim of this national ordinance is to grant the competence of enforcement powers and instruments to governing bodies so as to enable them to establish an administrative supervision of compliance with regulations set by (legal) persons. This supervision is intended primarily to prevent or remedy violations.

The main objective of the law is primarily to prevent or remedy violations. Punishment, (i.e. impose a sanction) must be regarded as a so called “ultimum remedium”.

How new powers can be adjudged, depends on the existing National Ordinances In this context can be referred to the National Ordinances as illustrated below:

The Road Traffic Regulation has currently no administrative enforcement;

- The National Ordinance on Foreign Labor, it will represent a major expansion of powers;
- The National Ordinance Inspectorate for the Public Health contains already largely the same powers, but those may have been formulated differently.
- The draft of the ‘National Ordinance Update and the Convergence of Surveillance-Legislations of the Central Bank’ containing the supervisory powers of the Central Bank of Curaçao and Sint Maarten will be filed very soon. .

A short description of the implementation system

There has been chosen for a flexible entry into force, which means that this National Ordinance will not become effective in one go for all the governing bodies in Sint Maarten.

The flexible entry into force aims at the competence of enforcement that will be adjudged to an administrative authority after an administrative authority has been able to prepare its administrative enforcement and has been familiarized with the new general rules. This can be different for each administrative authority, hence. It is proposed that this draft Ordinance will become effective by National Decree for each separate administrative authority. This makes it also possible that different parts of the draft law, for different administrative authorities and for different laws will become effective at different moments. It is even possible to make a distinction in the legislation.

If the administrative authority has already administrative privileges, this draft will become effective by harmonization of the texts of other laws concerning administrative competences of enforcement with this Ordinance by National Decree. This can be done by removing specific articles from the specific National Ordinance, and to replace them with the National Ordinance Administrative Enforcement.

When shall an administrative authority be able to execute their powers?

Each ministry in this case each administrative authority, must submit an implementation plan.

The implementation plan will need to prove that the administrative authority has an enforcement policy, in which:

- a) it is determined in which situations an admonition, a formal warning, an order subject to a financial penalty, administrative enforcement order or an administrative fine will be given;
- b) the maximum amount is established for the respective administrative fine of each offence;
- c) standard tailored letters for all possible situations have been established;
- d) a sufficient amount of officials (enforcement capacity) is active
- e) a sufficient budget is made available;
- f) agreements concerning administrative fines with the Public Prosecutor's Office are established;
- g) agreements with the Receiver's office concerning debt collections are established;
- h) a communication plan outlining the methods how the public will be informed about the new enforcement powers and the enforcement policy is established;
- i) the supervisors are trained on the new authoritative powers and a continued training plan is established;
- j) the business processes are set up in such a way that different legal deadlines are met for the handling of enforcement requests as well as objections;
- k) a proper archiving system is arranged;
- l) other possible boundary conditions are determined.

The involvement of other ministries

First the Parliamentary approval has to be awaited. After this first parliamentary session action has been taken right away by scheduling in the Secretary General deliberations and about some time it will be followed by discussion in the Council of Ministers.

In June or September, a ' launch conference ' will be organized, the aim is to explain the new law and create a platform to exchange experiences by administrative authorities which already have administrative enforcement powers.

In March the Advisory Board has set out a course Module “Administrative enforcement” in which the draft of the National Administrative will have a central role.

Thereafter, an internal preparation per administrative authority should be conducted, which will result in a specific implementation plan per administrative authority.

Specific Questions, not previously answered

MP Frans Richardson

May anyone submit a request for enforcement regarding to Article 6 of the National Ordinance administrative enforcement?

Yes, just like the draft in Aruba anyone can submit a request for enforcement.

Will the administrative authority be able to respond within the set deadline?

To begin with, the deadlines determined in this draft are no fatal periods. As is now the case with decision periods laid down in legislation, an administrative body should aim to respond within the relevant time limits.

Will there be a general enforcement policy?

