

To: The Minister of VSA
From: Jairo Bloem
Re: Draft National Decree to mandate/authorize SZV to effectuate the Stimulus and Alleviation Plan by making the amount of 74,100,000 Antillean Guilders available for the payroll support of businesses for the month of April, May and June 2020
Date: April 20th, 2020

The Honorable Mr. Richard Panneflek,

1. Introduction

- 1.1 Our office has been tasked with advising in captioned matter. We have been provided yesterday afternoon with an undated and unnumbered draft National Decree mentioned in the subject-line (“the Draft Decree”). After having analyzed this matter, I can inform you as follows.
- 1.2 The Draft Decree contains several considerations that lead up to three (3) resolutions. The third resolution, namely the effectuation date of the Decree in question is a standard legal clause that does not require any further discussion. The questions at hand is the legality of the first and second resolution contained in article 1 and respectively article 2 of the Draft Decree. These questions will be addressed in chapters 2 and subsequently 3 below.

2. Legality article 1 Draft Decree

- 2.1 Article 1 of the Draft Decree states Country Sint Maarten is entitled as per article 50 paragraph 1 of the Compatibility Ordinance to contract an agreement with SZV to effectuate the payroll support program, as part of the stimulus and alleviation plan.

Article 50 paragraph 1 of the Compatibility Ordinance allows country Sint Maarten to deviate of its budget, before the requisite amendment by a specific National Ordinance:

- (i) in case the interest of the country demands same urgently; or
- (ii) in case of urgent requirements that were not foreseen in said budget year.

- 2.2 One of the core considerations in the Draft Decree is that SZV has the necessary expertise, experience and capacity to on a larger scale render payroll assistance and to give financial reason and account.
- 2.3 At first glance it is somewhat unclear if the Draft Decree intends for SZV to only render administrative services by, briefly put, organizing and checking the grants for financial aid for payroll support to businesses on behalf of Country Sint Maarten, or to also do more. The Draft Decree does not state where the requisite funds to realize the payroll support will be derived from. The language used in the Draft Decree is furthermore generic enough to possibly cause misunderstandings. This, in the sense that it could be interpreted and/or understood that SZV would have to finance the payroll support itself, at least temporarily. It is as such very much recommendable to clarify in the Draft decree from where the 74,100,000 guilders will be procured to realize the payroll support.
- 2.4 If it's only the intention of Country Sint Maarten to basically broaden the tasks established by law for SZV with the administrative execution and control of the payroll support program from the stimulus and alleviation plan, then what must be established is if, and if so in which form, Country Sint Maarten can grant such an assignment to SZV. However, again if Country Sint Maarten also intends to have SZV – at least temporary – finance this payroll support program, a more extensive analysis of the legal possibilities and ramifications thereof is mandated.
- 2.5 Please note that article 50 paragraph 1 of the Compatibility Ordinance to which reference is made in the Draft Decree, does not establish any authority of Country Sint Maarten to give any assignment or additional tasks to SZV, nor does it validate a possible instruction by Country Sint Maarten to SZV, to execute the payroll support program using its own funds. The article 50 paragraph 1 of the Compatibility Ordinance only allows the Sint Maarten Government to in very specific circumstances, such as the ongoing COVID-19 Pandemic, deviate from its budget pending the adoption of an Amendment Ordinance thereto.
- 2.6 The National Ordinance on the Effectuating Body Social and Sickness Expenses Insurances (“SZV Ordinance”) regulates the establishment of SZV. This ordinance designates the Minister of VSA as the responsible Minister. Neither (i) the National Ordinance on an Emergency Situation, (ii) the National Ordinance on Combating Disasters and (iii) the National Decree to Establish a Disaster Plan as per the aforementioned ordinance, create an

exception or derogate otherwise to the responsibilities of the Minister of VSA as per the SZV Ordinance. Consequently, also considering the ongoing COVID-19 Pandemic and considering the disaster declaration of Country Sint Maarten dated April 5th, 2020, the Minister of VSA remains the responsible Minister, as designated by the SZV Ordinance.

