

Enforcement policy supervision Centrale Bank of Aruba

1. Introduction

If the Centrale Bank van Aruba (CBA) establishes a violation, it will assess how it will act, whether an (administrative) enforcement measure will be imposed, and, if so, which measure. For this assessment, CBA is guided by the following enforcement policy.

This policy document will discuss the policy applied by CBA to enforce the provisions of the supervisory state ordinances and the regulations based on them. The supervisory state ordinances consist of the following state ordinances: the State Ordinance on the Supervision of the Credit System ('AB' [*Statute Publication Gazette*] 1998 No. 16) ('SOSCS'), the State Ordinance on the Supervision of Insurance Business (AB 2000 No. 82) ('SOSIB'), the State Decree on the Supervision of Insurance Brokers (AB 2014 no. 6) ('SDSIB'), the State Ordinance on the Supervision of Money Transaction Companies (AB 2003 No. 60) ('SOSMTC'), the State Ordinance on the Supervision of Trust Service Providers (AB 2009 No. 13) ('SOSTSP'), the State Ordinance on the Supervision of Securities Business (AB 2016 no. 53) ('SOSSB'), the State Ordinance Company Pension Funds (AB 1998 No. GT 17) ('SOCPF'), the State Ordinance on the Prevention and Combating of Money Laundering and Terrorist Financing (AB 2011 No. 28) ('AML/CFT State Ordinance'), and the Sanctions State Ordinance 2006 (AB 2007 No. 24) ('Sanctions State Ordinance').

Wherever in this policy document reference is made to the sectoral state ordinances, the reference includes the SOSCS, SOSIB, SDSIB, SOSMTC, SOSTSP, SOSSB and SOCPF.

2. Legal basis

Pursuant to articles 35a, paragraph 4, of the SOSCS; 16, paragraph 4, of the SOSIB; 4, paragraph 5 of the SDSIB; 23, paragraph 4, of the SOSMTC; 11, paragraph 4, of the SOSTSP; 99, paragraph 4 of the SOSSB; 26a, paragraph 3, of the SOCPF and 37, paragraph 4, of the AML/CFT State Ordinance, the CBA has to lay down guidelines for the exercise of the powers to impose a penalty charge order or an administrative fine and incorporate them in a policy document. Furthermore, the policy document should at any rate contain a description of the procedures to be followed when exercising aforementioned powers. The purpose of this policy document is also to comply with aforementioned obligation, but it covers the entire range of enforcement instruments.

The Sanctions State Ordinance does not contain a provision as described above. However, the CBA deems it desirable to draw up a uniform and comprehensive enforcement policy for the enforcement of all supervisory state ordinances.

3. Supervision and enforcement

The CBA aims *inter alia* to promote and, if necessary, enforce compliance by the supervised institutions with the norms laid down in the supervisory state ordinances. The starting point is

that everybody shows voluntary norm-compliant behavior. Regular supervision contributes considerably to this. If necessary, standard-compliant behavior can also be achieved by using informal and formal instruments (hereinafter: 'enforcement instruments'). The enforcement policy described hereinafter provides information about the starting points and factors that are important to the CBA when deciding on the deployment of enforcement instruments to achieve compliance with the norms laid down in the supervisory state ordinances. By assessing the seriousness of the violation and other concrete circumstances of the case, the CBA arrives at appropriate actions to accomplish norm-compliant behavior in an effective manner. The starting points (part 4) and circumstances (part 5.3) mentioned hereinafter provide a framework for this assessment.

Regular supervision consists of *inter alia* the provision of information and guidance by the CBA with respect to the norms laid down in the supervisory state ordinances, the collection of data, and the conduct of investigations as to the extent to which these norms are complied with. Within this framework, the CBA will use a risk-based approach. Not every violation of the supervisory state ordinances leads to the deployment of a formal enforcement instrument. A normative conversation or a warning letter can play an important role in enforcement. This does not mean, for that matter, that, initially, a normative conversation will take place or a warning letter will be sent in all cases in which a violation of the supervisory state ordinances is established. Whether the CBA will proceed to do so will depend on the circumstances of the case.

