

Code

The Corporate Governance Codes were implemented in the Dutch Caribbean (with the exception of Aruba) in 2009. This was shortly before the dismantling of the Netherlands Antilles. At the last moment, during the negotiations in 2008, the Netherlands imposed the implementation of a national ordinance and a Corporate Governance Code as an additional condition for dismantling.

They had to apply to entities linked to the government, both at the national level and at the island level. The local politics insisted on dismantling of the Netherlands Antilles and these codes were therefore drafted and implemented in a hurry for the former island territories of Curacao, St. Maarten, Bonaire, Statia and Saba. An identical Corporate Governance Code was drafted for the entities linked to the government of the country of the Netherlands Antilles. This was necessary because there was question of public corporations and public foundations both at the island level and at the country level.

The methodology selected in 2009 implied that the codes were embedded in an umbrella national ordinance: the respective island ordinance. The said ordinance imposed, inter alia, a best efforts obligation on the former island territories and the State, as stakeholder in an entity linked to the government, to implement the code in the relevant entities. Technically this had to take place by amending the articles of incorporation. In addition, it was regulated in the island (national) ordinance that in case of a number of important decisions of the stockholder, a prior opinion would need to be obtained from an independent advisory body. Think about decisions about appointment and dismissal of directors and supervisory directors and decisions about the sale or acquisition of stocks.

The code never applied directly at any entity linked to the government. Nor would this be possible in the system of the law. After all, there were and are numerous corporations linked to the government in which the State only holds a part of the stocks. In pursuance of Book 2 of the Civil Code it would result in an unauthorized distinction between stockholders if one stockholder (the island territory or the State) could impose a (statutory) regulation on another stockholder. The wording of the code itself also renders clear that a separate provision must be included in the articles of incorporation of the relevant entities in order to ensure applicability of the code.

It all went differently for the Caribbean Netherlands. After the dismantling these former island territories switched to the Dutch state structure. They all became so-called special municipalities or Public Entities. During the period prior to 2010 the legislation applicable on these islands was a combination of Dutch-Antillean and island legislation. In 2010 most of the said legislation was placed on a so-called "positive list". This regarded local regulations that would remain applicable after the dismantling. One way or the other, the national ordinance Corporate Governance did not end up on the positive list. Hence, the legislative basis for the Corporate Governance Code in the entities linked to the government on Bonaire, Saba and Statia disappeared. Consequently, there is no longer a statutory basis for the applicability of the code on these islands. Nor is there a mandatory obligation to obtain an opinion from an independent authority.

This does not imply that the Corporate Governance Code cannot apply to entities linked to the government on these islands. However, the law no longer includes a best efforts obligation for the Public Entity to ensure that the applicability of the code is stipulated in the articles of incorporation. If the articles of incorporation of a public limited corporation or a public foundation in the Dutch Caribbean do not expressly require this then the Corporate Governance Code is therefore not applicable to the said public limited corporation or public foundation. Moreover, the Dutch Caribbean lack the preventive supervision of a Corporate Governance Advisor or a Corporate Governance Council. In the recent past it has become apparent that the said supervision is

missed considerably. That is a good reason for the Dutch legislator to scrutinize the statutory system again.



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