The much discussed integrity chamber for St. Maarten
There is a lot going on in the media these months: whether or not and how to establish and organize an Integrity Chamber for St. Maarten.

Where does the idea of an Integrity Chamber for St. Maarten come from? What is the (legal) basis and relevant legislation for such an Integrity Chamber? In what way should this chamber be organized, and what tasks and powers will this chamber actually get? And what is the extent of those powers? Will there actually be the Integrity Chamber? Some of these questions cannot be answered yet, as St. Maarten is currently waiting for a new National Ordinance on the Integrity Chamber. A definitive regulation is still missing. Nevertheless, this is a first overview based on what we already know.

First of all, what is integrity?
There is no clear definition of integrity; the term is used in a variety of contexts. Generally, we understand integrity as a trait of an individual, which implies that a person adheres to his own ideas, norms and values, even when this person is under pressure. We recognize an integer person by his trustworthiness, honesty, sincerity, righteousness and incorruptibility.

If we apply the term integrity to officials, government employees and directors, we often mean that they exercise their function adequately and carefully, even under external pressure, in view of their position and all the responsibilities involved.

There are many integrity issues that companies and governments can face: (In)compatible functions and positions, (im)proper decision-making and voting, taking (or not) an oath/affirmation, whistle-blowing schemes, conflict of interests, codes of conduct, malfeasances and misconducts, corruption. A fundamental question in this regard is: do the informal relational interdependencies supersede the applicable rules and procedures?

The idea behind an Integrity Chamber, the Protocol
In the course of 2014 and 2015, various inquiries were held both at the request of the Council of Ministers of the Kingdom of the Netherlands and at the request of the Council of Ministers of St. Maarten into the integrity of the public administration of St. Maarten. The then Council of Ministers of St. Maarten decided to tackle the integrity issues of the government of St. Maarten apparent from the report and to follow the recommendations in those reports. One of those recommendations was to

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1 The National Ordinance of August 21, 2015 establishing the Integrity Chamber (National Ordinance on the Integrity Chamber) was repealed by the judgment of the Constitutional Court of July 7, 2016 (AB 2015, nr.18).
2 Mens-en-samenleving.infonu.nl, Recognizing integrity (September 23, 2011)
3 But also: (misuse of) reimbursement of entertaining expenses, ancillary positions, gift schemes, confidentiality, registration and reporting to the Public Prosecution Office, the manner of proceeding in the event of an integrity violation.
4 The Charter for the Kingdom of the Netherlands, which regulates the constitutional relationship between the Netherlands, Aruba, Curaçao and St. Maarten, states that each country of the Kingdom shall preserve the value of good governance and that the safeguarding of the good governance is a Kingdom affair.
5 (i) General Audit Chamber (St. Maarten), Baseline study St. Maarten, State of affairs institutional integrity management (2014)
   (ii) Committee Integer Public Administration, Doing the right things right (2014)
establish an independent Integrity Chamber for St. Maarten. The Netherlands agreed to provide assistance and support aimed at the establishment, organization, operation and funding of such an Integrity Chamber. Both countries agreed that the Integrity Chamber should have an independent position with independent powers, including the power to conduct inquiries into all relevant organizations and individuals, to report to the Public Prosecution Office, to give solicited and unsolicited advice and to submit proposals, and to report to the government of St. Maarten and the Council of Ministers of the Kingdom of the Netherlands.

St. Maarten and the Netherlands laid down the mutual commitments in a Protocol. The regulation for the Integrity Chamber would be further elaborated by national ordinance of St. Maarten.

National Ordinance on the Integrity Chamber

The National Ordinance on the Integrity Chamber was adopted on 21 August 2015, to promote and monitor the integrity of the public administration of St. Maarten by establishing the Integrity Chamber. Although this National Ordinance has not come into force - the Constitutional Court repealed it as unconstitutional at the request of the Ombudsman - it is still useful to clarify some aspects of it. It is expected that various provisions of the repealed National Ordinance will remain unaltered in a new National Ordinance on the Integrity Chamber, and that the provisions the Constitutional Court considered to be unconstitutional - insofar as they will not be deleted - will be amended in compliance with the framework conditions and suggestions formulated by the Constitutional Court.

