PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE NETHERLANDS

December 2012

This Phase 3 Report on the Netherlands by the OECD Working Group on Bribery evaluates and makes recommendations on the Netherland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 December 2012.

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EXECUTIVE SUMMARY

The Phase 3 report on the Netherlands by the OECD Working Group on Bribery evaluates and makes recommendations on the Netherlands' implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in the Netherlands' legislative and institutional framework, as well as progress made since the Netherlands' Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

The Working Group on Bribery has serious concerns that the overall results of foreign bribery investigations and prosecutions to date are too low. Eleven years after the entry into force of the Convention in the Netherlands, no individual or company has been sanctioned for foreign bribery. Out of 22 foreign bribery allegations received by the Dutch law enforcement authorities, 14 have not triggered the opening of any investigation, in part due to a lack of resources. Only two foreign bribery cases have led to prosecutions, which are scheduled to go to trial in 2013, and four cases are the subject of ongoing investigations. The Working Group thus recommends that the Dutch law enforcement authorities be more proactive in opening investigations into foreign bribery allegations, and take all the necessary steps to ensure their effective investigation. The Working Group questions in particular the Netherlands' ability and proactivity in initiating proceedings against companies which are incorporated in the Netherlands but pursue their activities entirely from abroad ('mailbox companies'). Out of the 22 foreign bribery allegations mentioned, 12 concern mailbox companies. In this respect, the Working Group welcomes the firm intention recently expressed by the Dutch prosecution authorities to actively pursue ongoing investigations and prosecutions in foreign bribery cases involving such mailbox companies. The Working Group recommends that the Netherlands vigorously pursue these efforts, and looks forward to seeing increased enforcement of the Netherlands' foreign bribery laws very soon.

The report identifies further areas for improvement. Law enforcement authorities must be adequately resourced to be able to effectively deal with the significant number of foreign bribery allegations requiring investigation, a situation which has yet to be remedied in the Netherlands. While other prosecutors may take on foreign bribery cases, the office of the National Public Prosecutor for Corruption, which is responsible for the coordination and prosecution of foreign bribery, is only staffed with two prosecutors. Efficient enforcement also goes hand in hand with effective, proportionate and dissuasive sanctions: the current level of sanctions for legal persons in the Netherlands is not sufficient in that respect. The Working Group therefore welcomes the draft legislation prepared by the Netherlands aiming to increase the maximum pecuniary sanctions for legal persons to ten per cent of the turnover of the company, and recommends that the Netherlands proceed promptly with the passing of this law. The Netherlands should also step up efforts to enhance detection and reporting of foreign bribery, in particular by adopting appropriate whistleblower protection legislation.

The report also notes positive developments. The Netherlands has developed strong expertise with respect to confiscation of the proceeds of crime, as demonstrated by the efficient legislation in place, the significant financial commitments to support its implementation in practice, and the high level of expertise in the specialised Criminal Asset Deprivation Bureau. A database has also been set up to track mutual legal assistance requests, thus ensuring more prompt and efficient responses, and facilitating the collection of

statistics. The Netherlands has also put in place a number of initiatives to raise awareness of foreign bribery among the Dutch public and private sectors. The Ministry of Foreign Affairs has been particularly active in the awareness-raising area through its embassies abroad, and has put in place specific channels to facilitate the reporting of foreign bribery.

The Report and its recommendations reflect findings of experts from Estonia and Ireland, and were adopted by the Working Group on 14 December 2012. It is based on legislation and other materials provided by the Netherlands and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its three-day on-site visit to The Hague on 19-21 June 2012, during which the team met representatives of the Netherlands' public and private sectors, legislature, judiciary, civil society, and media. Within one year of the Working Group's approval of this report, the Netherlands will make a follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years. The Working Group will closely re-examine foreign bribery enforcement efforts when the Netherlands makes its Phase 3 Follow-up Report in 2013 and its Written Follow-up Report in 2014.

A. INTRODUCTION

1. The on-site visit

1. From 19 to 21 June 2012, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group or Working Group on Bribery[1]) visited The Hague as part of the Phase 3 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention or Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation). The purpose of the visit was to evaluate the implementation and enforcement by the Netherlands of the Convention and the 2009 Recommendations.

2. The evaluation team was composed of lead examiners from Estonia and Ireland as well as members of the OECD Secretariat.[2] Prior to the visit, the Netherlands provided very focused and detailed responses to the Phase 3 general questionnaire and supplementary questions. It also provided translations of relevant legislation, documents and case law. During the visit, the evaluation team met with representatives of the Dutch public and private sectors and civil society.[3] The on-site visit was generally well attended, and the evaluation team was grateful in particular for the time taken by a number of officials from the Ministry of Economic Affairs, the Ministry of Security and Justice and the Public Prosecutor's Office (PPO) to meet with the examiners. However, the evaluation team was disappointed with the low level of participation by the private sector despite the efforts made to secure their participation by the Dutch authorities; only 3 out of 16 invited companies attended. The evaluation team expresses its appreciation towards the Netherlands for its excellent cooperation throughout the evaluation process and is grateful to all of the participants at the on-site visit for their cooperation and openness during the discussions.

2. Summary of the monitoring steps leading to Phase 3

3. The Netherlands has already undergone a number of monitoring steps leading up to Phase 3 according to the regular monitoring procedure that applies to all Parties to the Convention as follows: Phase 1 (February 2001); as well as Phase 2 (June 2006) and Phase 2 Written Follow-Up Report

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1 The Working Group is made up of the 39 State Parties to the OECD Anti-Bribery Convention (the 34 OECD member countries, as well as Argentina, Brazil, Bulgaria, Russia and South Africa), and Colombia, which is a full member of the Working Group but had not yet acceded to the Convention as of the time of this report.

2 Estonia was represented by Mr. Tanel Kalmet, Adviser of the Penal Law Division, Economic Crime and International Criminal Law, Ministry of Justice. Ireland was represented by Mr. Henry Matthews, Professional Officer, Office of the Director of Public Prosecutions, and Mr. Gerard Walsh, Detective Inspector, Garda Bureau of Fraud Investigation. The OECD Secretariat was represented by Ms. France Chain, Senior Legal Analyst, Anti-Corruption Division; and Ms. Melissa Khemani, Co-ordinator of the Phase 3 Evaluation of the Netherlands, Legal Analyst, Anti-Corruption Division.

3 See Annex 2 for a list of participants.

(December 2008). As of December 2008, the Netherlands had implemented all of the Working Group's recommendations in Phase 2 except: recommendations 3f, on amendments to the 2002 Directive on Investigation and Prosecution of Corruption of Officials, and 5a, on increasing the level of sanctions for legal persons, which had not been implemented; and recommendations 2a, on the obligation of public servants to report suspicions of crime, and 7, on encouraging Aruba and the Netherlands Antilles to adopt foreign bribery legislation, which were only partially implemented. [4]

3. Outline of the Report

4. This Report is structured as follows. Part B examines the Netherlands' efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts, weaknesses identified in previous evaluations and new issues, including those arising from amendments to the current legislative framework. Part C sets out the Working Group's recommendations and issues for follow-up.

4. Economic Background

5. The Netherlands is the 14th largest economy in terms of GDP among the 40 Working Group members.[5] Its exports and imports of goods and services comprise 82.6 per cent and 74.5 per cent of its GDP, respectively.[6] These large shares are pushed upwards by a large volume of re-export activities, reflecting Rotterdam's role as a gateway to Europe.[7] In 2011, the Netherlands ranked 8th in the world in terms of level of exports.[8] A large share of the export of goods are machinery-related and chemical products, while the major sectors with regard to the export of services include business, professional and technical services, franchises (and similar rights), and air and sea transport.[9] With regard to the export of goods, the major trading partners of the Netherlands are member states of the European Union (EU) (in particular Germany, Belgium, France, and the UK), China and the United States. The major trading partners with regard to the export of services are also EU member states (in particular Ireland and Germany), and the United States.

6. The Netherlands has large outward foreign direct investment (FDI). More than half of such investment is in member countries of the EU (in particular the UK and Luxembourg), and the United States, Switzerland and Canada. Mining, oil, chemicals and quarrying activities, as well as investment in banking and insurance, are the most prominent sectors for FDI, amounting to 41.7 and 33.5 31.2 per cent of GDP respectively in 2011.[10]

7. One feature of the Dutch economy is the significant presence of "mailbox companies". These are legal persons that have been set up in the Netherlands mainly for tax purposes, which comply with the minimum requirements for organisation and registration. They usually have no office, business assets or employees in the Netherlands and carry out their commercial activities in another country. Mailbox companies are most often managed by Trust or Company Service Providers (TCSPs) which offer the

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4 See Annex 1 for the list of fully, partially and unimplemented Phase 2 recommendations at the time of the Netherlands' Phase 2 Written Follow-Up Report

5 UNCTAD Statistics, Nominal and Real DGP, (2010).

6 OECD Economic Survey of the Netherlands (2012).

7 *Ibid*., at p. 14.

8 CIA World Factbook, Netherlands Country Profile.

9 Netherlands Ministry of Economy, Agriculture and Innovation.

10 Dutch Central Bank (2010).

minimum substance needed to maintain a Dutch corporation.[11] There are over 20 000 mailbox companies registered in the Netherlands and "the number is rising". In 2009, the benefits of this industry to the Dutch economy consisted of just over EUR 1bn in tax revenues. Dutch GDP at the time amounted to EUR 573.2bn.[12] The ability of the Netherlands to exercise jurisdiction over mailbox companies for foreign bribery, however, has recently been called into question. This is discussed in further detail in the ensuing sections of this Report.

5. Overseas territories

8. With regard to Dutch overseas territories, the Kingdom of the Netherlands previously consisted of three countries: the Netherlands in Europe, the Netherlands Antilles and Aruba. On 10 October 2010, the Netherlands Antilles was dissolved, and the Kingdom of the Netherlands now consists of four separate countries: the Netherlands in Europe, Aruba, Curaçao and Sint Maarten. The islands of Bonaire, Saba and Sint Eustatius have now become a part of the Netherlands as special municipalities (Caribbean part of the Netherlands (CN)). The economy of the overseas territories is largely based on tourism, although banking and transportation are also prominent sectors in Aruba.[13] Amendments were introduced to the CN Criminal Code to implement the Anti-Bribery Convention. However, with regard to Aruba, Curaçao and Sint Maarten, the adoption of the Anti-Bribery Convention remains an autonomous affair. In Phase 2, the Working Group recommended that the Netherlands promote and assist the ratification process among these territories. Recent developments in this regard are discussed in further detail under section B.1.c. of the report.

6. Cases involving the bribery of foreign public officials

9. Since the entry into force of its 2001 foreign bribery legislation, the Netherlands has not prosecuted any cases of foreign bribery. Foreign bribery charges were laid in an international organised drug case, but the case did not ultimately involve the bribery of foreign public officials in an international business transaction. In view of the size of the Dutch economy, its level of exports, FDI, and involvement in high risk sectors, the absence of any foreign bribery convictions to date is seriously concerning. This significant lack of enforcement is not due to an absence of allegations, however. There are at least 22 allegations of foreign bribery involving Dutch companies or individuals. Investigations were opened into 8 of the 22 cases. 4 of these investigations were subsequently closed, and 4 cases are currently on-going, in which charges have been laid in 1 case. 14 of the 22 allegations have not triggered the opening of any investigation, which seriously calls into question the level of proactivity of the Netherlands in fighting foreign bribery. Dutch authorities stated that they expect to bring their first two foreign bribery cases to trial in 2013.

(a) Terminated foreign bribery investigations

10. *Case #1 – The Communications Systems Case:* In 2002, a Dutch company allegedly paid bribes to foreign public officials to obtain a contract to set up a communications system in connection with a defence project. In 2004 and 2006, the Netherlands received MLA requests from the foreign country concerned (non-Party to the Convention). The first request concerned suspicious payments made by a non-Dutch company through a Dutch bank. The second request concerned the activities of the Dutch company. With regard to the first request, the Dutch authorities indicate that suspicious payments made through the Dutch bank could not be confirmed. With regard to the second request, the Dutch authorities state that the

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11 This includes "domiciliation" (*i.e.* a registered address) and majority resident directors.

12 See: www.seo.nl/uploads/media/2011-50_Trust_matters_01.pdf

13 See: www.aruba.com/explorearuba/islandfacts/economy.aspx

Rijksrecherche conducted a "project-based" investigation into the allegations, which required additional information from the foreign country in order to decide whether a criminal investigation could be opened. The Dutch authorities made several requests for additional information but received no further details. In 2007, the High Court in the foreign country decided that the law enforcement body with which the *Rijksrecherche* had been in contact no longer had powers to request or execute MLA. In 2009, the *Rijksrecherche* Central Coordination Committee formally decided to close the preliminary investigation. The Netherlands states that the foreign country has been informed that if they are legally able to provide the requested information, the case will be reviewed.

11. *Case #2 – The Exports Case:* This case involved the alleged bribery of foreign public officials by a Dutch national in connection with the export of goods. In 2007, the *Rijksrecherche* initiated an exploratory investigation to determine whether one of the suspects was in the Netherlands and concluded that it was not the case. The *Rijksrecherche* investigation did not lead to any evidence and the case was subsequently closed because the Dutch authorities were unable to take any further action in the absence of a MLA request by the foreign country. The Dutch authorities explained that they would have needed the information contained in the MLA request in order to be able to open a criminal investigation in the Netherlands.

