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To the Council of Minister of Country Sint Maarten,  
Attn Mrs. Sarah Wescot-Williams,  
Administration Building,  
Clem Labega Square,  
Sint Maarten

**Philipsburg, June 18, 2011**

**Subject:** open letter in response to current public debate regarding  
the Corporate Governance Council (CGC)  
**Nr. 2011/50.**

Esteemed Council of Ministers,

On May 9, 2011, the CGC has issued an advice concerning the intended appointment of the new Managing Director of Princess Juliana International Airport Exploitiatiemaatschappij N.V. This was in response to the request for advice which was received April 21, 2011, so well within the 4 week response deadline stipulated by Article 9, section 3 of the Island Ordinance Corporate Governance which states (1)<sup>1</sup>:

***"Binnen vier weken na ontvangst van de melding, bedoeld in het eerste lid, doet de Corporate Governance Council het bestuurscollege schriftelijk zijn advies toekomen over de vraag of een voornemen als bedoeld in het eerste lid, voldoet aan de statuten van de vennootschap of stichting en aan de toepasselijke regelgeving, waaronder de procedureregels en de profielschets, bedoeld in artikel 8***

<sup>1</sup> As a consequence of the change in constitutional status, the Island Ordinance Corporate Governance that was in force at October 10, 2010, now has the legal effect of a National Ordinance. Consequently, for executive council and island council must be read as Council of Ministers respectively Parliament, being the legal successors of the former institutions.

**Temporary meeting address:** A.Y. Illidgeroad 106, Suite 2, Sint Maarten

***eerste lid en de Corporate Governance Code. In het advies geeft de Corporate Governance Council gemotiveerd aan of er al dan niet zwaarwegende bezwaren zijn tegen gemelde voornemen."***

Article 9, section 4 states:

***"Van een zwaarwegend bezwaar als bedoeld in het derde lid is in ieder geval sprake als een voornemen als bedoeld in het eerste lid, niet voldoet aan de profielschets, bedoeld in artikel 8, eerste lid. De vorige volzin is van overeenkomstige toepassing in de gevallen waarin met het voornemen de procedureregels, bedoeld in artikel 8, eerste lid, niet wordt nageleefd."***

In recent weeks and especially in the past days a public debate has erupted, not only about the purport of the advice but also about the role of the CGC in general. In view of some of the positions taken in this public debate, also by Cabinet Ministers, the CGC feels that a public response is now in order.

#### **Public debate about an issue concerning a private individual**

First of all, the CGC wants to express its sincere regret that, as a result of this public debate, a serious violation has taken place of the privacy rights of the person who was nominated for the abovementioned position and who consequently is the subject of the CGC advice.

This regret does not mean that the CGC accepts any responsibility for the violation of the rights of the nominee. More specifically, the CGC strongly refutes allegations as published in some of the local media that it would have "leaked" the advice.

Advices concerning persons are by definition of a confidential nature and all (draft) advice letters and related documents are therefore treated with great circumspection by the CGC to safeguard such rights. However, once an advice is issued it is beyond the control of the CGC what happens to it.

Like all advice letters of the CGC, the advice at hand was sent to the Council of Ministers through the Prime Minister and, on June 6, 2011 it was sent to Parliament. Article 4, section 3 of the Island Ordinance Corporate Governance states:

***"Binnen een week na het uitbrengen van een op grond van deze eilandsverordening door de Corporate Governance Council gegeven advies aan het bestuurscollege wordt een kopie van dat advies door de Corporate Governance Council gestuurd naar de eilandsraad."***

The CGC does not know when the advice at hand was made public or by whom. The fact is that soon after the advice was received by Parliament, rumours began circulating and on June 10, 2011, a scan copy of the advice was published on a news website ([www.eyon.nl](http://www.eyon.nl)):

This gives reason for concern, especially since this is not the first time a CGC advice concerning a private individual was made public. The same happened with the advice of April 6, 2010, regarding several intended appointments in the Supervisory Boards of PJIAE N.V. and PJIAH. N.V.