Independent administrative body

The National Ordinance 2015 determines that the Integrity Chamber is an independent administrative body. An independent administrative body is not hierarchically subordinate to a minister, and the minister cannot therefore give specific instructions to the administrative body. The body is independent and can therefore function at a distance from the politics and the public administration.

Members and appointment

The Integrity Chamber will consist of three members; all three will be appointed by national decree of St. Maarten, one upon binding recommendation of the Council of Ministers of the Netherlands, one upon binding recommendation of the Council of Ministers of St. Maarten and one upon binding recommendation of the two aforementioned members. The members must take an oath before assuming office. The National Ordinance will also contain rules regarding incompatible functions, relationships, ancillary positions, suspension and dismissal, in order to ensure the independence and

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6 Protocol between the Netherlands and St. Maarten providing for cooperation by means of a mutual arrangement pursuant to Article 38, paragraph 1, of the Charter of the Kingdom of the Netherlands in connection with the establishment, organization, operation and funding of an Integrity Chamber on St. Maarten (May 24, 2015).
7 National Ordinance of August 21, 2015 establishing the Integrity Chamber (National Ordinance on the Integrity Chamber).
8 Judgment of the Constitutional Court of St. Maarten of July 7, 2016 in case 2015/1.
9 See also “Govt. to send integrity chamber law for review by month’s end”. Daily Herald (Augustus 4, 2017): The new draft does not have any of the points that led the Ombudsman to take the scrapped one before the Constitutional Court for its judgment.
10 See also Explanatory Memorandum AB 2015, nr.18, general section, paragraph 4.1: The government is of the opinion that the establishment of the Integrity Chamber as an independent administrative body is the only right instrument. By establishing the Integrity Chamber as an independent administrative body, the duties and powers of the Integrity Chamber will be, in fact, removed from the direct influence of the Minister and will be assigned to this body, which specializes in promoting and monitoring integrity within the government and will also advise in this regard.
11 The Prime Minister and other ministers of St. Maarten are also appointed (under the Government Regulations) by national decree. A national decree will be signed by the Island Governor and one or several ministers.
impartiality of the members as effectively as possible.

Tasks and scope
Essentially, the Integrity Chamber was given three tasks in 2015: (i) to give solicited and unsolicited binding advice on alleged integrity violations, and to conduct concrete inquiry into integrity violations; (ii) to give solicited and unsolicited advice on integrity policy; and (iii) to oversee the implementation of advice given or proposals made.

The terms 'integrity violation' and 'integrity policy' were defined in the National Ordinance 2015 and explained in the Explanatory Memorandum. It appears that an integrity violation must be an objectifiable violation; it must be plainly visible in facts or circumstances. Furthermore, there must be an unlawful breach of a rule or a procedure applicable to the performance of an office or a function. A number of examples (including corruption, breach of confidentiality, offering or accepting bribes) are explicitly included in the National Ordinance. This list is not exhaustive and deliberately leaves the Integrity Chamber room for inquiries into the integrity, which is sometimes difficult to get a grip on.

Finally, not just actions or omissions by (government officials and employees of) government agencies and executive authorities such as the police, but also the actions or omissions by (directors of) public companies and government foundations as referred to in the National Ordinance on Corporate Governance may constitute an integrity violation within the meaning of the National Ordinance\(^\text{12}\).

Reports from the public
The Integrity Chamber is authorized to investigate an alleged infringement of integrity, whether or not in response to a report. According to the Explanatory Memorandum, the government of St. Maarten attaches great importance to the fact that anybody can report an alleged violation of integrity to the Integrity Chamber. The Integrity Chamber is therefore required to establish and maintain a reporting center and to make the public sufficiently aware of this reporting center. During a preliminary investigation, the Integrity Chamber will need to assess whether launching an inquiry is appropriate, given the nature, the gravity and the ability to validate the alleged integrity violation, and the credibility and position or personality of the person filing the report. The confidentiality issue of the personal information of the person filing the report should also be raised, as much as the confidentiality cannot be guaranteed in all cases.\(^\text{13}\)

Powers
It is expected that the above-mentioned aspects of the National Ordinance 2015 will be accepted, either fully or in large part, in a new National Ordinance on the Integrity Chamber. This does not apply