12. *Case #3 – The Medical Systems Case:* This case involved the bribery of foreign public officials by non-Dutch employees of a local subsidiary of a Dutch company. In 2008, the Netherlands received a MLA request from the foreign country concerned (Party to the Convention). Following legal obstacles encountered in connection with the search warrants required for the execution of the MLA request, the Netherlands was able to hand over the information to the foreign authorities in 2010. The Netherlands explained that the delay in responding to the MLA request was caused by issues concerning dual criminality and determining whether the Dutch legal person was a suspect or a witness. In September 2010, the Dutch Public Prosecutor's Office decided that the company would not be prosecuted in the Netherlands. The decision was based on the information gathered during the execution of the MLA request. According to the Netherlands, the reason for this decision is that the role of the Dutch part of the company was "very very small", the Dutch investigation had not led to any criminal suspicion for the Dutch part of the company, no Dutch nationals were involved, and the company's Board of Directors took measures to prevent the acts that had occurred in the foreign country.

13. *Case #4 – The Chemical Waste Case:* This case involved the investigation into alleged foreign bribery committed by a Dutch company in connection with the transportation and discharge of chemical waste. The investigation revealed that the recipients of the bribe payments were not foreign public officials. In December 2011, the Court of Appeal in The Hague decided that a complaint from Greenpeace aimed at obligating the Netherlands to further prosecute the case was inadmissible. The court concluded that the Dutch prosecution did its utmost and decided to stop the prosecution because: i. the Netherlands already prosecuted several suspects for other crimes; ii. no leads on foreign corruption had been found, and; iii. the country in which the acts took place did not (and does not) cooperate in providing requested information. However, the Court of Appeal in The Hague did raise issues that questioned the ability of Dutch law enforcement authorities to exercise jurisdiction over Dutch "mailbox companies". The Court's remarks in this regard were made tangentially and are therefore not binding on lower courts. However, this case remains important to note as the remarks made on jurisdiction are expected to soon be tested. This issue will be addressed in further detail in this report (see section B.5.d.(iii)).

(b) On-going foreign bribery investigations

14. *Case #5 – World Bank Referral Case:* Following a referral from the World Bank based on information obtained through an internal audit, Dutch law enforcement authorities started a criminal investigation into alleged bribe payments made to World Bank and foreign public officials in relation to

World Bank-financed projects. Shortly thereafter, Dutch law enforcement authorities formed a joint investigation team with another Party to the Convention to further investigate the case. MLA requests have been sent to several countries, including three Parties to the Convention. The World Bank is simultaneously conducting its own audit into the case. Dutch law enforcement authorities indicate that they expect the case to go to trial in 2013.

15. *Case #6 – The Port Case*: Following an incoming MLA request from a foreign country (non-Party to the Convention), Dutch law enforcement authorities launched a parallel investigation into a Dutch company suspected of bribing the port authorities of the foreign country to obtain a contract to carry out dredging works. The investigation led to *inter alia* the search of the company's premises and the request for financial data. The company objected to the release of financial documents and in 2011, the Dutch Supreme Court decided that an investigative judge was to make a selection of the seized items before the Dutch criminal case and the execution of the MLA request could proceed. On 22 October 2012, the Dutch Court decided that the evidence could be released to the foreign country. However, this decision was appealed by the suspect to the Supreme Court. At the time of this review, Dutch law enforcement authorities were waiting for the Supreme Court's ruling before further proceeding with the investigation.

16. *Case #7 – The Oil Contract Case:* In 2006, a Dutch company allegedly paid bribes to the Minister of a foreign country (non-Party to the Convention) to obtain an oil trading contract. The investigation was triggered by a letter sent to the Netherlands by the foreign country's then opposition leader. In 2010, the Dutch authorities sent nine MLA requests to the foreign country. After several attempts, the Dutch Public Prosecutor and other Dutch authorities agreed with their counterparts to question key witnesses. In 2011, Dutch law enforcement authorities travelled to the foreign country to carry out witness examinations. However, following a court decision obtained by the suspects' lawyers to stop the examinations, they could not be carried out. To date, Dutch law enforcement efforts to interview the witnesses have been blocked by the High Court in the foreign country. According to the Netherlands, the ongoing political instability in the country has undermined efforts to continue the investigation by interviewing witnesses. Dutch law enforcement authorities have also sent MLA requests to another foreign country (Party to the Convention) in connection with this case, in which "concrete progress has recently been made".

17. *Case #8 – The Construction Company Case*: In January 2011, a multi-national construction company self-reported alleged bribe payments to local agents made through its subsidiary. The Public Prosecutors' Office, together with the Fiscal and Economic Intelligence and Investigation Service (FIOD-ECD), are currently conducting a criminal investigation into the bribery of foreign officials between the period 1996 – 2004. The company is also listed on the NYSE Euronext stock exchange of Amsterdam. No further information is available.

(c) Concluded Oil-for-Food Cases

18. The Dutch prosecution authorities have concluded out-of-court settlements with seven Dutch companies involved in paying kickbacks in the Iraqi Oil-for-Food programme. The offence with which the companies were charged was the violation of sanctions legislation, and not the foreign bribery offence. Criminal proceeds were also confiscated in these cases and press releases were issued in July 2008 noting the names of the companies and the settlement agreements. These will be addressed in further detail in this Report (see also sections B.3.a., B.3.d., and B.5.c.).

Commentary

The lead examiners are seriously concerned that the Netherlands' results in foreign bribery investigations and prosecutions to date are too low, especially given the size of the Dutch

economy and its significant external commercial activities. Eleven years after the entry into force of the Convention in the Netherlands, no individual or company has been brought to trial for foreign bribery. They recommend that the Netherlands review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials, as recommended under the 2009 Recommendation. The lead examiners further recommend that the Working Group closely re-examine foreign bribery enforcement efforts when the Netherlands makes its Phase 3 Follow-up Report in 2013 and its Written Follow-up Report in 2014.

B. IMPLEMENTATION AND APPLICATION BY THE NETHERLANDS OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

19. This part of the Report considers the Netherlands' approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from the Netherlands' progress on weaknesses identified in Phase 2, or from changes to the Netherlands' domestic legislative or institutional framework.

1. The foreign bribery offence

20. The Phase 2 review of the Netherlands did not make any recommendations regarding the foreign bribery offence in the Dutch Criminal Code, or identify any issues for follow-up.

21. The Dutch foreign bribery offence is contained in several articles of the Dutch Criminal Code:

- Article 177(1) covers foreign bribery where the purpose of the bribe is to obtain a breach of the foreign public official's duties;
- Article 177a covers foreign bribery where the purpose of the bribe is not to obtain a breach of the foreign public official's duties;
- Article 178(1) covers foreign bribery where the purpose of the bribe is to influence a judge's decisions; and
- Article 178(2) covers foreign bribery where the purpose of the bribe is to obtain a conviction in a criminal case.

22. The different offences carry different sanctions. Furthermore, the range of investigative tools available for each of these offences differs slightly, as does the statute of limitations. (See sections B.3 and B.5 for further discussion on these issues).

(a) Proposal to amend the foreign bribery offence

23. The Dutch Ministry of Security and Justice (MSJ) has prepared draft legislation aiming, *inter alia*, at the simplification of the foreign bribery offence. The proposed amendments criminalise domestic and foreign bribery, irrespective of whether the domestic or foreign public official was bribed to act or not to act in breach of duty. Dutch prosecutors interviewed during the on-site visit explained that the current distinction has caused certain domestic bribery cases to "fall through the cracks", notably because of the higher evidentiary burden under article 177(1) to establish a breach of duty. The *Explanatory Memorandum* accompanying the proposed amendments, prepared by the MSJ, explains the rationale for harmonising the two offences: as the distinction has now lost considerable importance, states the *Memorandum*, it is proposed "to criminalise active and passive bribery of a public servant […] independent of the question of whether or not this involves a breach of official duty." As of the time of this report, it has been proposed that article 177a be repealed, and that the active bribery offence in article 177(1) (which also covers foreign bribery) be amended. The new text, provided by the Netherlands at the time of this review, did not appear to pose problems in terms of conformity with the Convention (see Annex 4 for the new draft bribery offence). Representatives of the MSJ expect the new legislation to enter into force in early 2014.

(b) Small facilitation payments

24. Commentary 9 of the OECD Anti-Bribery Convention allows countries to provide an exception for small facilitation payments. The Dutch law does not provide for such an exception. However, the *Instruction on the Investigation and Prosecution of Foreign Corruption* explicitly indicates that such payments will not be prosecuted.

25. At the time of the Dutch Phase 2 in 2006, the Working Group was concerned about the lack of clarity in the Dutch approach to small facilitation payments, and asked the Netherlands to address the issue.[14] During the written follow-up in 2008, the Working Group on Bribery was satisfied with the clarifications provided by the revised *Instruction*,[15] which sets out the following criteria as factors that count against prosecution:[16]

- "[W]here acts or omissions are concerned which the public servant in question was already obliged to perform by law. The payment may not distort competition in any way whatsoever;
- where small amounts are concerned, in absolute or relative terms;
- where payments to junior public servants are concerned;
- the gift must be entered in the company's records in a transparent way, and must not be concealed;
- the making of the gift must be the initiative of the foreign public servant."[17]

The *Instruction* was revised, in December 2012, but the language on small facilitation payments was not modified.

26. The *Instruction* itself is quite clear that an investigation may be opened – and in fact be necessary – to establish whether one or more of these factors exist and justify dropping the charges. However, the Annex to the *Code of Conduct of the Ministry of Foreign Affairs*, which also addresses the issue, provides more simplistic explanations, which could create some misunderstandings on how these factors will be assessed in practice. The Annex states that "the existence of one or more of these factors would tend to discourage prosecution" - a statement which goes beyond the language of the *Instruction*. This could lead Ministry of Foreign Affairs (MFA) officials and possibly companies counselled by these officials to believe that, for instance, it would be enough for the foreign public official to have initiated the making of

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14 Phase 2 Report on the Netherlands, recommendation 4.

15 Written follow-up to Phase 2 by the Netherlands at para. 5, and conclusions by the Working Group, at para. 10.

16 It is worth noting that the Instruction states that "strictly speaking, 'facilitation payments' are also liable to punishment. The Public Prosecutions Department, however, deems it not expedient to pursue a stricter investigation and prosecution policy on tackling bribery of foreign public servants than the policy required under the OECD Convention. This means that acts which can be qualified in terms of the OECD Convention as 'facilitation payments' will not be prosecuted."

17 Instruction on the Investigation and Prosecution of Corruption Offences in Public Office Committed Abroad.

the gift for the bribery to be considered a small facilitation payment.[18] This may therefore be worth clarifying in all MFA and other relevant documentation. Following the on-site visit, the Dutch authorities indicated that the *Code of Conduct* was in the process of being revised, including with respect to the text on small facilitation payments. The revised *Code* is expected to be presented at the annual conference for Ambassadors in January 2013.

27. The question also arises as to whether this small facilitation payment exception functions in practice. The factors to be taken into account include the requirement that the payment be recorded in the company accounts. The accountants and companies interviewed during the on-site visit were quite clear that they had never seen a small facilitation payment recorded in company accounts. Furthermore, private sector lawyers explained that, in general, they would advise their client companies against engaging in small facilitation payments because, "while these wouldn't be prosecuted in the Netherlands, they may fall under the broad jurisdiction of the United Kingdom's Bribery Act."

(c) Foreign bribery legislation in the Netherlands' overseas territories

28. Prior to 10 October 2010, the Kingdom of the Netherlands consisted of three countries: the Netherlands in Europe, the Netherlands Antilles and Aruba. In Phase 2, the Working Group on Bribery acknowledged that only the Netherlands in Europe was bound by the Anti-Bribery Convention, but nevertheless encouraged the Dutch authorities to promote ratification of the Convention by Aruba and the Netherlands Antilles, and assist them in their efforts. This recommendation was considered to be only partially implemented, as neither the Netherlands Antilles nor Aruba had taken any significant steps towards ratification.[19] The issue of criminalisation of foreign bribery in these countries has gained importance as allegations surfaced that a subsidiary of a company incorporated in Curaçao had engaged in bribery of foreign public officials.

29. On 10 October 2010, the Netherlands Antilles was dissolved. The Kingdom of the Netherlands now consists of four separate countries: the Netherlands in Europe and the Caribbean, Aruba, Curaçao and Sint Maarten. The islands Bonaire, Saba and Sint Eustatius (the Caribbean part of the Netherlands (CN)) have become a part of the Netherlands as special municipalities. These special municipalities largely resemble other Dutch municipalities and have introduced most provisions of Dutch law.

30. The Dutch authorities indicate that the CN have their own Criminal Code, which is closely related to the Dutch Criminal Code. They further explain that amendments were introduced to the CN Criminal Code specifically to implement the Anti-Bribery Convention, as explicitly stated in the *Explanatory Memorandum* to the Code. The bribery offences in the CN Criminal Code mirror very closely those in the Dutch Criminal Code, with the same distinction between bribery to obtain a breach of the foreign public official's duties, and bribery not to obtain a breach. As of the time of this report, it is uncertain whether the proposed amendments to the Dutch Criminal Code which would remove this distinction would also apply to the CN Criminal Code.