4. Starting points

The sectoral state ordinances serve several purposes, such as promoting and safeguarding a sound financial sector, safeguarding the financial integrity of the sectors, and safeguarding the sound and controlled business operations of financial service providers. The purpose of the AML/CFT State Ordinance is to lay down rules to prevent misuse of financial institutions and designated non-financial service providers by criminals for money laundering and terrorist financing. The Sanctions State Ordinance is the basis for the further specification of (inter)national treaties or decrees implementing the international sanction measures. Sanction measures may be used in response to violations of international law or human rights and in the combat of terrorism. The AML/CFT State Ordinance and the Sanctions State Ordinance contribute considerably to the strengthening of the integrity and stability of (financial) institutions and lead to increasing confidence in the entire financial system.

One of the duties of the CBA is to supervise compliance with the supervisory state ordinances. To achieve this compliance, the CBA, as supervisory authority, has been assigned legal powers and enforcement instruments. For the exercise of these powers and the actions to be taken in case of (possible) violations, whether or not by means of informal or formal instruments, the CBA has formulated a number of starting points that are in line with the objectives of the supervisory state ordinances. These starting points are as follows.

a. Action aimed at achieving norm-compliant behavior

The actions of the CBA are primarily aimed at the promotion of norm-compliant behavior. The strategy of the CBA aims at everyone showing voluntary norm-compliant behavior. If this

strategy does not lead to the result desired or is not expected to lead to the result desired, the CBA will take action, in principle, and - if necessary - enforce norm-compliant behavior by deploying (formal) enforcement instruments.

b. Action dependent on content and purport of the norm

The nature of the response of the CBA to a violation is mainly determined by the content and purport of the violated norm. Thus, violations of market access requirements, prudential requirements, and integrity requirements each require its own approach. In addition, supervisory state ordinances contain open and closed norms. Open norms create scope for supervised institutions to give substance to them in specific situations, while it is the institution's responsibility to interpret these norms correctly. This distinction makes no difference in so far as enforcement is concerned. As soon as a violation of an open or closed norm is established, the CBA will take action in both cases, in principle, in accordance with the starting point as reflected under c. However, enforcement of open norms does always require (additional) substantiation to prove that the open norm has been violated, whereas, as regards closed norms, reference to the behavior and the violated provision may sometimes be sufficient.

c. Action as soon as the CBA becomes aware of a violation (no tolerance)

The CBA enforces the laws and regulations upon which it has a supervisory duty. This means that, if the CBA becomes aware of a situation in which rules are not complied with, this situation should be brought to an end. The manner in which the CBA acts to achieve this depends on the concrete situation. This starting point does not affect the fact that the CBA sets priorities in its enforcement in view of the available capacity.

d. Effective action

Taking enforcement action is at any rate aimed at ceasing the violation (or causing same to be ceased) and/or preventing any further violation or a repetition thereof. The choice to use a certain measure and the manner in which it is used should each time be assessed in a concrete situation, against the background of the specific circumstances of the case. In this way, it is determined per situation which measure is most effective.

e. Action in accordance with the general principles of proper administration

Taking enforcement action is in accordance with the general principles of proper administration. By way of illustration, reference is made to the principle of proportionality, the principle of the balancing of interests, and the principle of equality, meaning for the CBA:

- Principle of proportionality: with the instruments available to it, the CBA should always offer as much as possible a proportional response to a violation; the measure to be taken should be in line with the seriousness and nature of the violation, as well as with the other circumstances of the case.
- Balancing of interests: in each separate case, a balancing of the interests directly involved in the decision takes place.
- Principle of equality: in equal cases, equal action is taken; the enforcement instruments are deployed consistently.