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\(^{12}\) See also Explanatory Memorandum AB 2015, nr. 18, article part, article 1: The term "director" has been defined for the purpose of clarifying the scope of the term "integrity violation". This term ensures that also public companies and government foundations as referred to in the National Ordinance on Corporate Governance fall within the scope of the investigative powers of the Integrity Chamber. According to the National Ordinance on Corporate Governance, a (government) foundation is a foundation where a minister has the power to decide on the appointment or dismissal of one or several directors, or upon the amendment of the Articles of Association. According to the National Ordinance on Corporate Governance, a (government) company is a public (naamloze) or private (besloten vennootschap) limited liability company with its corporate domicile on St. Maarten and the shares of which are in part or in whole, directly or through intervention of a third party, in beneficial or legal ownership, held by the country of St. Maarten.

\(^{13}\) See also Explanatory Memorandum AB 2015, nr. 18, general part, paragraph 6.1.
to the administrative powers granted to the Integrity Chamber\textsuperscript{14}, which they may use in the context of an inquiry to the extent that this is reasonably required for the conduct of the inquiry. For example, the Integrity Chamber may, inter alia, claim information, access locations, demand the inspection of data, documents and other information carriers, subject items to examination and inspection or take samples of those items. In addition, the National Ordinance 2015 grants to the Integrity Chamber, within the context of the obligation to cooperate, the power to question anyone under oath. A number of these powers, combined with the inadequate formal procedure for adoption of the National Ordinance\textsuperscript{15}, gave the Ombudsman of St. Maarten the reason to bring the matter before the Constitutional Court of St. Maarten\textsuperscript{16}. Essentially, the Ombudsman's objections suggest that the inquisitorial powers go beyond what is reasonably required for the purpose for which the Integrity Chamber has been created, that these powers (that are governed by administrative law) may interfere with criminal safeguards and that they also otherwise insufficiently provide for adequate legal guarantees, and the citizens are insufficiently protected as a result\textsuperscript{17}. The Constitutional Court has found that the National Ordinance 2015 is incompatible in various parts with the (fundamental rights laid down in the) Constitution, has declared the Ombudsman's complaint in respect of the inadequate procedure for adoption of the National Ordinance well-founded, and has repealed the National Ordinance\textsuperscript{18}.

Obligation to cooperate, order subject to a penalty for non-compliance
On the basis of the National Ordinance 2015, anyone who has been asked to cooperate with the inquiry of the Integrity Chamber, must allow inspection, provide information and tell the truth. The Integrity Chamber is authorized to impose an order subject to a penalty for non-compliance on a natural or legal person, if they fail to comply with one of these obligations. In the criminal law, the \textit{nemo tenetur} principle applies: no one may be bound to incriminate himself. The Constitutional Court has pointed out that a testimony, which is contrary to the \textit{nemo tenetur} principle, may not be used as evidence in a criminal case. In the view of the Constitutional Court, it is advisable to have a coordination mechanism between the Integrity Chamber and the Public Prosecution Office. It must be made clear how far the Integrity Chamber may take its inquiry and use its inquisitorial powers when the subject of an inquiry becomes a suspect in a criminal case.

Questioning under oath
In the National Ordinance 2015, the Integrity Chamber has been granted the power to question people under oath (both subjects of an inquiry and third parties such as whistleblowers and compliance officers). The Integrity Chamber may mandate this power to its staff pursuant to the National Ordinance 2015. In the criminal justice system, people are allowed be questioned under oath only by the judge or the investigating judge in view of the grave consequences thereof. The Ombudsman complained about this matter and the Constitutional Court decided that this power in the administrative National Ordinance did not provide for adequate safeguards for the protection of citizens. In addition, there is also the problem with the \textit{nemo tenetur} principle.