- 2.7 Article 3 of the SZV ordinance states that insofar as it's not regulated differently by National Ordinance, SZV has the following tasks:
- a. effectuating social and sickness insurances or insurances with the mostly a social character, if and insofar designated by a National Ordinance;
 - b. advising the Minister of VSA about policy frameworks about social and sickness expenses insurances;
 - c. implementing and effectuating policy frameworks regarding social and sickness expenses insurances of the Minister of VSA;
 - d. advising the Minister of VSA about country laws and legislation pertaining to social and sickness expenses insurances;
 - e. performing tasks in the area of social and sickness expenses insurances, designated by National Ordinances;
 - f. insofar as is necessary upon the instruction of the Minister of VSA safeguard the Sint Maarten national interest related to social and sickness expenses insurances within the Kingdom, regionally and/or internationally;
 - g. advising the Minister of VSA and if asked other members of the Council of Ministers, about the matters mentioned under a-f above;
 - h. advise or render services in favor of Government Departments and/or third parties, about matters with regard to social and sickness expenses insurances;
 - i. performing other tasks designated by the Minister of VSA;
 - j. performing other assignments designated by a National Ordinance.
- 2.8 Articles 3 paragraph i and j of the SZV Ordinance are the only possible anchors for justifying granting SZV the litigious payroll support tasks. The Minister of VSA is namely entitled as per article 3 paragraph I of the SZV Ordinance to charge SZV with other tasks and paragraph of that articles states that same can be realized by National Ordinance. However, the scope of possible assignments to SZV is bound by its purpose clearly mentioned in article 2 paragraph 1 of the SZV Ordinance as an Executing Body of Social and Sickness Expenses Insurances.

Within the system of the law assignments given by the Minister of VSA or by National Ordinance to SZV should be within the framework of its generic purpose.

SZV is also as per the Memorandum of Explanation on the SZV Ordinance an Independent Government Body exclusively in charge with insurances as designated by National Ordinances.

An insurance agreement is intrinsically a chance agreement that requires the uncertainty of an insured event that can cause damage for the insured. If the insured can never suffer damages from a certain event, he/she/it can in principle also not contract an insurance agreement in that respect. Same applies is the event is not uncertain, possibly because it already materialized.

Whilst its certainly possible to have employers mandatorily contract business interruption and specifically payroll support insurance with SZV or another -Independent Government-Body as per a to be adopted and enacted National Ordinance, there are good grounds to argue that a grant by the Sint Maarten Government to business in the form of payroll support, nota bene after the disaster and as such unforeseen circumstance already materialized, cannot be qualified as an insurance. Moreover, since the recipients of the grants did not make any contribution thereto.

- 2.9 It is questionable that the payroll support program as per the Stimulus and Alleviation plan constitutes a matter that relates to social and sickness expenses insurances. Whilst there is no argument that the plan intends to provide highly necessary social aid, it doesn't meet the insurance criteria. Moreover, it does not meet the formal requirement of being regulated in a prevailing/existing National Ordinance. Consequently, the SZV Ordinance, which essentially constitutes its Charter, significantly limits the legal possibilities to have SZV render the specific payroll support services to businesses on Sint Maarten. This task can also not be validated using article 3 sub h of the SZV ordinance, mentioned above.

The Memorandum of Explanation on article 3 of the SZV Ordinance states: “*The tasks of SZV follow from the prevailing legislation in the area of social expenses insurances and sickness expenses insurances, the execution of which s designated to SZV.*”