5. Enforcement instruments

5.1 Deployment enforcement instruments

The enforcement instruments that can be found in the supervisory state ordinances are:

- issuing a direction, whether or not accompanied by publication;
- imposing a penalty charge order, whether or not accompanied by publication;
- imposing an administrative fine, whether or not accompanied by publication;
- deciding that an auditor or actuary is no longer authorized to make the required statement with respect to a credit institution, an insurance company, a securities broker, an asset manager, an investment company, a holder of a stock exchange or a money transfer company;
- appointing a silent receiver for a credit institution, an insurance company, a securities broker, an asset manager, an investment company, a holder of a stock exchange or a company pension fund;
- requesting the judge to declare emergency regulations and to appoint one or more administrators for credit institutions and insurance companies c.q. in the case of company pension funds requesting the appointment of an administrator;
- revoking a license or cancelling the registration.

In addition, it is also possible to report a case to the Public Prosecution's Office, where there are grounds for doing so.

Not all instruments can only be deployed until after a violation has been established. Thus, for example, the CBA is authorized, in some circumstances, to issue a direction and to appoint a silent receiver for a credit institution, an insurer, a securities broker, an asset manager, an investment company, a holder of a stock exchange or a company pension fund if the CBA sees signs of a development that jeopardizes or could jeopardize the solvency and/or the liquidity of this institution.

5.2 De facto control and instructions

Pursuant to articles 35a, paragraph 3, of the SOSCS; 16, paragraph 3, of the SOSIB; 4, paragraph 5 of the SDSIB; 23, paragraph 3, of the SOSMTC; 11, paragraph 3, of the SOSTSP, 99, paragraph 3 of the SOSSB and 37, paragraph 3, of the AML/CFT State Ordinance, violations can be committed by legal entities and natural persons. Within this framework, article 1:127, second and third paragraph, of the Criminal Code of Aruba applies mutatis mutandis.

Article 1:127 of the Criminal Code reads as follows:

1. *Criminal offenses can be committed by natural persons and legal entities.*
2. *If a criminal offense is committed by a legal entity, criminal proceedings can be instituted, and the sanctions and measures provided for in the respective legislation, if they qualify for this, can be ordered*
 - a. *against this legal entity, or*
 - b. *against those who gave instructions for the act, as well as against those who actually controlled the prohibited act, or*
 - c. *against those mentioned under a and b together.*

3. *For the application of the first and second paragraph, a legal entity is considered equivalent to: the unincorporated company, the public company, the undisclosed partnership, the shipping company, and the special-purpose fund.*

This means that a penalty charge order or an administrative fine cannot only be imposed on the party to which the violated provision applies, but, in some circumstances, also on the party giving the instructions and the de facto controller.

Whether there is question of de facto control or instructions depends on the circumstances of the case. The following starting points can be provided:

- The term 'de facto control' is broader than 'giving instructions'. It may be sufficient that the person concerned was aware of the violation and was in the position to intervene but failed to do so. Of course, the de facto controller can be the one that took the initiative. In this case, there is less difference with giving instructions. De facto controlling the violation or giving instructions for this are considered equally grave offenses, for that matter.
- The de facto controller does not have to be familiar with all details of the violation. Knowledge of the violation in a more general sense is sufficient. This means, for example, that the de facto controller does not have to know exactly where, when, and how the violation has been committed.
- A director of a N.V. (or V.B.A.) is not always the party giving the instructions or the de facto controller by definition. It concerns the party who actually gave instructions for or de facto controlled the prohibited act. This will often be a director, but not necessarily. It may also be someone who is subordinate to the management of the corporation but, in reality, exercised de facto control.
- Both the de facto controller/party giving the instructions and the legal entity may be fined for the same violation. If applicable, several de facto controllers/parties giving instructions may also be fined, whether or not in addition to the legal entity.

The Sanctions State Ordinance does not have a similar provision.

In the case of company pension funds, the CBA can impose an administrative fine or penalty charge order on the board of directors as a whole, or on the company pension fund.¹

5.3 Assessment deployment of enforcement instruments

5.3.1 General

The assessment on which the deployment of enforcement instruments is based includes all relevant facts and interests to be balanced.

¹ Article 26a, paragraph 2, of the SOCPs.