Therefore the CGC recommends that Parliament and the Council of Ministers review their policies and procedures in order to stop such incidents from recurring and find ways to protect the privacy rights and interests of persons who are or will be (inevitably) mentioned by name in CGC advice.

#### **Current status of the CGC advice**

Government has failed to provide the CGC with a number of documents (such as the job profile and regarding the selection procedure) that it was required to provide by the law, while the forwarded copy of the Articles of Association of PJIAE N.V. was outdated. Without this information the CGC cannot issue an advice regarding the intended appointment as required by the law. Therefore the CGC, while asking for the missing information, informed the Council of Ministers that it cannot yet consider the request pending receipt of the documents in question.

Recognizing the urgency of filling the vacant position at PJIAE N.V., the CGC decided to nonetheless issue an advice based on its right as laid down in Article 4 section 2 of the island Ordinance Corporate Governance, which states:

***"De Corporate Governance Council adviseert, onverminderd hetgeen verder in deze eilandsverordening***

***is bepaald, het eilandgebied op diens verzoek over de toepassing van de in de Corporate Governance Code en in deze eilandsverordening opgenomen bepalingen. De Corporate Governance Council kan het eilandgebied daarover ook uit eigen beweging adviseren.”***

What the CGC has advised in its letter of May 9, 2011, must therefore be considered as such unrequested advice. This advice is based on facts of common knowledge only. The letter does therefore NOT hold the advice required under the corporate governance law of St. Maarten for the completion of the vetting and appointment process.

#### **Content of the advice**

Due to the missing information, the CGC was not able to complete the vetting procedure for the nominee with respect to the position to be filled. Contrary to what has been suggested in some news reports, the CGC has refrained from any opinion regarding the skills and competencies of the candidate. In stead, as for the suitability of the candidate who to some extent is a public figure, the CGC in this preliminary advice has restricted itself to facts of common knowledge.

First, the CGC observed that PJIAE N.V. is a company with a greater financial and human resource substance than the nominee seems to have been used to in the past. Therefore the CGC advised that the nominee as CEO of the company should be supported by a CFO and a COO as is normal for companies of this size and substance.

Second, statements in the media by the public prosecutor indicated that a criminal investigation of the nominee is highly likely. The CGC is of the opinion that the integrity of any candidate for such a prominent position should be above any doubt. Should the nominee, once appointed, have to defend herself in court, this would not only reflect negatively on the company but, as long as her integrity is in question, will also undermine the authority of the Managing Director of a company which is extremely important for the economy of the island.

To protect the interests of the company, the CGC therefore recommended not to appoint the nominee at this time, i.e. as long as a cloud is hanging over her integrity, but to either consider an alternative candidate or an alternative solution as appointing an interim director.

### **Advisory or supervisory role**

The latter – preliminary and time-bound – conclusion has ignited a fierce public debate, hardly about its substance, but apparently about the fact that the CGC has dared to advise against the apparent wishes of Government. Otherwise the CGC cannot explain why so much attention was given to the question if the CGC has an advisory or supervisory role towards the Government.

The CGC has been surprised, if not astonished, by the confusion on this issue and by the emotions cooked up around it, especially since at least three knowledgeable Cabinet Ministers have elaborated on this theme, instead of ending the confusion by making a simple reference to the law.

The legislation under which the CGC is bound to work is far from perfect, but one thing is crystal clear: the CGC has no supervisory powers whatsoever with respect to government. Further, in all its 18 letters to the Council of Ministers to date, the CGC has been very careful not to use any wording that could suggest otherwise. The CGC has never claimed that it can “tell Government what it can or cannot do”. Instead, it fully recognizes “the right of Government to manage according to its political philosophies” as another Cabinet Minister put it. Therefore the CGC wonders why it was necessary for Cabinet Ministers to even raise and/or debate this issue.