In principle, this is not the intention as each National Ordinance has specific offences/violations, which must be approached differently. The aforementioned 'launch conference' will aim to exchange knowledge and to coordinate preparations.

Is there enough budget regarding to Article 41 of the National Ordinance administrative enforcement?

In the drafting of the implementation plan, the administrative authority should ensure that there is sufficient budget.

Will appeal be possible?

Yes, in accordance with the National Ordinance on administrative procedure (LAR) appeal is possible at the Court of First Instance. The court decides whether reconsideration by the administrative authority is appropriate or not.

Since a consistency in appeals procedures is desirable, will there be a central appeals committee?

A Central Committee has its advantages and disadvantages. Overall centralization is a complicated, lengthy and costly operation. The Government chose for a gradual process. First, the ministries need to decide whether there will be a Central Appeals Commission per ministry. After a number of years of acquired experience, the only relevant question then should be whether there should be Central Appeals Commission for all ministries.

Who will be appointed in the Central Appeals Commission?

That question can only be answered when the time comes. Assumedly most of those members will be recruited from the existing or revoking committees.

Should the LAR be changed?

The LAR has already provided a comprehensive framework for the appeals procedure. In the States, there is a further bill pending in which this arrangement strengthens parts in favor of the objector. Refer to the draft "National Ordinance amending the Ordinance on Administrative Enforcement Law (ZJ 2014-2015-062) (States Netherlands Antilles 3703) (IS / 597 / 2014-2015 dated April 2nd 2015)". The adoption of such (Netherlands Antilles) Bill is from the viewpoint of the uniformity of procedure considered necessary and urgent in the Caribbean parts of the Kingdom, especially as the States of Curaçao, from the proposed amendments that have been already adopted on July 18, 2015.

MP George Pantophlet

Will this be collaborated with the Labour Inspectorate? Are they well equipped?

The Labour Inspectorate has shown great interest in the preparation process. It is conceivable that the Labour Inspectorate will be one of the first governing bodies to have

an implementation plan. This will prove that they are well equipped.

Will the Labour Inspectorate be able to impose administrative fines?

If the Labour Inspectorate will choose so, it will be possible. This should be evident in their implementation plan.

How far is Aruba?

The draft National Ordinance of Aruba, does not only regulate the supervision and enforcement authoritative powers of governing bodies, but also includes all general rules that relate to the relationship between the government and citizens. Both the draft National Ordinance, as well as the Explanatory Memorandum, after being processed by Advisory Board, is handled by the Council of Ministers. The documents have not yet been submitted to the Parliament of Aruba.

What are Curaçao's plans?

In Curaçao, there are no concrete plans, and it is not yet beyond the "official orientation phase".

Article 47, second paragraph, of the National Ordinance administrative enforcement refers to Articles 251 and 253 of the Code of Criminal Procedure, but the data bank states these are expired. What is the situation?

Apparently, there is a misunderstanding. These articles did not expire. According to the laws of the data base of St. Maarten:
http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/Historie/Sint%20Maarten/142469/142469_3.html; for clarification, they are included in the annex to this document.

MP Rudolph Samuel

What kind of effect will the National Ordinance have on ministers and the department heads? Will each minister have to report his or her plans after the implementation of this national ordinance?

This question was already answered under 'General Questions.'

Can the officers be punished if they report incorrect findings?

The actions of an official is regulated by the National Ordinance substantive civil servants law (LMA). The LMA provides measures, including disciplinary measures against an official when he or she commits dereliction of duty. The preparation of a false report of findings can be regarded as dereliction of duty.

Can an administrative authority be punished if it does not comply with the National Ordinance administrative enforcement? For example, when an administrative authority exceeds a term?

The administrative court also serves to correct the governing bodies. If the administrative authority does not respond in time, there is recourse to the courts. According to Article 3, first and second paragraph of the LAR, a refusal to make a decision, is a decision. When the legal deadline for adopting a decision expires without a decision, it shall be considered as refusing to give a decision. Often the court will instruct the administrative authority to impose a new deadline, in which it must still decide. If the authority does not adhere to that period, the person concerned, could make a request to the court to force it to decide on a penalty of forfeiture of a penalty payment for each day that the administrative authority fails.