31. With regard to Aruba, Curaçao and Sint Maarten, the act of adopting the necessary legislation to make the Anti-Bribery Convention applicable remains an autonomous affair. With respect to the criminalisation of foreign bribery, Curaçao – economically the most important of the three countries – adopted a new Criminal Code in November 2011, which includes a foreign bribery offence. According to

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18 Annex I to the 2009 Anti-Bribery Recommendation explains that "Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe."

19 Written follow-up to Phase 2 by the Netherlands at para. 9, and conclusions by the Working Group, at para. 10.

the Dutch authorities, the offence closely resembles the foreign bribery provisions under the Dutch Criminal Code. The Dutch authorities further indicate that Aruba is due to introduce a new Criminal Code based on the same model in January 2013, and Sint Maarten shortly thereafter. Consequently, although none of these countries have formally ratified the Convention, legislation already is, or shortly will be, in place to allow for the enforcement of foreign bribery offences.

Commentary

The lead examiners recommend that the Netherlands keep the Working Group on Bribery informed of developments concerning the adoption of the amendments to the foreign bribery offence in the Dutch Criminal Code, to ensure that the Working Group is able to assess the continued conformity of the Dutch foreign bribery offence with the standards under the Anti-Bribery Convention.

They further recommend that, in conformity with the 2009 Anti-Bribery Recommendation, the Netherlands periodically review their policy and approach on small facilitation payments, and continue to encourage Dutch companies to prohibit or discourage their use, and in all cases accurately record them in companies' accounts.

Finally, concerning Aruba, Curaçao and Sint Maarten, the lead examiners welcome the recent developments in Curaçao, which now criminalises the bribery of foreign public officials in international business transactions. They recommend that the Netherlands in Europe continue to encourage Aruba and Sint Maarten to adopt a similar foreign bribery offence and assist them in their efforts, in line with the rules governing their relationship.

2. Responsibility of legal persons

32. The criminal liability of legal persons is set out under article 51 of the Criminal Code. If an offence is committed by a legal person, "criminal proceedings may be instituted and the punishments and other measures provided for by the law may be implemented where appropriate against (a) the legal person, or (b) those who ordered the commission of the offence, and those were in control of such unlawful behaviour, or (c) the persons mentioned under (a) and (b) together."[20] It is thus possible to prosecute the company, the company's director, the employee who committed the offence, and/or the person who manages the company, if he/she different from the company director.

33. The Public Prosecutor has full discretionary powers to choose who to prosecute, which will depend on the circumstances of each case. Law enforcement officials stated that it is standard practice to prosecute legal persons, but there are cases where only the natural person is prosecuted. Reasons for not prosecuting the legal person include where it went bankrupt or ceased to exist, or where prosecution could lead to bankruptcy and loss of jobs and where special conditional measures have been imposed, such as "probationary periods". "Probationary periods" involve the imposition of remedial actions to be undertaken by the company. Should the company violate the terms of probation or commit an offence again, it will be prosecuted for that offence, as well as for the offence for which it was conditionally dismissed. Law enforcement officials indicated that conditions imposed during probationary periods can include the use of corporate monitors, although this has not been imposed to date. There is no formalized procedure or guidance on the imposition of "probationary periods" and they are applied on an *ad hoc* basis.

[20] Article 51(2), Criminal Code.

(a) Application of corporate liability in practice

34. Law enforcement authorities stated that they experience no practical difficulties in the application of corporate liability. In 2011, 1 044 convictions were obtained against legal persons, and 4 568 new criminal cases were opened against legal persons. However, there has been a steady decrease in the prosecution of legal persons over the past ten years in the Netherlands. While there were 19 728 prosecutions of legal persons in 1995, this figure dropped to 14 635 in 2004, and dropped further to 4 568 in 2011 (these figures include out-of-court settlements). The evaluation team questions whether this decline may be connected to the current level of low sanctions imposed against legal persons in the Netherlands. The Dutch authorities assert that such a conclusion cannot be reached and indicate that they are looking into the reasons for this decline. They further point out that the ratio of convictions for legal persons has increased from 13 per cent in 1995 to 24 per cent in 2011. However, it should also be noted that a number of investigations have not been opened into foreign bribery allegations involving major Dutch legal persons headquartered in the Netherlands (see also section B.5.a.).

35. While there have been no prosecutions of legal persons for foreign bribery in the Netherlands, there have been prosecutions for domestic corruption offences. In this regard, the Netherlands highlighted the recent prosecution of legal persons involved in the largest case of real estate fraud in the Netherlands (the '*Klimop-case*'*)*. Approximately EUR 12m in fines and EUR 15m in confiscation were imposed on Dutch companies implicated in this case. In addition, EUR 135m had to be paid to fraud victims.

(b) Acts of the natural person triggering the liability of the legal person

36. Annex I of the 2009 Recommendation provides that liability of legal persons should not be restricted "to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted". Dutch jurisprudence initially required the act of the natural person to trigger the liability of the legal person.[21] This changed with a 2003 Supreme Court (*Hoge Raad*) decision that established autonomous liability of the legal person without the need to identify the natural person.[22] The main criterion is now "whether the conduct took place or was carried out in the spirit of the legal entity." Dutch authorities explained that an act "carried out in the spirit of the legal entity" can occur in one or more of the following circumstances: i. an act or omission by someone who is employed by or works for the legal entity; ii. the act is part of the normal business processes of the legal person; iii. the act was useful for the legal person in the business conducted by the legal person, or; iv. the legal person could make a judgment whether or not the conduct should take place and such or similar behaviour was, according to the actual state of affairs by the legal person, accepted or used to be accepted.[23] The focus has thus shifted to the act committed. Panellists interviewed during the on-site visit were widely aware that it is no longer necessary to identify the natural person to impose criminal liability on the legal person.

(c) Corporate liability for not preventing the commission of the offence

37. The 2003 Supreme Court decision also established corporate liability for a criminal offence committed by a company's employee(s), if the company could "determine" the act and "accepted it." In other words, a legal person can be held liable if it did not prevent the act even though it was in its power to

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21 More specifically, it was required that (i) the legal person perpetrates the illegal act through a natural person with the power to direct its activities, or (ii) the legal person perpetrates the illegal act through a natural person with no directive powers, but within the sphere of normal activity of the legal person, and for its benefits.

22 Supreme Court (Hoge Raad_HR) 21 October 2003, NJ 2006, 328 (Zijpe case).

23 The Dutch authorities further clarified that acceptance is meant as not fulfilling the care which reasonably can be expected of a legal person in view of preventing behaviour.

do so. During the on-site visit, law enforcement officials stated that a company could escape liability if it had established effective internal controls, ethics and compliance rules and that it did all in its power to prevent the act. These factors would be considered by the judge when the indictment is filed. There are no set standards applied in assessing a company's efforts to prevent the commission of the offence, but law enforcement officials indicated that they would have to be "meaningful". There has not been any jurisprudence that further expands on this form of liability or the defence. Defence lawyers participating in the on-site visit felt it would be useful, and create more legal certainty, if this defence was formalised in law. However, the MSJ and the Public Prosecutor's Office (PPO) consider that this would "seriously endanger" the effectiveness of their system. They further assert that the courts should have a certain degree of discretion to assess liability, which also promotes the evolution of case law.

(d) Liability of legal persons for acts committed by intermediaries, including related legal persons

38. The Dutch foreign bribery offence does not expressly cover bribes made through intermediaries.[24] However, as addressed in the Netherlands' Phase 2 evaluation, the offence is intended to be interpreted in a broad functional sense and cover such *modus operandi*. This position is also supported by Supreme Court authority. The *Instruction on the Investigation and Prosecution of Foreign Corruption* also expressly refers to the criminalisation of bribery through the use of intermediaries, including local agents, representatives and consultants. During the on-site visit, all panellists interviewed from law enforcement and the private sector were in agreement that the Dutch foreign bribery offence covers bribery through intermediaries.

39. The Netherlands has no legal power over foreign subsidiaries of Dutch companies. However, during the on-site visit, law enforcement officials indicated that they could prosecute the Dutch parent company if it can be proven that it knew about the illegal acts of the subsidiary, or if the act was carried out "in the spirit of the legal entity", as described above. At the time of this report, this has not been supported by case law.

(e) Liability of Dutch "mailbox companies"

40. The Working Group is especially concerned by the lack of proactivity of the Netherlands in foreign bribery cases involving mailbox companies. As noted above, the Netherlands houses over 20 000 "mailbox companies". These are companies which have only complied with the minimum requirements for organisation and registration in the Netherlands. They usually have no office, business assets or employees in the Netherlands and carry out their commercial activities in another country. As "mailbox companies" are incorporated in the Netherlands, they are considered Dutch legal persons under the Civil Code.[25] The issue of jurisdiction over mailbox companies is of particular concern in the Netherlands given the number of such companies involved in foreign bribery allegations. Out of 22 cases of alleged foreign bribery reported in the media, 12 concern mailbox companies, but only 2 are the subject of ongoing investigations (see also section B.5.d. on Jurisdiction).

41. The ability to hold Dutch "mailbox companies" liable for foreign bribery has been called into question by the 2011 Court of Appeal decision in *Case #4 – The Chemical Waste Case*. In this decision, the court indicates that the Netherlands may not be able to exercise jurisdiction over Dutch legal persons in cases where i. all of the facts occurred outside of the Netherlands; ii. none of the persons involved have

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24 Annex I of the 2009 Anti-Bribery Recommendation provides that "Member countries should ensure that […] a legal person cannot avoid responsibility by using intermediaries, including related persons, to offer, promise of give a bribe to a foreign public official on its behalf."

25 As noted in the Phase 2 Report on the Netherlands, legal persons are broadly defined under Dutch law. See Articles 1, 2 and 3 of the Civil Code.

Dutch nationality, and; iii. the commercial activities of the company take place outside of the Netherlands. This jurisprudence could therefore create a significant jurisdictional loophole in the Netherlands' ability to prosecute foreign bribery committed by "mailbox companies". At the on-site visit, Dutch prosecutors stated their firm intention to pursue on-going investigations and prosecutions against certain mailbox companies allegedly involved in foreign bribery and to test the issue of jurisdiction before the courts, including up to the Supreme Court, if necessary.

42. Of further concern is the express recognition on the part of the Dutch authorities that they are unable to adequately address offences committed by "mailbox companies". In the responses to the Phase 3 Questionnaire, the Netherlands states that they are "fully aware of the fact that housing these 'mailbox companies' brings along the corresponding responsibilities, including the responsibility to fight foreign bribery… The Netherlands is, however, only a small country, with limited government (and thus law enforcement) resources." This reasoning is concerning, especially in view of the commitments the Netherlands undertook with regard to Annex I of the 2009 Recommendation, which states that "member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions." It should also be noted that while the Netherlands is geographically a small country, it ranks 14th among the 40 Working Group members in terms of GDP.

Commentary

The lead examiners are concerned with the decrease in prosecutions of legal persons in the Netherlands, but are encouraged to learn that the Netherlands is looking into the reasons for this decline.

With respect to the liability of legal persons, they recommend that the Netherlands:

- ***(i) draw the attention of prosecutors to the importance of applying effectively the criminal liability of legal persons;***
- ***(ii) continue to maintain detailed yearly statistics on the number of prosecutions of legal persons; and***
- ***(iii) develop guidance on the application of probationary periods in foreign bribery cases.***

The lead examiners further recommend that the Working Group closely monitor the application of the liability of legal persons in practice in the Netherlands in foreign bribery cases, including for acts of intermediaries and related legal persons. They also note that the prosecution of legal persons is a horizontal issue that affects many other Parties to the Convention.

The lead examiners are also very concerned about the ability of the Netherlands to prosecute mailbox companies in light of the Court of Appeal's decision in Case #4 – The Chemical Waste Case, and recommend that the Working Group follow-up on the Dutch jurisprudence on the issue. The lead examiners also recommend that the Netherlands take all possible measures to ensure that cases of foreign bribery involving mailbox companies can be effectively investigated and prosecuted.

3. Sanctions

(a) Criminal sanctions for natural persons

43. The following maximum sanctions are applicable to natural persons for foreign bribery under the Dutch Criminal Code (these sanctions are proposed to be increased in the new draft legislation by the MSJ; see sub-section (c)):

- For breach of article 177(1), where the purpose of the bribe is to obtain a breach of the foreign public official's duties, the maximum sanctions are 4 years imprisonment, and a EUR 78 000 fine (5th category fine);
- For breach of article 177a, where the purpose of the bribe is not to obtain a breach of the foreign public official's duties, the maximum sanctions are 2 years imprisonment, and a EUR 78 000 fine (5th category fine);
- For breach of article 178(1), where the purpose of the bribe is to influence a judge's decision, the maximum sanctions are 6 years imprisonment, and a EUR 78 000 fine (5th category fine); and
- For breach of article 178(2), where the purpose of the bribe is to obtain a conviction in a criminal case, the maximum sanctions are 9 years imprisonment, and a EUR 78 000 fine (5th category fine).