### **Authority and responsibility**

Presented with a Government request to advise on an appointment decision in a government owned entity, the CGC is not only authorized but also legally obliged to render its advice to the best of its abilities within the scope of corporate governance. In this case the CGC was presented with a request from Government that did not meet the legal requirements. For reasons of expediency it decided to nonetheless issue an unrequested advice within that same scope. That is the responsibility of the CGC, no more and no less.

The Council of Ministers has a wider scope of interests to pay attention to. Therefore it is the exclusive authority of the Council of Ministers to decide about appointments, either by following or by rejecting the CGC advice.

However authority comes with responsibility, also for the Council of Ministers. As for corporate governance, the legislator of St. Maarten has chosen to add an extra dimension to this responsibility and obliged the Council of Ministers to take a CGC advice seriously into account. Therefore the law stipulates in Article 9, section 5 that a rejection of such advice must be notified, immediately and duly motivated, to the CGC. Article 9 section 5 of the island Ordinance Corporate Governance states::

***"Indien wordt afgeweken van een advies van de Corporate Governance Council waarin geconstateerd wordt dat aan een voornemen als bedoeld in het eerste lid, zwaarwegende bezwaren kleven, meldt het bestuurscollege dit terstond schriftelijk en gemotiveerd aan de Corporate Governance Council."***

### **Completion of the process**

In a normal situation such an explaining notification would be the end of the involvement of the CGC in the vetting and appointment process. Contrary to the CFT (which was mentioned in the same context by one of the Cabinet Ministers), the CGC is a strictly advisory body without the authority to stall or block intended decisions.

However this is not a normal situation. Due to the failure of Government to provide the CGC with the legally required documents, it has not been able to advise on the appointment of the nominee as such. Therefore, should the Council of Ministers indeed wish to proceed with the same nominee, it still has to provide the missing information and allow the CGC to issue its final and complete advice.

At present, the Council of Ministers is free to reject that conclusion, but is still bound to complete the vetting process under the corporate governance law of St. Maarten.

Should the Council of Ministers choose to pursue the appointment now, as some reports in the media seem to indicate, without having enabled the CGC to issue a final and complete advice, it could be argued that it would place itself above the law.

### **Political Turmoil**

The CGC cannot but conclude that the political turmoil caused by its advice of May 9, 2011, comes down to the question "What gave the CGC the nerve to issue an advice to Government that it does not like?"

Given the corporate governance legislation, as cited and explained above, the answer to this question is very simple: the Law of the Land.

The law has not installed independent advisory bodies to rubber-stamp intended Government decisions but to organize objective and professional advice on the relevant subject matters.

St. Maarten is, or at least aspires to be, a Country governed by the Rule of Law and its legislation, including the corporate governance legislation, is determined in a democratic process. In such a Country it should be perfectly normal for advisory bodies to issue a negative advice, as it should be equally normal for the Council of Ministers to deviate from such negative advice as long as the confines of the law are respected.

The CGC now has the honour of being the first advisory body to "bite the bullet" but, given the issues the Country is facing, it cannot take long before other advisory bodies such as the "Advisory Council" or the "Social Economic Council" may also advise negatively on intended decisions or legislative proposals which the Council of Ministers holds for politically necessary.

Apparently, dealing with independent government bodies still is part of the collective learning process of becoming a Country or, as the Prime Minister so eloquently put it on St. Maarten Flag Day, part of the nation building process which includes respecting and building its laws and institutions.

As the members of the CGC we are convinced to have acted in full accordance with the legislative framework that governs our appointment and the functioning of this independent body. Whilst in the current debate we have not recognized much of the respect that the Prime Minister alluded to on St. Maarten Flag Day and whilst the circumstances under which we are still forced to operate are less than desirable, we remain resolved to continue serving Country St. Maarten in that same spirit.

Respectfully yours,  
On behalf of the Corporate Governance Council,

Louis Duzanson,  
Chairman