When opting for deploying an enforcement measure in a concrete case, the CBA takes into account all relevant facts and circumstances, and it balances all interests involved. In doing so, the CBA will at any rate make the following assessments:

- which enforcement instruments can be used pursuant to the supervisory state ordinances;
- whether the deployment of informal and/or formal enforcement instruments is opportune;
- whether or not the punishment of the violator is opportune, in addition to imposing a remedial measure aimed at ending the violation and restoring compliance with the norm;
- whether or not criminal prosecution is opportune in addition to the deployment of a remedial measure or instead of the deployment of punitive measure by the CBA.

More specifically, this means that, if and in so far as applicable in the concrete case, the CBA includes *inter alia* the following in its assessment:

- the interests to be protected by the violated provision and the extent to which there is a violation of this provision;
- whether there is recidivism;
- what the supervisory history is;
- to what extent the violation is culpable;
- to what extent third parties have been prejudiced by the violation, and, if so, whether they have been compensated by the violator voluntarily;
- to what extent the violator benefited from the violation;
- whether the violator ended the violation voluntarily, and, if so, before or after the violator became aware of the investigation;
- whether the violator took adequate measures aimed at norm recovery and prevention of repetition of the violation at the moment that he became aware of the possible violation;
- what the duration of the violation has been;
- to what extent the violator cooperated with the investigation;
- what the financial capacity of the violator is;
- what the economic effect of the supervisory measure on the violator is;
- whether termination or prevention of repetition of the violation is necessary;
- whether a reversal of the violation is necessary or desirable;
- whether a special or general preventive effect is desirable;
- whether the violation has led to social unrest;
- whether the violation has led to market distortions;
- whether the confidence in the market has been prejudiced by the violation;
- whether the violator disposes of a license or entry in a register pursuant to a sectoral state ordinance;
- whether there also is question of offenses under general criminal law;
- whether the use of coercive measures under criminal law is necessary.

This enumeration of circumstances is neither comprehensive nor mandatory. This means that the enumeration is not exhaustive, and that the weighing of aforementioned circumstances may differ in each individual case.

5.3.2 Specifically as regards natural persons

Whenever the law provides for this possibility, the CBA will always assess whether it is opportune to take action against a de facto controller and/or a party giving instructions. This assessment by the CBA will include the circumstances mentioned under 5.3.1 in so far as relevant.

6. Special procedures prior to imposing a penalty charge order or an administrative fine

Pursuant to articles 53a of the SOSCS; 16 of the SOSIB; 4 of the SDSIB, 11 of the SOSTSP; 23 of the SOSMTC; 99 of the SOSSB; 26a of the SOSTSP; 37 of the AML/CFT State Ordinance, the CBA can impose a penalty charge order or an administrative fine due to the violation of the supervisory state ordinances. When the CBA intends to impose a penalty charge order or an administrative fine, the CBA will notify the party concerned of this intention in writing. In principle, the party concerned will have two weeks to express its views with respect to the intention to the CBA, either verbally or in writing. In case it regards an administrative fine, the party concerned is not obliged to give a statement on the matter. The party concerned is informed in respect thereof, before any question is posed. Subsequently, the CBA will make a final decision with respect to the measure to be imposed. If the CBA decides not to impose the intended measure, the party concerned will be notified hereof in writing.

7. Legal protection

The written decision of the CBA to impose a formal measure is an order within the meaning of article 2, paragraph 1, of the Administrative Decisions Appeal State Ordinance (AB 1993 No. 45). This means *inter alia* that a party concerned may file a notice of objection with the CBA within six weeks after the date of the order, in accordance with article 9 to 11 of the Administrative Decisions Appeal State Ordinance.

Subsequently, in accordance with article 23, 26 and 27 of the Administrative Decisions Appeal State Ordinance, an appeal may be lodged against the decision of the CBA on the notice of objection with the Court of First Instance of Aruba within six weeks after the date of the decision.

Finally, an appeal may be lodged against the judgment of the Court of First Instance of Aruba, in accordance with article 53a and 53b of the Administrative Decisions Appeal State Ordinance, within six weeks after the decision on the appeal. The notice of appeal should be sent to the "Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, Statia, and Saba" and be filed with the Court Registry of the Court of First Instance of Aruba.

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