44. As of the time of this report, there have been no finalised foreign bribery cases in the Netherlands. Consequently, no sanctions have been imposed against natural persons for acts of transnational bribery.

(b) Criminal sanctions for legal persons

45. In Phase 2, the Working Group considered that "the financial penalty applicable to legal persons does not amount to sufficiently effective, proportionate and dissuasive sanctions."At the time of the Netherlands' written follow-up report, the Working Group considered that recommendation 5(a) to increase the maximum level of sanctions for legal persons had not been implemented.[26]

46. For legal persons, fines may be increased to the amount of the next category as the one provided for natural persons. For foreign bribery, legal persons may therefore incur a 6th category fine. As a result, the maximum level of financial sanctions for legal persons is ten times the fine applicable to natural persons, i.e. EUR 780 000. It is worth noting that article 57(2) of the Criminal Code allows for the cumulating of fines if several offences have occurred; for instance, where a foreign bribery offence also constituted a false accounting and a money laundering offence, sanctions could, at least in theory, reach three times a 6th category fine or a maximum of EUR 2.34 million (since false accounting and money laundering also incur 6th category fines). Similarly, the commission of multiple bribery offences may lead to as many fines.[27] Fines can also be cumulated with confiscation measures (see section B.4. below).

47. There have not been any sanctions imposed on legal persons in practice to date for a foreign bribery offence. However, in the Oil-for-Food cases concerning the payment of bribes in Iraq, companies were fined in out-of-court settlements for violation of the sanctions legislation, but not the foreign bribery offence. The fines ranged from EUR 31 800 to EUR 381 600 (see below on sanctions in out-of-court settlements). A table of sanctions for other criminal offences provided by the Dutch authorities in their Phase 3 responses indicates that, since 2007, only two fines over EUR 1 million were imposed on legal persons for violations of articles 174 and 225 of the Criminal Code (concerning the deliberate selling of dangerous goods, and forgery of documents respectively). This seems to confirm a trend in the Netherlands to not impose heavy financial sanctions on legal persons. The Netherlands also points to the recent prosecution of legal persons involved in the largest case of real estate fraud in the Netherlands (the '*Klimop-case*'*)*, in which approximately EUR 12m in fines and EUR 15m in confiscation were imposed on Dutch companies. In addition EUR 135 million had to be paid to fraud victims. While these figures are

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26 Written follow-up to Phase 2 by the Netherlands at para. 7, and conclusions by the Working Group at para. 10.

27 Imprisonment sanctions cannot be cumulated; article 57(2) of the Criminal Code specifies that imprisonment sanctions cannot be over one third above the highest maximum.

indeed quite high, they should be considered in perspective of the EUR 200 million misappropriated by the defendants in this case.

48. In terms of perceptions on sanctions, a judge interviewed after the on-site visit was of the view that currently available sanctions for legal persons were sufficiently adequate, proportionate and dissuasive. The judge also referred to possibilities for victims to start civil procedures for damages; however, these would very rarely occur in foreign bribery cases. On the other hand, the Dutch chapter of Transparency International recognised that "the level of fines for foreign corruption should be raised."[28] This was also acknowledged in Transparency International's 2011 Progress Report on Enforcement of the OECD Anti-Bribery Convention, which noted that "monetary sanctions for bribery provided for by law are too low."[29]

49. Following the on-site visit, the Dutch authorities usefully provided a table on criminal cases initiated against legal persons between January 1995 and December 2011. This table shows a substantial drop in the number of cases against legal persons, which decreased from 19 728 in 1995 to only 4 568 cases in 2011 (see also section B.2 on liability of legal persons). This raises a question whether the current level of sanctions may, in practice, deter law enforcement authorities from prosecuting legal persons, a concern expressed by the Working Group at the time of the Phase 2.[30] As discussed earlier, the Netherlands has indicated that they are looking into the reasons for this decline.

(c) Sanctions under the proposed amendments to the Criminal Code

50. The Dutch authorities recognise that the current level of sanctions for legal persons may not be sufficiently effective, proportionate and dissuasive. In the *Explanatory Memorandum* that accompanies the proposed amendments to the Criminal Code, the MSJ acknowledges that "the prospect of punishments that are too low … encourages calculating behaviour. […] The financial capacity of businesses, which can only be punished with a fine because they are a legal person, is often so considerable that they are not deterred by a maximum fine that is many times lower than the profit they can make when breaking the law. It is therefore important, with a view to the preventative and repressive effect of criminal law, that sufficient possibilities are created to prosecute objectionable conduct under criminal law and to impose adequate punishments."

51. Consequently, the draft law proposes to increase the maximum fine for legal persons for a foreign bribery offence to ten per cent of the turnover of the legal entity where a 6th category fine does not provide suitable punishment. The draft law further proposes to increase imprisonment sanctions for natural persons for the new, harmonised foreign bribery offence to six years (as opposed to the maximum four years sentence currently applicable).

(d) Additional sanctions

52. Professional disqualification as a criminal sanction for natural persons for acts of bribery was established in April 2010. Given that no foreign bribery case has been finalised at the time of this report, such disqualifications have never been imposed in practice.

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28 Transparency International Netherlands, "National Integrity System Assessment – Netherlands", February 2012, at p. 23, *available at*: http://www.transparency.nl/wp-content/uploads/2012/05/TI-NL-NIS-report.pdf

29 Transparency International, "Progress Report 2011 on Enforcement of the OECD Convention," at p. 51, *available at*: http://www.transparency.org/whatwedo/pub/progress_report_2011_enforcement_of_the_oecd_anti_bribery_convention

30 See commentary after para. 212 of the Phase 2 Report on the Netherlands.

53. There is currently no possibility for the courts to impose debarment or other disqualification sanctions on legal persons, nor do the proposed amendments to the Criminal Code envisage such sanctions. Public agencies may discretionarily exclude companies convicted of foreign bribery from publicly funded contracts and export credits support. If companies are already benefiting from such public advantages, these may also be withdrawn (see section B.11 for further discussion).

(e) Sanctions in out-of-court settlements

54. The process of out-of-court settlements is governed by article 74 of the Criminal Code (see section 5 for further discussion of the out-of-court settlement procedure). Out-of-court settlements in the Netherlands do not require an admission of guilt. Under these provisions, imprisonment sanctions cannot form part of out-of-court settlements. These may include financial sanctions, which may be higher than those available under the Criminal Code provisions, the surrender of objects seized or the payment of their assessed value, as well as the payment of the estimated proceeds of crime. It is further worth noting that an out-of-court settlement would not be taken into account for EU debarment purposes. This may prove a very serious incentive to companies to try and settle (foreign) corruption cases out-of-court.

55. As noted earlier, there are no finalised foreign bribery cases to date in the Netherlands. However, the Dutch prosecution authorities concluded out-of-court transactions with seven companies for paying kickbacks in the context of the Oil-for-Food Programme in Iraq, although the offence charged was the violation of sanctions legislation and not the foreign bribery offence. The settlements included fines as well as confiscation of the criminal proceeds. A press release was also issued in July 2008, which included the names of the companies and the settlements reached. The sanctions in the context of these settlements were as follows:

- Alfasan International BV Woerden: EUR 31 800 fine and EUR 10 183,55 confiscation;
- NV Organon Oss: EUR 381 602 fine;
- Flowerserve BV Etten Leur: EUR 76 274 fine and EUR 180 260 confiscation;
- OPW Fluid Transfer Group Europe BV Nieuw Vennep: EUR 57 204 fine and EUR 24 600 confiscation;
- Prodetra BV Waddinxveen: EUR 64 751 fine and EUR 34 485,95confiscation;
- Solvochem Holland BV Rotterdam: EUR 136 000 fine and EUR 144 592 confiscation;
- Stet Holland BV Emmeloord: EUR 119 712 fine and EUR 54 458 confiscation.

Commentary

The lead examiners consider that the current level of financial sanctions applicable to legal persons, although increased since Phase 2, is not sufficiently effective, proportionate and dissuasive – a problem already highlighted by the Working Group on Bribery in Phase 1 and Phase 2. They are seriously concerned that the level of sanctions may, in practice, discourage effective prosecutions against legal persons.

The lead examiners are, however, encouraged by the proposed amendments to the Criminal Code, which would significantly increase the level of imprisonment sanctions applicable to natural persons, and of financial sanctions applicable to legal persons by allowing for the imposition of a fine of up to ten per cent of the legal person's turnover. They urge the Netherlands to proceed promptly with the adoption of this new legislation and to keep the Working Group abreast of developments in this area. The lead examiners further recommend that the Working Group follow up on the application of sanctions in practice in foreign bribery cases.

Finally, the lead examiners encourage the Netherlands to consider introducing the possibility of additional sanctions against legal persons such as suspension from public procurement or other publicly funded contracts. These could be included, for instance, in the draft legislation amending the foreign bribery offence in the Criminal Code.

4. Confiscation of the bribe and the proceeds of bribery

56. The Netherlands has a system of ordinary confiscation, which may be ordered by the court in the same proceedings as the offence tried, and without being requested by the public prosecutor, as well as a system of special confiscation, which is at the initiative of the prosecution, in separate proceedings. The special confiscation regime was fairly recent at the time of the Phase 2, and the Working Group on Bribery therefore identified this as a follow-up issue.[31] In July 2011, the Netherlands introduced a series of revisions extending the special confiscation regime, discussed in detail below.

(a) Ordinary confiscation

57. Ordinary confiscation is defined under articles 33 and 33a of the Criminal Code. It allows for the confiscation of property used or intended to be used to commit an offence. It could therefore be relied on in foreign bribery cases where the bribe is still in the hands of the briber (e.g. where there has only been an offer or promise but the bribe was never transferred to the foreign public official). Ordinary confiscation also allows for confiscation of property obtained in whole or in part from the commission of an offence. However, since it does not allow for confiscation of the financial equivalent of the proceeds, it would rarely be applicable in cases of transnational bribery in international business transactions, since the proceeds would generally be in the form of a permit or a public procurement contract, and thus could not be confiscated as such.

(b) Special confiscation

58. Special confiscation is defined under article 36e of the Criminal Code. It allows for the confiscation of the monetary equivalent of the proceeds of crime, including foreign bribery.[32] Accordingly, it is the most relevant instrument in foreign bribery cases.Although initiation of special confiscation proceedings is at the discretion of the public prosecutor, a Directive of the PPO urges all prosecutors to initiate special confiscation proceedings when the criminal proceeds are estimated to be at least EUR 500. Furthermore, the *Instruction on the Investigation and Prosecution of Foreign Corruption* urges prosecutors to rely on special confiscation in foreign bribery cases.

59. Special confiscation may reach even further than the proceeds of the original crime, as it also allows for the confiscation of illegally obtained profits in relation to other "similar offences" or to offences punishable with a category 5 fine, other than the offence for which the offender was convicted. In such cases, the public prosecutor would only need to establish on the balance of probabilities that the proceeds stemming from these other offences have been committed, rather than on the higher criminal standard of beyond reasonable doubt.[33]

60. The special confiscation regime was further extended on 1 July 2011, with the entry into force of a new revision of the provisions on special confiscation. In particular, the new law introduces a legal

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31 See commentary after paragraph 234 and Phase 2 Follow up Issue 8(e) of the Written follow-up to Phase 2 by the Netherlands.

32 *Ibid.*, at paras. 227-234.

33 Article 36e(2) of the Criminal Code.

presumption regarding the origin of assets belonging to the defendant acquired over a period of up to six years prior to the criminal offence.[34] Representatives of the public prosecution explained that this could be usefully relied on in foreign bribery cases; for instance, where a defendant has been convicted of foreign bribery in a particular foreign country to obtain a public procurement contract in a specific sector, the prosecution could rely on this provision to apply for confiscation of the proceeds gained by the convicted company in the same country and in the same sector of operations during the six years prior to the offence for which it was convicted. In such situations, the burden of proof is shifted to the defendant, who may refute the presumption on the balance of probabilities.

61. Amendments to article 94(3) and (4) of the Code of Criminal Procedure (CPC) expanded already existing possibilities for confiscation of the proceeds of crime held by third parties. Under the amended provisions, proceeds of crimes belonging to third party natural or legal persons may be seized if these proceeds were transferred to the third party to avoid confiscation, and this third party knew or should have known this. This could be useful in foreign bribery cases where, for whatever reason, a conviction of the legal person could not be reached. In such cases, the proceeds of the foreign bribery offence held by the third party legal person could be recovered.

62. Statistics provided by the Dutch authorities in their Phase 3 responses show that the amounts confiscated under special confiscation provisions have increased drastically since 2006. From EUR 17m confiscated in 2006, confiscation reached a record EUR 39m in 2009, and the latest figures for 2011 indicate special confiscation in the amount of EUR 28.9m (in addition to EUR 15.7m in ordinary confiscation). As noted earlier, these figures do not concern any foreign bribery cases, as none have been finalised to date.

(c) Expertise and resources

63. In February 2011, the Netherlands enacted a specific policy programme (*Afpakken*) to further boost confiscation. This programme provides for an additional funding of EUR 20m annually for law enforcement authorities specifically for the purpose of pursuing confiscation, and sets an objective of EUR 100m in confiscation by the year 2018.