- 2.10 Whilst article 3 paragraph j of the SZV Ordinance allows Country Sint Maarten as stated to give other specific assignments/tasks to SZV by National Ordinance, the law does not provide for the possibility to do this by National Decree.
- 2.11 The aforementioned means that its euphemistically challenging to maintain that the payroll support grants fall within the legal scope of activities intended by law for SZV. This

necessitates amending the SZV Ordinance by an Amendment Ordinance to allow it to also realize the specific payroll support tasks. Alternatively, Country Sint Maarten can opt to, if it still insists that SZV must exercise the payroll support program tasks as per the Stimulus and Alleviation Plan, endeavor to explicitly motivate why this must be considered to be a cardinal part or aspect of the existing social and sickness expenses insurances (AOV, AWW, AVBZ, FZOG, OZR, OV, and ZW).¹ This should then be stated and preferably also adequately motivated in the Draft Decree. It is recommendable to do that in the considerations. With a possible adequate motivation that the payroll support program falls within the legal scope of work of SZV, the Minister of VSA could request SZV to carry out the assignment mentioned in article 1 of the Draft Decree.

2.12 However, because time is of great essence and considering the legal challenges of the assignment of the tasks to SZV and more importantly the prevailing laws that even in case of a disaster do not derogate to the Ministerial Responsibilities of all Ministers, its recommendable to have the Labor Department carry out the payroll program. This, of course if it has the requisite capacity therefor. If not, SZV could designate part of its work force to assist the Labor Department under the authority of latter, in effectuating the payroll support program.

2.13 That brings me to the following.

2. Mandate to Minister of Finance to Contract Agreement with SZV

2.1 The envisioned agreement between the Sint Maarten Government and SZV entails an assignment to SZV to carry out an additional specific task. The SZV Ordinance specifically designates the legal ways to give -additional- assignments to SZV, either by a decree of the Minister of VSA or by a National Ordinance. The Draft Decree cannot derogate to the SZV Ordinance. The mandate as per article 2 of the Draft Decree to the Minister of Finance consequently lacks judicial basis.

2.2 Please note that the Minister of VSA can of course mandate the Minister of Finance or any other legally competent person for that matter, to on his behalf give assignments to SZV as per article 3 paragraph i of the SZV Ordinance. This is in my view the only way to legally

¹ With the best of creative interpretations I wasn't able to fit the payroll support program within either one of these insurances.

realize a valid assignment to SZV of a task that falls within the legal prerogative of SZV, by law.

3. Supplemental information on obligations of employers to continue pay salary

- 3.1 Any social payroll support program of the Sint Maarten Government to businesses must be premised on adequate understanding of the rights and obligations of employers towards their employees during this COVID-19 Pandemic. Only then will the Sint Maarten Government be able to adequately establish the terms and conditions for grant of payroll support to businesses. There are namely good grounds to argue that only employers that meet the legal criteria to not have to make -full- salary payments to employees should come in consideration for payroll support, for the part or a portion thereof that they cannot pay. The following serves to elucidate on the legal obligations of employers to pay salary to employees in case of a disaster.
- 3.2 Under Sint Maarten labor laws an employer cannot unilaterally amend the employees labor conditions. This means that also the wages of employees cannot be reduced unilaterally even if the event that the workload has been or will be reduced drastically. The main rule is that the wages of an employee are due from the commencement of the employment until the time of termination of the employment.

This rule is laid down in article 7A: 1614a of the Civil Code.

- 3.3 Another main rule that applies is the rule laid down in article 7A: 1614b of our Civil Code. This article stipulates that if an employee does not work, the employer does not owe the employee any wages, this rule is referred to as the "*no work, no pay*" rule. In the event that an employee wishes to work but the employer cannot make use of the employees services due to a reason which cannot be attributed to the employee e.g. a reason that can be considered a business risk then the employer has to continue the payment of the employee's salary.
- 3.4 In the case of many businesses on Sint Maarten the workload has decreased or has been simply completely halted, as a result of the COVID-19 pandemic and the measures taken by the Sint Maarten Government in connection therewith. In general reduction of work in a business is for the risk of the employer. The answer to the question whether the current

situation is an exceptional situation that cannot be considered as a normal business risk if contested by the employees shall ultimately have to be given by the Court.