Will Government be held liable for damages resulted from the misapplication of the law?

Yes, of course. Usually through civil law, because the extent of the damage must be rectified. The administrative court also has the jurisdiction to handle these cases. For example, the Central Bank of El Mas Rapidito will have the right to issue a license as a money transaction office within ten (10) days.

MP Chanel Brownbill

Why use punishment, when there are so many other options to ensure the compliance of the citizen's law?

A reference is made to this under 'General Questions'. It is emphasized that monitoring, reprimanding, warning and restorative sanctions always prevail in respect to a punitive sanction.

MP Franklyn Meyers

Can clarity be given about the checks and balances in the relationship between an administrative authority and the Public Prosecution?

The National Ordinance on Administrative Enforcement provides the necessary checks and balances. If an authority intends to impose an administrative penalty, the administrative body should contact the Public Prosecutor. What action, and by which authority in this particular case is the most appropriate? It should not occur that the two authorities take action at the same time, as it would result in a simultaneous fine.

MP Romeo F. Pantophlet

Article 2, second paragraph: Issuing of the sanctions. Can this also be conducted at the end of the term?

No, the term **starts** at the date of issue. The intention is that the administrative authority provides a sufficient period after the issue of the sanction to rectify the violation; the intention is not to set a specific date.

If the period is too short, protection is provided via the LAR

MP Sarah Wescot-Williams

Will a General Law be implemented in Aruba? How are they going to accomplish this? What are the preparations regarding the activation of this law?

In Aruba, there is a General Administrative Ordinance. The implementation requires a second national ordinance, as here in St. Maarten is the case with the coming into force of the new Penal Code.

How will improper use of or abuse of the officer's new authoritative powers be protected?

Hereby I would like to refer to the 'General Questions' and to the answer at the similar question of the honorable Member of Parliament Mr. Samuel.

Appendix

Artikelen uit het Wetboek van Strafvordering

Articles of the Code of Criminal Procedure

Artikel 251

Van het geven van getuigenis of van het beantwoorden van bepaalde vragen kunnen zich verschonen:

- a. de bloed- of aanverwanten in de rechte lijn van de verdachte of de medeverdachte;
- b. de bloed- of aanverwanten in de zijlijn tot de derde graad ingesloten, van de verdachte of de medeverdachte;
- c. de echtgenoot of vroegere echtgenoot van de verdachte of de medeverdachte, dan wel de persoon, met wie de verdachte of medeverdachte duurzaam feitelijk samenwoont of heeft samengewoond. Die samenwoning zal op genoegzame wijze aannemelijk moeten worden gemaakt.

Article 251

The giving of testimony or answering certain questions can be excused if:

- a. there is blood relation or marriage in the direct line of the defendant or co-defendant;
- b. there is blood relation or marriage including the third degree of the defendant or co-defendant;
- c. the witness is the spouse or former spouse of the defendant or co-defendant, or the person with whom the defendant or co-defendant durable actually cohabits or has cohabited. That cohabitation must be justified in a satisfactory manner.

Artikel 253

De getuige kan zich verschonen van het beantwoorden van een hem gestelde vraag, indien hij daardoor of zichzelf of een van zijn bloed- of aanverwanten in de rechte lijn of in de zijlijn in de tweede of derde graad of zijn echtgenoot of vroegere echtgenoot dan wel de persoon, met wie hij duurzaam feitelijk samenwoont of samengewoond heeft, aan het gevaar van een strafrechtelijke veroordeling zou blootstellen. Die samenwoning zal op genoegzame wijze aannemelijk moeten worden gemaakt.

Article 253

The witness may change from answering a question asked, if either himself or one of his relatives by blood or marriage in the direct line, or in the second or third degree or the spouse or former spouse or the person with whom he has permanently been living together or lived together, would expose them to the risk of a criminal conviction. The cohabitation must be justified in a satisfactory manner.