64. There is a rather high level of expertise in the field of confiscation in the Netherlands, as particularly exemplified by the detailed indications on quantification of the proceeds of crime in the *Instruction on the Deprivation of Criminal Assets* issued by the Board or Procurators General to public prosecutors. Another example is the specialised office of the public prosecution service for criminal assets deprivation (*Bureau Ontnemingswetgeving Openbaar Ministerie* or BOOM). The highly specialised prosecutors in the BOOM assist other public prosecutors with the special confiscation aspects of criminal prosecutions. Particularly complex special confiscation cases are handled by the BOOM itself. The BOOM also plays the role of asset recovery office. BOOM prosecutors may also rely on the expertise of civil lawyers to analyse complex corporate structures, asset-tracing experts, accountants, as well as international law specialists and advisers employed by the BOOM.

65. As concerns foreign bribery cases more specifically, the *Instruction on the Investigation and Prosecution of Foreign Corruption Offences* expressly recommends "to make use of the expertise of BOOM." During the on-site visit, representatives of the BOOM indicated that they are already involved in two of the four foreign bribery investigations underway.

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[34] *Ibid.*, Article 36e(3).

Commentary

The lead examiners commend the Netherlands for its commitment to an efficient confiscation regime, as demonstrated by the legislation in place, the financial efforts to support its application in practice, and the high level of expertise available in the Criminal Assets Deprivation Bureau of the Public Prosecution Service (BOOM). The lead examiners recommend that the Working Group follow-up on the application in practice of confiscation measures in ongoing and future foreign bribery investigations.

5. Investigation and prosecution of the foreign bribery offence

(a) Principles of investigation and prosecution

(i) Principal enforcement agencies and coordination

66. As in Phase 2, the Netherlands' main criminal law enforcement bodies in foreign bribery cases are the Dutch National Police Internal Investigation Department (*Rijksrecherche*) and the National Public Prosecutor for Corruption (NPPC). The Dutch Police and the Fiscal and Economic Intelligence and Investigation Service (FIOD-ECD) may also open foreign bribery investigations but most foreign bribery cases are referred to the *Rijksrecherche*. Of the four on-going foreign bribery investigations, three are being led by the NPPC, with *Rijksrecherche* carrying out the investigative measures, and one is being led by the FIOD-ECD in coordination with the *Rijksrecherche*.

67. With regard to coordination, a Coordination Committee for the *Rijksrecherche* (CCR), comprised of members of the Board of Prosecutors-General, the National Chief Public Prosecutor, the Director of the *Rijksrecherche*, and the NPPC, ensures that foreign bribery cases are systematically referred to the *Rijksrecherche*. When a "concrete suspicion" of foreign bribery has been detected, the CCR will order to *Rijksrecherche* to open a criminal investigation. Prosecution authorities may also request that the FIOD-ECD lead foreign bribery investigations, with which the *Rijksrecherche* has increased its cooperation since Phase 2.

68. The primary competence and coordinating role of the *Rijksrecherche* in foreign bribery investigations has been made clear to all relevant agencies. With regard to prosecutions, the NPPC is responsible for coordinating and carrying out foreign bribery prosecutions. However, other prosecutors can also carry out foreign bribery prosecutions under the coordination of the NPPC. During the on-site visit, law enforcement authorities stated that they experience no problems with regard to inter-agency cooperation and coordination, and that a very good working relationship has been established between the NPPC and the *Rijksrecherche*. Formal arrangements have also been made between the *Rijksrecherche* and law enforcement authorities in the CN for cooperation in corruption cases.

(ii) Initiating and terminating cases

69. A foreign bribery criminal investigation can be opened where there is a "concrete suspicion" of the criminal offence.[35] The *Instruction on the Investigation and Prosecution of Foreign Corruption* sets out in detail factors and principles to be taken into account in the investigation and prosecution of foreign bribery cases. These include:

- Public sources of information, including the international press and Internet;
- MLA requests from countries conducting an investigation into public servants accepting bribes from Dutch companies or individuals;

[35] Article 132(a), Code of Criminal Procedure.

- Cases that are reported on a regular basis by the OECD secretariat to the relevant parties to the Convention;
- Reports from whistleblowers;
- Reports from diplomatic officers;
- Offences reported by public servants on the basis of article 162 of the CCP or otherwise.

70. If the information gathered creates a "concrete suspicion" under article 27 of the CCP, the *Rijksrecherche* will open a criminal investigation. If there is insufficient information, the CCR can order the *Rijksrecherche* to open a preliminary investigation with the objective to collect sufficient information to establish a "concrete suspicion" of foreign bribery. The existence of a "concrete suspicion" is required to trigger the use of special investigative tools.

71. Law enforcement officials indicated that the most common sources of information that have triggered foreign bribery investigations in the Netherlands originate from whistleblower reports, MLA requests, media sources and self-reports by companies. One foreign bribery investigation stemmed from a referral from the World Bank, which resulted in the establishment of a joint investigation team (JIT) with another Party to the Convention (see also section B.9).

72. Cases will normally be terminated or suspended where there is insufficient evidence to indict. For example, Dutch law enforcement authorities indicated during the on-site that one foreign bribery investigation was closed because of a failure to obtain key information through MLA, despite having sent multiple requests as well as a delegation to the requested country.

73. As noted above, 14 of 22 foreign bribery allegations involving Dutch companies or individuals have not resulted in any form of investigation. A number of these allegations involve major Dutch companies with headquarters in the Netherlands, which raises particular concerns with regard to the level of proactivity of law enforcement authorities. Furthermore, in a number of these cases, Dutch authorities deferred to investigations that had been opened in other countries which also had jurisdiction over the foreign bribery offence. However, it is does not appear that Dutch authorities made any preliminary inquiries into the involvement of Dutch companies or individuals, or systematically undertook efforts to consult with the other jurisdictions where relevant, as provided under Article 4(3) of the Convention.

Commentary

The lead examiners note that the Netherlands may rely on a wide range of sources of information in opening a foreign bribery investigation. The lead examiners are seriously concerned that, in spite of this, the number of investigations opened to date in the Netherlands for foreign bribery is too low. They recommend that the Netherlands proactively gather information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations.

The lead examiners are concerned that Dutch law enforcement authorities have deferred to enforcement bodies in other jurisdictions rather than conduct their own investigations in some foreign bribery cases. Co-ordination with other relevant foreign agencies is undoubtedly important and necessary, especially in cases where foreign bribery is allegedly committed by multiple perpetrators from different countries. They therefore recommend that the Netherlands closely examine all allegations of foreign bribery, even where other jurisdictions are involved, and consider conducting concurrent or joint investigations, where appropriate.

(iii) Investigative tools

74. A wide range of investigative tools, including special investigative tools, are available to law enforcement authorities under the CCP, which were further expanded in 2000 following the introduction of amendments from the Special Powers of Investigation Act (Wet BOB). These include surveillance methods, search powers, wiretapping and the interception of communications, covert investigations and controlled deliveries.

75. Special investigative tools are available for offences which carry a maximum imprisonment sentence of four years or more. Accordingly, special investigative tools are largely available for foreign bribery offences under articles 177 and 178(1), but not under article 177a. However, as noted in Phase 2, this distinction does not present practical challenges, as the public prosecutor would usually base the initial investigation on both articles 177 and 177a. Dutch law enforcement authorities further indicated that in such cases, there will often be an additional suspicion of forgery and/or money laundering, which carry a maximum penalty of at least four years of imprisonment, thus also allowing for the use of special investigative tools. During the on-site visit, Dutch law enforcement authorities confirmed that multiple special investigative tools have been used in at least two on-going foreign bribery investigations. Finally, the new draft law creating a harmonized foreign bribery offence is expected to include high enough level of sanctions to trigger the use of special investigative tools.

76. Law enforcement authorities re-confirmed on-site that bank secrecy does not pose any difficulties for law enforcement in foreign bribery investigations. The new draft law revising the foreign bribery offence also aims to improve the possibility of the seizure of confidential documents; under the draft law an examining judge may order that documents be seized if he/she is of the opinion that maintaining confidentiality would "cause disproportionately significant damage to a more compelling interest of society."

Commentary

The lead examiners note that the Netherlands has a wide range of special investigative tools at its disposal. Given the concealed nature of the crime, such tools are very important for investigating foreign bribery cases. The lead examiners recommend that the Netherlands continue to make full use of these tools in its foreign bribery investigations.

(iv) Instructions by the Board of Procurators General on foreign bribery, and Article 5

77. In the Netherlands, the Public Prosecutor has discretionary powers to decide whether to prosecute a case. Once a case is referred to the Prosecution Office, the prosecutor can either prosecute or waive the prosecution in order to initiate alternative proceedings.[36] The decision to further prosecute foreign bribery cases is taken by the CCR on the basis of whether the facts can be proven and if the prosecution is in the public interest. The public prosecutor handling the case may also decide whether to settle the case out of court (see also sections B.3 and B.5.c.). The Netherlands emphasises that the decision to prosecute is not arbitrary, and the public prosecutor is subject to instructions and directives which are considered binding sources of law.[37]

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36 Article 167, Criminal Procedure Code.

37 The Netherlands highlights as an example Article 12 of the Code of Criminal Procedure, in which a complaint can be made to the court regarding a decision taken by the Public Prosecutor's Office not to prosecute.

78. In Phase 2, the Working Group was seriously concerned that a number of statements in the *Instruction on the Investigation and Prosecution of Offences in Public Office Committed Abroad* prevented the effective prosecution of foreign bribery cases, and recommended that the Netherlands amend the *Instruction* to ensure that the information contained therein may not be interpreted contrary to the Convention and the bribery offences in the Dutch Criminal Code.[38] The Working Group considered this recommendation not implemented at the time of the 2008 Follow-up Report. One particular issue was that the title of the *Instruction* referred to "corruption offences committed abroad", which could cause confusion since foreign bribery can also occur within Dutch territory. The Netherlands has now drafted an updated 2012 Instruction formally titled *Instruction on the Investigation and Prosecution of Foreign Corruption*.

79. Of even more concern to the Working Group, however, was the *Instruction*'s list of criteria in deciding whether to prosecute foreign bribery, which raised concerns with regard to Article 5 of the Convention. Article 5 of the Convention states that the "investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." At the time, the list included factors such as involvement of senior foreign officials and the potential impact on Dutch trading interests if a case was not investigated. It also listed factors which should not be relevant, such as the investigation and prosecution efforts in the foreign country.

80. The *Instruction* was updated and amended in 2011 to address the Working Group's recommendations. Following the on-site visit and concerns expressed by the evaluation team regarding factors included therein, such as the risk of reputational damage to Dutch trading and political interests and the law enforcement efforts in the foreign country concerned, the *Instruction* was further amended in December 2012. As a result, a new *Instruction on the Investigation and Prosecution of Foreign Corruption* was developed by the Board of Procurators General, which is expected to enter into force on 1 January 2013. However, the updated *Instruction* sets out the following criteria to assess whether a case should be prosecuted:

- The substantial scale of the bribe, in absolute or relative terms (e.g. a substantial percentage of the contract sum);
- Involvement of influential (foreign) public servants or politicians (in the sense that the bribery of such (public) figures, because of their position as a role model and/or position of power, has a more serious impact than if less influential individuals were involved);
- The bribe is directly or indirectly borne by Dutch central funds (e.g. government assistance, credit insurance, government subsidies, etc.) or is paid by funds intended for international development aid;
- The extent of unfair competition (the larger the scale, the more serious the offence);
- Recidivism;
- The possibilities of further investigation and the likelihood of successful prosecution.

81. The *Instruction* states that "these considerations should play an important part in assessing the expediency of prosecuting foreign corruption, and the fundamental attitude towards prosecution should therefore be positive." The Netherlands considers that these criteria therefore do not contravene Article 5 of the Convention. According to Dutch law enforcement authorities, this approach means, for example, that: "the higher the rank of a certain public official involved, the more important it is to prosecute." There nevertheless remains lack of clarity with this approach to the criteria listed in the *Instruction* which could prevent the investigation and prosecution of foreign bribery cases. For example, if a bribe was paid to a

[38] Phase 2 Report on the Netherlands, recommendation 3(f).

mid- or junior-level official, would this be a factor tending against prosecution? Or, with regard to unfair competition, if the prosecution deems that no other companies were negatively affected by the bribe, would this be a factor tending against prosecution? Moreover, some criteria continue to raise potential Article 5 issues, such as the extent of unfair competition. In response to the concerns expressed by the Working Group during the Netherlands Phase 3 evaluation, the Netherlands further amended the *Instruction* to make express reference to the considerations prohibited under Article 5 of the Convention. The revised *Instruction* will enter into force in January 2013.

Commentary

The lead examiners commend the Netherlands for promptly addressing the Working Group's concerns over a number of the statements in the former Instruction on the Investigation and Prosecution of Foreign Corruption. The lead examiners recommend that the Netherlands proceed with the adoption and implementation of the Instruction on the Investigation and Prosecution of Foreign Corruption to ensure in no uncertain terms that it cannot be interpreted contrary to Article 5 of the Convention.