- 3.5 Based however on the assumption that this situation is an exceptional situation and that the decrease in the business activity and the available work for the employees is not to be considered a business risk, employers have the following possibility to reduce the salary of its employees.
- 3.6 Employers can propose a reduction of the employee's salary by appealing to the employee to act as a good employee as stipulated in article 7A: 1615d of the Civil Code. This article stipulates that in general an employee should do or refrain from doing anything that a good employee in the same circumstances should do or refrain from doing.
- 3.7 If an employer wishes to make use of this possibility the first step should be - based on the changed circumstances due to the COVID-19 pandemic and the government measures - to propose a reasonable reduction of the employee's salary (thereby also taking into account the employee's personal circumstances) to the employee.

Based on case law of the Supreme Court in the Hague (Taxi/Hofman, H.R. 26 June 1998, NJ 1998/ 767 and Stoof/Mammoet, H.R. 11 July 2008, LJJN BD 1847) the employee pursuant to the principle of a good employee, as described above, generally should react positive to such reasonable proposal and should only reject the proposal if the acceptance thereof can reasonably not be expected from the employee in question.

- 3.8 In other words the employer's proposal must be reasonable and the expectation of the employer in respect of the acceptance of the proposed change by the employee also must be reasonable taking into account the employee's personal circumstances. The factual circumstances of each case will determine whether the employer's proposal is a reasonable one, the burden of proof thereof lies with the employer. Whether or not the acceptance of the proposal can in reasonableness be expected from the employee depends on the personal circumstances of the employee. The employee who rejects a proposal from the employer which is deemed reasonable shall have to prove why his personal circumstances should prevail over the employer's business interest.

- 3.9 If parties do not agree on the reasonableness of the proposal or if the employee is of the opinion that acceptance of the employer's proposal, given his personal circumstances, can in all reasonableness not be expected from him then the Court shall ultimately have to decide on the matter.
- 3.10 Hereunder, I will outline and further detail the criteria established by the Court in several cases with respect to the situation on Sint Maarten after hurricane Irma caused several businesses to (temporarily) close.
- 3.11 In the so called " Irma" cases a distinction can be made in:
- a) cases where the employment agreement included a provision that if - due to certain situations such as a calamity or any act of God - the employer was unable to make use of the services of the employee the employer's obligation to pay wages shall cease; and
 - b) cases where the employment agreements did not contain any provision for such a situation.

Employment agreements with a clause that gives the employer the right to cease the payment of wages

- 3.12 The employment agreements of one employer (ECLI:NL: OGEAM:2918:38) contained the following paraphrased clause:
- "In the event the employer is unable to make use of the services of the employee - due to a calamity (fire, hurricane, rain, or any Act of God) or any occurrence beyond the control of the Employer, whether or not for the risk of the Employer - the Employer will only be obliged to pay the applicable minimum wage for a period of 3 months and that parties shall do all that is legally necessary to terminate this agreement as soon as possible".*

In this case after a period of 3 months had passed the business of the employer was still not fully operational. The employer then informed the employees that it was forced to suspend further payment of wages for the employees who were not working.

The Court decided in short as follows:

In deviation of the main rule that the employer is obliged to pay the wages of the employee, parties can agree in writing that the employer does not have to continue paying the wages to an employee even if the employee is willing to work and the employer does not make use of

the employee's services. Although this deviation is allowed it is not meant to have a permanent character.

The judge further decided that the aforementioned provision cannot be considered a temporary provision as the employee is being obliged to cooperate with a termination of his employment agreement.

The employer thus was ordered to pay the employee's full wages.

- 3.13 In another case (ECLI:NL: OGHACMB:2019:84) the employer had a similar clause in its employment contracts but instead of 3 months the employer was only obliged to pay the applicable minimum wage for a period of 2 months.

In this case it was known that the employer (a tourist resort) was closed for business, nonetheless the Court in First instance ordered the employer to continue the salary payments until the date that the employment agreement has been legally terminated. Considered that the employer's business was still not operational the payment of the salary was limited to 50% of the salary as agreed upon pursuant to the employment agreement.