\textsuperscript{14} In fact, the powers conferred to the Integrity Chamber are largely (although not entirely) comparable with the powers conferred to supervisors in the Netherlands pursuant to Article 5:15 - 5.20 of the General Administrative Law Act.
\textsuperscript{15} The Ombudsman complained that the substantial Letter of Amendment, which had been submitted by the government during parliamentary proceedings, had not been submitted to the Council of Advice for additional advice.
\textsuperscript{16} The Constitutional Court of St. Maarten evaluates the compatibility of approved legislation (often National Ordinances) with the Constitution of St. Maarten. Cases can only be brought before the Constitutional Court by the Ombudsman of St. Maarten. The review takes place before the legislation in question enters into force.
\textsuperscript{17} See also judgment of the Constitutional Court of St. Maarten of July 7, 2016 in case 2015/1, paragraph 2.1.
\textsuperscript{18} Judgment of the Constitutional Court of St. Maarten of July 7, 2016 in case 2015/1.
Right to refuse to testify
The National Ordinance 2015 does not clarify whether the right to refuse to testify as provided in the National Ordinance also extends to a person who is the subject of an inquiry by the Integrity Chamber. The National Ordinance refers to the provisions on the right to refuse to testify in the Code of Criminal Procedure. In terms of criminal law, a person who is the subject of an inquiry by the Integrity Chamber under the National Ordinance is not always a suspect and can thus be regarded as a witness with the ability to claim the right to refuse to testify, which will impede the inquiry of the Integrity Chamber. The Constitutional Court is of the opinion that the right to refuse to testify requires further consideration and clarification with regards to the scope of this right.

Power to enter premises and to bring equipment
With the exception of dwellings which shall only be accessed following the resident's permission, the Integrity Chamber is authorized under the National Ordinance 2015 to bring the necessary equipment and to access any location, if necessary with the assistance of the police, to claim access to data, modems or other information carriers and to make copies thereof, or to subject items to examination and inspection, or to take samples of those items. According to the Constitutional Court, the definition of the term "dwelling" is unclear and the Constitutional Court has declared entering government buildings unconstitutional. The Constitutional Court also states that the National Ordinance 2015 does not provide for any form of independent review of aforementioned far-reaching powers. In the opinion of the Constitutional Court, the internal and inquisitorial powers of the Integrity Chamber should be supervised by an agency subject to sufficient safeguards in terms of independence and quality. The existing Review Committee cannot, in view of the Constitutional Court, serve this purpose, as proposed in the National Ordinance 2015, since it does not meet the aforementioned requirements and does not have the necessary powers.

What’s next?
The consequence of the annulment of the National Ordinance 2015 is that the legislator of St. Maarten will have to draft a new national ordinance. As stated above, the Constitutional Court has formulated framework conditions, identified ambiguities in the National Ordinance and made suggestions so that the legislator can take those into account when drafting a new regulation. According to recent media reports, the draft of a new National Ordinance is almost ready and will be submitted to the Council of Ministers for approval by the end of August 2017. All the objections raised by the Ombudsman would be addressed in that draft.

In the meanwhile, two coordinators have been appointed under the Protocol (one of whom was already appointed by St. Maarten in 2015, and one was appointed by the Netherlands in January this year), who would be involved in the implementation of the Integrity Chamber until a national ordinance enters into force. It is somewhat unclear whether these coordinators have already begun preparatory work. Probably, the political disagreements and discussion between St. Maarten and the Netherlands did not contribute much to this.

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19 Article 251, 252 en 253 of the Code of Criminal Procedure.
20 For example, the National Ordinance 2015 does not provide for a complaint procedure, in contrast to the criminal law.
21 See also "Govt. to send integrity chamber law for review by month’s end", Daily Herald (Augustus 4, 2017): The new draft does not have any of the points that led the Ombudsman to take the scrapped one before the Constitutional Court for its judgment.
To conclude

Integrity and the Integrity Chamber continue to prey on people’s minds. Anyway, it is an interesting subject that gets the required media attention. Intentions to establish an independent Integrity Chamber have also been voiced on Curaçao\textsuperscript{22}. This would be evident from the new coalition agreement, and from assurances of Prime Minister Eugene Rhuggenaath that he will establish the Integrity Chamber himself. Will there be the Integrity Chamber for St. Maarten? Probably, yes. What will be its powers? This is still unclear. We should wait for the draft of a new National Ordinance.

\footnote{\textit{Curaçao gets an integrity chamber}, Curaçao News (May 11, 2017): The ‘Unidad kontra Konupshon’ must become a reporting center that can conduct inquiries into integrity issues, but must also be able to independently launch an inquiry when integrity issues are suspected. This chamber must help to distantiate politics from government companies.}