(b) Resources and training

82. Since Phase 2, the *Rijksrecherche* has received increased financial resources to combat corruption, including foreign bribery. In 2008, EUR 1.2m was added to their budget, enabling them to extend their capacity to a total of 100 employees by the end of 2012. The extra financial resources have been mainly allocated towards the recruitment of financial investigators, crime analysts, digital information investigators and an intelligence investigator. These agents are deployed in national and international financial economic crime cases, including foreign bribery. In 2010, the *Rijksrecherche* received EUR 300 000 in additional funding for corruption investigations specifically in the CN. In one major corruption investigation (non-foreign bribery-related) in one of the CN islands, the *Rijksrecherche* also received extra project-based funds. In addition, EUR 20m has been recently allocated to law enforcement authorities by the Dutch government to combat money laundering, which the Netherlands expects will help uncover more foreign bribery cases. With regard to the PPO, there are approximately 35 prosecutors working on fraud and corruption cases generally. The NPPC's office, however, which is responsible for the coordination and prosecution of foreign bribery, is only staffed with two prosecutors. Representatives of the legal profession participating in the on-site visit commented on this low number, and its implications on the Netherlands' ability to effectively enforce the foreign bribery offence.

83. The *Rijksrecherche* has an annual budget of approximately EUR 13.1m from which an average 2 per cent is spent on staff training. This includes courses on corruption offences. In 2006, a specialised training programme on foreign bribery was introduced. The programme was completed in 2009, and the Netherlands stated that the level of knowledge of foreign bribery among law enforcement agents has increased as a result. Training courses for prosecutors and judges on foreign bribery cases have also been held; the training institute of the judiciary and PPO conduct annual training courses on combating cross-border bribery.

84. During the on-site visit, Dutch law enforcement officials asserted that the level of human and financial resources made available to investigate and prosecute foreign bribery is sufficient. At the same time, however, the Netherlands indicated in the Phase 3 Questionnaire responses that they have limited law enforcement resources to investigate all allegations of foreign bribery, particularly those relating to the numerous mailbox companies the Netherlands houses (see also section B.2.e). Participants from the legal profession participating in the on-site visit were also very sceptical of the level of resources allocated towards foreign bribery prosecutions. The number of cases where no preliminary investigations were conducted further question the sufficiency of resources available to effectively investigate foreign bribery.

Commentary

The lead examiners find that there are insufficient resources allocated to the investigation and prosecution of foreign bribery in the Netherlands. This finding is supported by not only the number of foreign bribery cases in which preliminary investigations were not opened, but also statements made by the Netherlands itself that it has limited law enforcement resources to investigate all suspicions of foreign bribery, particularly those relating to mailbox companies. The lead examiners therefore recommend that the Netherlands:

- ***(i) Ensure that adequate resources are available to law enforcement authorities to effectively examine, investigate and prosecute all suspicions of foreign bribery;and***
- ***(ii) Periodically review its approach to enforcement in order to effectively combat foreign bribery, as provided by the 2009 Anti-Bribery Recommendation.***

(c) Out-of-court settlements

85. The PPO has broad discretionary powers to settle cases out of court. As discussed above, the rules and processes are governed by article 74 of the Criminal Code and the *Directive on Large and Special Transaction*s. Out-of-court settlements may include financial sanctions ("transactions"), the surrender of objects seized or the payment of their assessed value, as well as the payment of the estimated proceeds of crime. They may also include compensation for damages caused to victims, as well as the imposition of "probationary periods" (see also section B.2). Out-of-court settlements are available for serious offences excluding those for which imprisonment is more than six years. Accordingly, it is possible to settle foreign bribery offences under articles 177, 177a and 178(a) out of court, but not under article 178(2).

86. The rules for out-of-court settlements involving a "high level" of financial sanctions are set out in the Directive. These include cases where the "high fixed penalty" exceeds EUR 50 000. In such cases, a press release is mandatory, including information on the offence, the name of the natural and/or legal persons involved, and the amount of the fine. The Directive further states that out-of-court settlements cannot be used in cases of "public concern" unless there is a justifiable reason for its use. If the public prosecutor chooses an out-of-court settlement in such a case, the proposed "transaction" has to be submitted by the Board of Procurators General to the Minister of Security and Justice, who then has to discretion to accept the proposal or decide to submit the case to court. As noted above, there have been no out-of-court settlements for foreign bribery cases. Prosecution authorities did conclude out-of-court settlements with seven companies involved in the Oil-for-Food cases. While the Oil-for-Food cases were of public concern, the Dutch authorities indicated that they were justifiably settled out of court mainly because of the significant difficulties law enforcement authorities would have confronted in obtaining evidence and witness testimonies from abroad, which included countries with which the Netherlands did not have a MLA treaty.

(d) Jurisdiction

(i) Territorial and nationality jurisdiction

87. In Phase 2, it was unclear whether Dutch law governing territorial and nationality jurisdiction could be effectively relied upon to prosecute foreign bribery cases where (1) a Dutch legal person uses a non-Dutch national to bribe a foreign public official while outside of the Netherlands;[39] (2) where the bribing of a foreign public official occurs in a third country where there is no foreign bribery offence; and

[39] The Working Group noted that this was a general issue for many Parties to the Convention.

(3) where the foreign bribery offence is committed by a company incorporated in the Netherlands Antilles or Aruba.

88. The Working Group decided to follow-up on these issues as case law developed. As noted earlier, there are no finalised foreign bribery cases in the Netherlands on which to rely to re-assess these issues. Nevertheless, the Dutch authorities provide the following explanations in their Phase 3 responses:

(1) Where a Dutch legal person uses a non-Dutch national to bribe a foreign public official while outside of the Netherlands, this would expose to prosecution the Dutch legal person itself, regardless of its nationality (as well as the natural persons who may have ordered the commission of the criminal offence).

(2) Where a Dutch natural or legal person bribes a foreign public official from country X, but the offence is carried out in country Y which does not criminalise foreign bribery offence, the Netherlands could potentially not exercise its jurisdiction.

(3) Legal persons incorporated in the Caribbean Netherlands (Bonaire, Saba or Sint Eustatius) can be considered "Dutch citizens" and may therefore be subject to prosecution. However, legal persons incorporated in Aruba, Curacao and Sint Maarten, cannot be considered "Dutch citizens", pursuant to the Civil Code which requires that Dutch legal persons be incorporated in the Netherlands, and therefore cannot be prosecuted for acts of foreign bribery.

(ii) Exercising jurisdiction in practice

89. While there are no major flaws in the Dutch legislation on jurisdiction, the Netherlands has been slow to exercise its jurisdiction in practice in a number of cases concerning foreign bribery allegations. The Netherlands often explains its lack of action by the fact that other countries Party to the Convention are already investigating and/or prosecuting the case. This tendency not to exercise jurisdiction seems particularly acute where the allegations concern a Dutch company, but where no Dutch natural persons are involved (see also section B.2.a). Proceedings underway in another jurisdiction do not and should not absolve Dutch law enforcement authorities of their duty to investigate foreign bribery allegations involving Dutch natural or legal persons. Co-ordination with other relevant agencies is undoubtedly important and necessary, and at the very least, consultations with the foreign jurisdictions involved should occur, as required by Article 4.3 of the Anti-Bribery Convention. While consultations have reportedly taken place in some instances, and the Netherlands has entered into one joint investigation with another country in a foreign bribery case, in a number of other cases, the Netherlands seems to rely solely on the fact that investigations are "said to be" taking place elsewhere (see also section B.5.a.(ii)).

(iii) Jurisdiction over mailbox companies

90. The issue of jurisdiction of the Netherlands over its "mailbox companies" was the subject of extensive discussion during the on-site visit (see sections A.4 and B.2.e for definition).

91. The first issue of concern is a December 2011 decision from the Court of Appeal in The Hague concerning the prosecution of a chemical waste company for environmental crimes in the Ivory Coast. It should be stressed that the Court decision concerns a complaint by Greenpeace against a decision of the Dutch Public Prosecution Service. The Court was not asked – and did not need to address – the issue of jurisdiction in the context of this decision; its remarks were made tangentially and are therefore not binding on lower courts. Nevertheless, the views expressed by the Court of Appeal raise serious concerns as to whether the courts will accept jurisdiction being exercised over mailbox companies. The Court states:

The Netherlands has no jurisdiction as regards the facts referred to in the complaint nor with respect to the persons or legal entities whose prosecution is requested for the following reasons:

- *The facts in respect of which the complainant requests prosecution did not take place in the Netherlands.*
- *The company only has its formal registered office in the Netherlands. In the Netherlands, it was no more than a company with its registered office at a trust office. The actual commercial activities carried out by the accused company take place from the United Kingdom and Switzerland. In view thereof, the company was, at the time of the facts in respect of which Greenpeace requests prosecution, not a legal entity as referred to in Article 5 of the Criminal Code;[…]*[40]

92. As the Dutch authorities pointed out in their Phase 3 responses and during the on-site visit, this verdict may cause jurisdictional problems in future cases concerning mailbox companies. However, a judge (not from the Court of Appeal of The Hague) interviewed on the topic of the decision following the on-site visit considered that, "if a Dutch enterprise is involved in a criminal matter, whether it is a mailbox or a "real" company, the Dutch law is applicable." He further stressed that "for tax purposes, there is no doubt as to whether a mailbox company would be treated similarly to a "real" company by the tax authorities."

93. Moreover, prosecutors interviewed on-site stated their firm intention to pursue ongoing investigations and prosecutions against certain mailbox companies allegedly involved in foreign bribery, and to test the issue of jurisdiction before the courts, including up to the Supreme Court, if necessary. However, despite this firm statement, representatives of the prosecution authorities also indicated their reluctance to initiate investigations against other Dutch mailbox companies alleged to have paid bribes to foreign public officials. For example, one of these alleged foreign bribery cases involves a company registered in the Netherlands, but whose activities are essentially carried out from a third country Party to the Convention. In this case, the third country has decided not to open an investigation for lack of jurisdiction over the company, and the Netherlands has decided not to open an investigation because the company's activities are not carried out in the Netherlands and no Dutch nationals or residents are involved.[41]

94. The issue of jurisdiction over mailbox companies is of particular concern in the Netherlands given the number of such companies involved in foreign bribery allegations. Out of 22 cases of alleged foreign bribery reported in the media, 12 concern mailbox companies, but only 2 are the subject of ongoing investigations. The Dutch authorities pointed out that the prosecuting authorities exercise their discretion in deciding whether to initiate proceedings based on a number of factors, including, where foreign bribery is concerned, on the *Instruction on the Investigation and Prosecution of Foreign Corruption* (see section B.5.a(iv) on prosecutorial discretion for further discussion on the *Instruction*).

95. The Dutch authorities explain that if a foreign bribery allegation concerns a Dutch mailbox company with no activity in the Netherlands and no Dutch citizens involved, the national public prosecutors would informally contact their foreign colleagues from the countries where the bribery took place or are home to the main suspect(s). They would then inform them about the case and inquire whether they would be willing to investigate it or have already started an investigation. However, given the current number of foreign bribery allegations which are not being investigated at all, this approach to mailbox companies appears to be a potentially significant loophole in the Dutch framework for effectively

40 LJN: BQ1012, The Hague Court of Appeal, K09/0334.

41 Following the on-site visit, the Dutch authorities indicated that they had contacted their counterparts in the third country Party to the Convention to solicit their cooperation in opening an investigation.

combating foreign bribery. In short, there is a real risk that companies set themselves up as mailbox companies in the Netherlands in order to escape prosecution for foreign bribery or other offences. These concerns are reinforced by media articles and research carried out by think-tanks, which have suggested that mailbox companies may provide foreign officials a way to operate investments obtained through acts of corruption,[42] and as a means of evading sanctions by undemocratic or despotic regimes.[43]

Commentary

In view of its apparent reluctance to exercise jurisdiction in a number of foreign bribery cases, the lead examiners recommend that the Netherlands be more proactive in exercising its jurisdiction over cases involving allegations of foreign bribery committed by a Dutch natural or legal person, and, where relevant, consult with other Parties to the Convention with a view to determining the most appropriate jurisdiction for prosecution.

The lead examiners are also seriously concerned as to whether the Dutch law enforcement authorities are sufficiently resourced and ready to initiate proceedings against mailbox companies registered in the Netherlands but carrying out their activities from another country. They consider that this may create a significant loophole for the prosecution of legal persons involved in foreign bribery. This concern is further reinforced by the statements in the April 2011 court decision by The Hague Court of Appeal. The lead examiners therefore urge the Netherlands to proactively investigate all suspicions of foreign bribery involving legal persons, including mailbox companies, and to take all necessary measures to ensure that such companies are considered legal entities under the Dutch Criminal Code, and can be effectively prosecuted and sanctioned.