The employer in this case appealed the aforementioned decision however the Joint Court of Appeal confirmed the decision of the Court in First Instance.

Employment agreements where no provision has been included in the event of e.g. calamities etc.

- 3.14 As mentioned an employer's proposal to an employee to agree to a reduction of his salary must be a reasonable proposal in which the employee's interest has also been considered.
- 3.15 In several of the Irma cases the Court has further clarified the rule that the Supreme Court in the Hague laid down in the Stoof/Mammoet case as referred to in our previous advice namely that when an employer is proposing an amendment of the employment conditions such as a reduction of salary to an employee the following applies:
1. based on the principle that the employer should act as a good employer, the first consideration should be to determine if the employer is acting as a good employer by proposing such a change to the employment conditions;

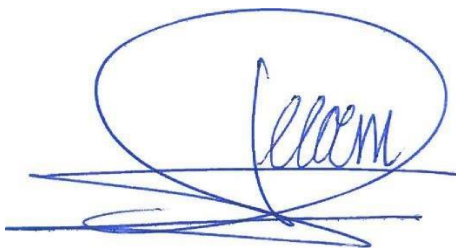
2. secondly it must be determined whether the proposal is reasonable for the individual employee and that the employee therefore in all reasonableness cannot reject the proposed amendment.
- 3.16 Based on the Irma cases (ECLI:NL:OGEAM:2018:64; ECLI:NL:OGEAM:2018:61 and ECLI:OGEAM:2018:69) the following can be distilled as minimal information that an employer should provide for the assessment of the reasonableness of the employer's proposal:
1. the proposal should be in writing for the employee to have the opportunity to think about it and to seek legal advice. If the proposal was done verbally, it should be immediately thereafter be confirmed in writing for the same reasons;
 2. the employer has to be fully transparent with respect to the financial reason for proposing the change. Transparency means among other things:
 - (i) the presentation of its annual reports over the previous years;
 - (ii) if there is an insurance in place covering damages in the event of a business interruption, the employer shall have to present a detailed damage report accompanied by underlying documents and a motivated opinion of the insurer on the expected payment;
 - (i) a substantiated cash flow forecast; and
 - (ii) a detailed plan for the future, also substantiated.
- 3.17 If the employer cannot substantiate its financial reason for the proposed reduction in the employee's salary the proposal in any event will not be considered a reasonable proposal. We also point out ,for the avoidance of doubt, that even if the employer provides all the information mentioned above it will still be at the Court's discretion to decide in any given case on the reasonableness of the proposal taking all circumstances of the matter into account.
- 3.18 In one of the Irma cases where the employer stated that the financial impact of continuing the salary payments to the employee will lead to the employer's bankruptcy and therefore the employer had ceased the salary payments, the Court decided that this is not a valid reason for not paying the employee's salary (ECLI:NL:OGEAM:2018:65).
- 3.19 In view of the above the burden is laid primarily on the employer when proposing a change in the employment conditions that has such a severe impact on the employee's situation. The

ratio behind this reasoning is based on the fact that any decision made by the employer is a business decision. Consequently, the employee's interest has to be protected in conformity with the employment laws as being the weaker (subordinated) party.

- 3.20 Also the situation of each individual employee should be assessed separately by the employer.
- 3.21 In practice it will take months or possible years for the Courts to establish if an employer must continue paying salary or not. Moreover, (macro) economic necessity to avoid massive dismissals and as such great unemployment is imperative. It remains however recommendable to have employers that apply for payroll support provide the Sint Maarten Government with same or similar data that they would have had to show to the Court to try validating a possible decision not to pay salary. More importantly, to as part of an equitable government payroll support program have the statutory directors of employers sign a personally guarantee on behalf of the companies receiving payroll support to allow or facilitate the recourse facilities of the Sint Maarten Government in case reimbursement is mandated for whatever reason, e.g. misrepresentation of financial situation, ultimately not compliant with grant criteria etc.

If you have any questions concerning the above, please do not hesitate to contact us.

Kind regards,



Jairo Bloem