(e) Statute of limitations

96. Article 70 of the Criminal Code provides for the rules on the statute of limitations, which are currently 12 years for offences under Articles 177 and 178, and 6 years for offences committed under Article 177a. The period begins to run on the day following the day on which the act in question was committed. Under Article 72(1), "any act of prosecution terminates" the running of the period. Under the former law, the act of prosecution must have been known by the defendant for the statute to be suspended. A new law enacted in 2006 changed this provision and now, the defendant's knowledge of the prosecution is no longer required. When a period of limitation terminates, a new one commences, and the suspension of a prosecution for the purpose of resolving a preliminary issue temporarily suspends the limitations period. According to the Netherlands, the expiry of the statute of limitation period has not caused any practical challenges in foreign bribery investigations. Law enforcement officials nevertheless welcome the new legislation currently being prepared that will simplify the foreign bribery offence and harmonise the statutes of limitations, rendering it 12 years for all cases of foreign bribery.

6. Money laundering

97. With regard to the money laundering risks in the Netherlands, the Financial Action Task Force (FATF) stated in its 2011 report that "indicators suggest that the Netherlands is susceptible to money laundering (ML), including because of its large financial centre, openness to trade and the size of criminal proceeds. The 16th economy in the world by nominal GDP, it ranks 7th in terms of the systemic importance

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42 SOMO (Centre for Research on Multinational Corporations), "The Netherlands: A Tax Haven), at p. 23, *available at*: http://somo.nl/publications-en/Publication_1397/at_download/fullfile.

43 Tax Justice Network, "How Libya Got Around Sanctions – via the Netherlands", *available at*: http://taxjustice.blogspot.fr/2011/08/how-libya-got-around-sanctions-via.html

of its financial sector. [...] Work done by academics suggests a significant amount of criminal proceeds originating from foreign countries flows into the Netherlands for laundering. The authorities have developed novel and advanced research investigating the links between business and crime."[44]

(a) The money laundering offence

98. The Dutch money laundering offences are placed in articles 420*bis*, *ter* and *quater* of the Criminal Code. Under these provisions, any criminal offence (including foreign bribery) is a predicate offence to money laundering. According to a 2004 Supreme Court decision, a proven link to the predicate offence is not necessary, and it would be sufficient for the prosecution to establish that the defendant knew or should have known that the goods/monies derive from criminal asset.[45] Money laundering is sanctioned by one to six years imprisonment and a fifth category fine. In the proposal to amend the Criminal Code prepared by the MSJ, it is proposed to raise the imprisonment sanction to eight years (for money laundering offences committed regularly).

99. The Anti-Bribery Convention requires under Article 7 that foreign bribery be a predicate offence to money laundering "without regard to the place where the bribery occurred." The Dutch money laundering offence does not specifically address predicate offences committed abroad. However, the Dutch authorities asserted, in Phase 2 and Phase 3, that money laundering is criminalised in the Netherlands, regardless of where the foreign bribery offence was committed. As of the time of this review, there has never been a money laundering case predicated on foreign bribery.

(b) Money laundering reporting

100. Reporting obligations can be found in the Disclosure of Unusual Transactions Act, which sets out the entities subject to the duty to report unusual transactions. These include banks, insurance companies, credit card companies, securities institutions, currency exchange organisations, money transfer institutions, casinos, gatekeepers such as dealers in expensive goods (e.g. cars, ships, jewellery, diamonds, art and antiques) and professions such as lawyers, notaries, estate agents, tax consultants, chartered accountants, and company managers.[46]

101. With regard to obligations to report suspicious transactions (also referred to as 'unusual transactions' in the Netherlands), the 2011 FATF report states that "the Netherlands have a long-standing system of preventive measures and while the legal framework is modern and comprehensive for both financial and non-financial institutions, it falls short of the international standard in some areas, such as in the case of the verification of beneficial owners and simplified due diligence." The FATF further notes that the Dutch anti-money laundering legislation "has to be amended to improve the reporting regime, including by requiring that suspicious transactions are reported promptly. Measures should be taken to ensure quality reporting by all financial and non-financial institutions. In light of the risks identified in relation to corporate lawyers' activities, authorities are recommended to address legal issues preventing effective implementation of preventive measures and supervision."[47] The Netherlands indicates that it has

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44 See the FATF, Mutual Evaluation Report of the Netherlands on Anti-Money Laundering and Combating the Financing of Terrorism, 25 February 2011. The Netherlands indicates that most of the FATF conclusions were accepted by the Dutch government, but that the Netherlands had differing opinions on certain conclusions. The Netherlands is due to present its first follow-up report to the FATF in February 2013.

45 LJN: AP2124, *Hoge Raad*, 02679/03, 28 September 2004, and Phase 2 Report on the Netherlands at paragraph 250.

46 Phase 2 Report on the Netherlands, at paras. 105-106.

47 FATF Mutual Evaluation Report of the Netherlands, at para. 9.

already begun working on these FATF recommendations, with a view to providing a satisfactory update to the FATF in February 2013. In particular, the Act on Prevention of Money Laundering and Terrorist Financing is due to be amended by January 2013, to respond to the shortcomings identified in the FATF evaluation.

(c) Authorities and expertise to combat money laundering

102. According to the FATF, "the Netherlands have a long standing financial intelligence unit (FIU) responsible for receiving, analyzing and disseminating information concerning money laundering." At the time of the Phase 2, in 2006, new administrative arrangements were being implemented by the Netherlands with the merger of the MOT (Office for the Disclosure of Unusual Transactions within the Ministry of Justice) and the BLOM (a special police unit) to create the FIU Netherlands/MOT-BLOM, integrated into the National Police. The MOT-BLOM combines an administrative function to receive, analyse and disseminate the Unusual Transaction Reports (UTRs) received, and a police function to serve as point of contact for law enforcement. However, some six years later, the legal framework governing the FIU is not yet fully complete, and the finalisation of the reorganization of the FIU has been delayed. This was raised as a point of concern by the FATF who considered that this state of flux hampered the FIU's effectiveness and eroded its operational independence. The FATF consequently rated the Netherlands as one of the lowest performers for its FIU. [48] At the on-site visit, the Dutch authorities indicated that they were in the process of addressing the concerns raised by the FATF, and would update the FATF on this point in February 2013.

103. In terms of resources, the FIU indicated that resources to deal with UTRs are tight, with approximately 60 persons dealing with 200 000 UTRs a year. Approximately 90 per cent of UTRs concern money transfers, which, under the Dutch anti-money laundering legislation, must be reported above a EUR 2 000 limit. Approximately 20 to 22 per cent of UTRs are forwarded to law enforcement for investigations.

104. A large number of law enforcement agencies are involved in money laundering investigations. The Netherlands explains in its Phase 3 responses that this derives from the direction taken by the MSJ to try to prosecute money laundering and deprive offenders of the proceeds of crime in each investigation related to lucrative crimes. To this end, the Board of Procurators-General has also issued a *Directive on Money Laundering*, which *inter alia* recommends that every public prosecutor's office consider combating money laundering to be a priority.

105. With regard to enforcement, the FATF report states that "financial investigations have been pursued through aggressive and effective approaches, as shown by the relatively high number of prosecutions for ML or ML and other offences. However, it has not been demonstrated that the analytical work of the FIU has significantly contributed to investigations and prosecutions of ML cases."[49] The Dutch authorities interviewed on-site re-confirmed their success with the enforcement of money laundering, in which they have reached a 90 per cent conviction rate. They further indicated that most of these cases are predicated on fraud and drug-related offences.

106. With respect to foreign bribery specifically, the Netherlands indicates that one of the four foreign bribery investigations underway is also being investigated for money laundering. The Dutch authorities were not aware, however, of any money laundering cases predicated on foreign bribery as of the time of this review. Measures to develop specific training, typologies or other types of awareness-raising on foreign bribery as a predicate offence to money laundering, either within the FIU itself or for reporting entities could improve attention to this topic. Representatives of the FIU interviewed on-site expressed

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48 *Ibid*.

49 FATF Mutual Evaluation Report of the Netherlands.

their intention to increase their efforts in this area, particularly in their meetings with reporting entities. Furthermore, the Dutch authorities have made additional financial resources of EUR 20m available to two teams within the PPO to exclusively investigate money laundering. As these teams turn their attention to the connections between criminal offences, it is expected that this will bring to light more corruption cases, including foreign bribery. Following the on-site visit, the Dutch authorities further explained that, since it is not necessary to investigate the predicate offence to get a conviction for money laundering, there is at present little information in general on predicate offences in money laundering cases.

Commentary

The Netherlands is a major financial centre, which entails higher risks of money laundering, including with respect to foreign bribery. In light of this, the lead examiners recommend that the Netherlands raise awareness and provide training to the FIU, law enforcement officials and reporting entities on foreign bribery as a predicate offence to money laundering. Such awareness-raising could also include the sharing of typologies on money laundering related to foreign bribery.

7. Accounting requirements, external audit, and company compliance and ethics programmes

(a) Accounting standards

107. Dutch legislation on accounting requirements was considered to be in conformity with Article 8 of the Convention at the time of the Netherlands' Phase 2 evaluation, and no recommendations for improvement were made in this area.[50] No significant changes have been introduced to the books and records requirements since Phase 2. External audit requirements have also not changed; pursuant to EU Directives, companies with more than 50 employees are subject to an external audit, with the exception of group companies for which the parent company has issued a declaration of full responsibility.[51]

108. False accounting is punished under Articles 225, 226 and 336 of the Penal Code, which prohibit forgery, the false preparation or falsification of a document. As noted in Phase 2, these provisions cover the fraudulent preparation or fraudulent use of documents with the intent to conceal the fact that a foreign public official has or will be bribed. The penalty imposed on natural persons is imprisonment not exceeding six years or a 5th category fine (EUR 78 000). For legal persons, fines may be increased to the 6th category, resulting in ten times the fine applicable to natural persons (i.e. EUR 780 000). The application of the false accounting offence in practice was identified by the Working Group in Phase 2 as a follow-up issue. The Netherlands indicates that between the period of 2007 to 2011, there have been a total of 5 807 cases relating to false accounting; none of these cases involved the concealment of foreign bribery. As discussed above (section B.3), the Netherlands can impose cumulative fines, which may result in financial sanctions that exceed the limit of the 6th category. In this regard, the Netherlands cites a fine of EUR 8m that was recently imposed on a Dutch multinational for false accounting offences. For a single offence, however, the financial sanctions at present remain too low to be sufficiently effective, proportionate and dissuasive. However, as discussed above, proposed amendments to the Criminal Code would increase the maximum fine for legal persons to ten per cent of the turnover of the legal entity where a 6th category fine does not provide suitable punishment.

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50 Article 1.4 of the Economic Offences Act; Articles 361, 362 *et seq*., Civil Code (Book 2).

51 Articles 361, 396 and 403 of the Civil Code.

(b) Detection of foreign bribery

109. None of the foreign bribery investigations in the Netherlands have been detected through the enforcement of books and records requirements, or accounting and auditing standards. In Phase 2, the Netherlands was recommended to "encourage the accounting and auditing professions to develop initiatives to raise awareness of the foreign bribery offence and the accounting and auditing requirements under the Convention, and encourage both professions to develop specific training on foreign bribery in the framework of their professional education and training programmes".[52] The Working Group considered this recommendation satisfactorily implemented at the time of the 2008 Follow-up Report, when the Netherlands reported on training courses provided to the accounting and auditing profession, which included components on bribery. The Netherlands Institute of Chartered Accountants (NBA) continues to provide mandatory training, which includes a training course for all auditors in public and private practice on professional scepticism and awareness-raising on fraud. Foreign bribery-specific red flag training has not been provided. Auditors participating in the on-site visit were aware of the foreign bribery offence and the identification of red flags, and emphasised the importance of regular training in this regard.

(c) Reporting of foreign bribery by external auditors

110. The Netherlands implemented the Clarified International Standards on Auditing (ISA) (*Nadere Voorschriften Controle- en overige Standaarden* - 'NV-COS') in 2010. The requirements for accountants and external auditors to report suspicions of fraud are based on ISA 240 and ISA 250. Accordingly, when auditing a company's annual accounts, auditors are obliged to hold an additional investigation "upon suspicion of fraudulent actions with regard to the annual accounts." If the investigation strengthens or confirms the auditor's suspicions, the auditor must report the suspicions to management and subsequently verify whether adequate action has been taken. If the fraud is material to the financial statements and adequate action has not been taken by management, the auditor is obliged to report the suspicions to the Dutch police, after which the public prosecutor will take appropriate action. The term "fraud" applied in the ISA standards would cover suspicions of foreign bribery. Auditors are also obliged to report unusual transactions, which may uncover foreign bribery, pursuant to the Dutch anti-money laundering requirements (see also section B.6.).

111. Auditors who inform the relevant authorities of suspected fraud are not liable for any breach of confidentiality. The Dutch anti-money laundering legislation ('WWFT') also provides protection from both criminal and civil liability when reporting unusual transactions. There was general agreement among the auditors participating in the on-site visit that there are sufficient safeguards in place affording protection.

(d) Corporate compliance, internal controls and ethics

112. Dutch authorities have collaborated with the private sector to promote company internal controls, ethics and compliance programmes. In 2012, the Ministries of Economic Affairs, Security and Justice, and Foreign Affairs developed a detailed brochure on foreign bribery, *Honest Business without Corruption*, in partnership with a number of Dutch business associations (VNO-NCW, SME Netherlands and the Dutch Chapter of the International Chamber of Commerce). The brochure highlights *inter alia* the importance of establishing a code of conduct, whistleblowing mechanisms, policies on gifts and hospitality, internal control and accounting systems, and anti-corruption contractual provisions when dealing with agents and other third parties.

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52 Phase 2 Report on the Netherlands, recommendation 1(b).

113. The Dutch Corporate Governance Code, which applies to all publicly listed companies on the Amsterdam Stock Exchange, also sets out general recommendations on financial and risk management including on the prevention of bribery. The Code identifies as a best practice that companies should outline their corporate governance structure, including their compliance with the principles of the Code, in a separate chapter of their annual reports. The Code is considered a form of self-regulation undertaken by companies, and is therefore not enforced by a government body. The Netherlands also highlights the "Transparency Benchmark Award" as a means of promoting the importance of internal controls, ethics and compliance. Since 2004, the Ministry of Economic Affairs (MEA) has annually given the award to a Dutch company that demonstrates the highest level of transparency on its environmental, social and governance-related performance. The MEA evaluates the top 500 companies in the Netherlands on the basis of a questionnaire, which include questions on the company's anti-bribery compliance systems.

Commentary

The lead examiners recommend that the Dutch authorities continue to work closely with the accounting and auditing professions to facilitate their more active role in detecting foreign bribery. In particular, they recommend that specific awareness-raising initiatives be undertaken to ensure that the foreign bribery offence and the accounting and auditing requirements of the Convention are covered in training programmes and related guidelines.

The lead examiners further recommend that the Netherlands ensure that financial sanctions imposed on legal persons for the false accounting offence for the purpose of bribing a foreign public official or concealing such bribery are sufficiently effective, proportionate and dissuasive. In this regard, the lead examiners are encouraged by the proposed amendments to the Criminal Code, which would significantly increase the level of financial sanctions applicable to legal persons by allowing for the imposition of a fine of up to ten per cent of the legal person's turnover. They urge the Netherlands to proceed promptly with the adoption of this new legislation and to keep the Working Group abreast of developments in this area.

With regard to internal controls, ethics and compliance, the lead examiners welcome the steps taken by the Netherlands to promote these issues among companies to help prevent foreign bribery. They recommend that the Netherlands continue to pursue these efforts, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance, in Annex II of the 2009 Anti-Bribery Recommendation, in particular among SMEs. They also note that this is a horizontal issue among Parties to the Convention.

8. Tax measures for combating bribery

(a) Non-deductibility of bribe payments and enforcement

114. In Phase 2, the Working Group indicated its intention to follow-up on the application in practice of the law prohibiting the tax deductibility of bribes to foreign public officials, which had only been recently introduced in 2006.[53]

115. Tax legislation in line with the OECD Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions was enacted in April 2006. Regarding entrepreneurs, the new provision in Article 3.14 of the Law on Income Tax provides that "In determining the operating profits, expenses related to the following items are not deductible: […] expenses relating to donations, promises and services, if it is established that they relate to a criminal offence

[53] See follow-up issue 8(a) in the Phase 2 Report on the Netherlands.

referred to in articles 126(1), 177, 177a, 328*ter*, para 2 or 328*quater*, para 2, 177, 177a and 178 of the Penal Code."[54] With respect to small facilitation payments, the Dutch authorities explain that, since these are criminalised, they would fall under the application of the tax legislation which refers to the Criminal Code offences, and would thus not be tax deductible.

116. The provisions introduced in 2006 removed the requirement for a conviction in order to deny the tax deductibility of expenses. Tax officials are thus able to disallow deductions straight away, provided it can be established that the expenses claimed relate to a bribe. A further safeguard is that the Dutch taxation system requires taxpayers to substantiate legitimate business expenditures. The taxpayer thus has the burden of proof in (1) establishing that expenses have actually been made; (2) that something was done in return for the payment of such expenses; and (3), if nothing was obtained in return, that the payment served a business purpose. Furthermore, expenses for business purposes are only deductible if the deduction is not prohibited under tax legislation. In summary, where a tax inspector raises questions in respect of a claim for deduction, the taxpayer must provide all of the information required or the deduction will be refused.

117. As concerns the reopening of tax returns, representatives of the Dutch tax administration interviewed during the on-site visit indicated that where, for instance, a foreign bribery conviction is pronounced, the time limit for reopening a tax return to find out if tax fraud was also involved is 12 years in foreign-related situations, and 5 years in domestic situations. Tax auditors indicated they would be "extremely interested" to be informed of foreign bribery investigations underway, as they consider that persons willing to commit a foreign bribery offence may well be willing to break other laws, including tax law.

118. With respect to the prosecution of tax fraud, Transparency International Netherlands recently criticised the fact that tax offences are not systematically prosecuted. In 2011, the State Secretary of Finance stated that there needs to be, in general, at least a EUR 125 000 loss for the Tax Collectors Office before the case is taken up by the PPO. TI Netherlands considers that, by not prosecuting all tax evasion cases, there is a real risk of not discovering and prosecuting corruption cases.[55] The Dutch authorities however consider that this is only a partial representation of reality: while not all tax frauds give rise to criminal prosecutions, they would be the subject of administrative fines up to 100 per cent of the underlying tax assessment. The Netherlands considers that the imposition of such administrative fines is the equivalent of criminal proceedings. To make best use of resources in the PPO, only the most serious tax frauds are criminally prosecuted, typically where the tax loss exceeds a certain amount. They further point out that the investigative powers of tax authorities are very broad and that there is therefore no real risk of not uncovering and prosecuting corruption.

(b) Detection of bribery

119. The OECD Bribery Awareness Handbook for Tax Examiners is being used as an awareness raising and training tool for tax officials in relation to the detection of domestic and foreign bribery. In addition, the topic is also part of the "control set" – a database accessible to all tax auditors with risks, treatment methods and background – which is relied on in preparation of each tax audit. A special *Instruction* on the subject of bribe payments has been included in the control set and published in a newsletter handed out to all supervisory staff. Furthermore, the tax authorities organise regular meetings for tax officials on tracing domestic and cross-border corruption, and dealing with suspicions of corruption, including reporting to the PPO. Despite these efforts, the Netherlands reports that bribes to foreign public officials have never been detected by the tax authorities.

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54 Article 3.14 paragraph 1, sub. (h), Law of Income Tax.

55 Transparency International Netherlands, "National Integrity System Assessment", February 2012, at p. 148, *available at*: http://www.transparency.nl/wp-content/uploads/2012/05/TI-NL-NIS-report.pdf

(c) Exchange of information with Dutch law enforcement authorities

120. Under article 67 of the General States Act, there is a general duty of confidentiality prohibiting the disclosure of tax information. However, article 43c of the Act provides for a list of exceptions to this duty (see Annex 4). In particular, tax officials are allowed to make certain disclosures to the MSJ, the FIOD-ECD and the PPO where it concerns criminal law offences, including foreign bribery, or the exchange of information in the context of mutual legal assistance.[56] In addition, a set of rules published by and for the tax administration imposes a requirement on tax employees to report suspected tax and customs offences (not including foreign bribery) internally. Such reports are then passed on to the FIOD-ECD.[57]

121. In addition to the possibilities provided for under section 43c, the tax authorities may also establish "covenants" with other administrations and law enforcement bodies to cover specific areas of cooperation. The Dutch tax authorities reported that the multiplication of such covenants has helped "break the confidentiality mentality" within the tax administration.

122. Organisational arrangements have been put in place to encourage reporting, sanctioning and collaboration. With regard to the reporting of corruption specifically, a national contact person in the Tax Administration has been appointed. The objective of this new structure is to guarantee that each fraud signal reaches the relevant authorities.

(d) Exchange of information with foreign authorities

123. The Netherlands has signed 86 Double Taxation Conventions (DTCs), covering 90 jurisdictions, that provide for exchange of information in tax matters. The Netherlands has also signed Tax Information Exchange Agreements (TIEAs) with 28 jurisdictions. This network of 114 agreements allows for exchange of information with 118 jurisdictions. Currently, 96 of these agreements are in force. The Dutch authorities indicate that they have included language allowing for tax information to be used in criminal investigations in some of these; for example, in the DTCs with Belgium, Germany, India and Switzerland.[58] Under Article 8 of TIEAs, information obtained under the agreement may not be disclosed to any other authority or jurisdiction without the express written consent of the competent authority of the Party that provided the information. Under this provision, information received for tax purposes may be disclosed to other authorities to combat corruption subject to the express consent of the jurisdiction providing the information.

124. The Netherlands is also a Party to the Convention on Mutual Administrative Assistance in Tax Matters which allows information received for tax purposes to be used for non tax purposes and therefore

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56 Article 43c(1)l.3 and e.2 respectively.

57 See: "Richtlijnen aanmelding en afhandeling fiscale delicten, douane- en toeslagendelicten: richtlijnen AAFD".

58 On 17 July 2012, after the on-site visit to the Netherlands, the OECD Council approved an "Update" to Article 26 of the Model Tax Convention and its Commentary, including Commentary 12.3. The Working Group on Bribery has not yet had an opportunity to assess the impact of this update on implementation of the 2009 Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions. As the current report involved an on-site visit prior to the entry into force of this updated article 26 in the Model Tax Convention, the review under this section is based on the provisions of the Model Tax Convention as they were in force at the time of the visit. The Update can be accessed at the following weblink: http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf.

to be passed to law enforcement authorities to be used in criminal investigations (e.g. for foreign bribery) with the permission of the country providing the information. [59]

125. Similarly, Article 16.2 of the 2011 European Union *Directive on Administrative Cooperation in the Field of Taxation* provides that information and documents received in accordance with the *Directive* may be used for other purposes than for the administration and enforcement of taxes covered by the *Directive* if the Member State providing the information grants its permission. An EU Member State providing such information is obliged to grant this permission if it could use the information for similar purposes domestically. The Netherlands has transposed this *Directive* into the International Assistance (Levying of Taxes) Act.

(e) Tax measures for combating bribery in the Netherlands overseas territories

126. As for criminal law, the CN has its own tax law. With respect to the non-tax deductibility of bribes, article 9.c.1.n of the Income Tax Act explicitly states that bribes are non-deductible for tax purposes on these islands. The Tax Administration of the Netherlands in Europe is responsible for levying and collecting taxes in the CN.

127. Aruba, Curaçao and Sint Maarten are not Parties to the Anti-Bribery Convention (see section 1.c above on the foreign bribery offence in the Netherlands overseas territories). With respect to the non-tax deductibility of bribes in Curaçao and Sint Maarten, article 9.c.1.n of the Income Tax Act explicitly states that bribes are non-deductible for tax purposes. Since foreign bribery is not yet criminalised in Aruba, it is possible that bribes to foreign public officials may be claimed as tax-deductible on this island.

128. With respect to exchange of information with foreign authorities, the exchange of information provisions of the 22 agreements (1 DTC and 21 TIEAs) established by the former Netherlands Antilles are applicable to the CN. Article 8.124(2) of the CN Taxation Act also allows the Netherlands to provide information from the CN to answer a request received from any of its 118 partners. Furthermore, the Convention on Mutual Administrative Assistance in Tax Matters has been signed and ratified for the entire Kingdom of the Netherlands, including Aruba, Curaçao and Sint Maarten.

Commentary

The lead examiners welcome the efforts undertaken by the Netherlands to raise awareness and provide training on the detection of foreign bribery to tax auditors. They recommend that the Working Group follow-up on the application of the non-tax deductibility of bribes in practice, particularly to see whether any of the ongoing foreign bribery investigations lead to the reopening of tax returns. In this respect, the lead examiners encourage the law enforcement authorities to share information on enforcement actions in relation to foreign bribery with the tax administration. They further encourage sharing of information and increased coordination between the Tax Administration and the law enforcement authorities to enhance foreign bribery enforcement with respect to companies.

[59] The Netherlands has also signed the Protocol amending the Convention and opening it to all countries. To date, 38 countries have signed the amended Convention or Protocol.

9. International cooperation

(a) Mutual legal assistance and extradition

129. No specific recommendations were made in Phase 2 regarding the provision of mutual legal assistance (MLA). However, concerns were expressed regarding the effective use of MLA as an evidence gathering tool, and the Netherlands was encouraged to be more proactive in their use of MLA requests.[60]

130. It should be noted that the responses provided by the Dutch authorities to the Phase 3 questionnaire were particularly detailed and well illustrated with respect to the issue of MLA. This is in part due to an elaborate national computerised system in place that keeps track of the status of each MLA request, and maintains global statistics. Extradition requests are also handled through this database.

131. MLA requests from or to EU countries may be handled directly at the law enforcement level. Requests from and to other countries are dealt with through the Central Authority situated in the MSJ. A team of 20 persons in the Central Authority handle MLA requests, and assess if the requirements are met and then forward them to the competent prosecuting authorities. Seven centres in the Netherlands assist with cooperation between the police and prosecution for the purpose of providing MLA.

132. While there may be a general issue of proactive enforcement of foreign bribery offences in the Netherlands, it appears that, for those cases under investigation, MLA was proactively relied on. Ten MLA requests were sent out in foreign bribery cases (seven to Parties to the Convention, and three to non-Parties). Seven of these requests have been granted, of which one partially (five by Parties; two by non-Parties), and the remainder are still pending. The Dutch authorities indicate that difficulties in obtaining MLA have caused multiple challenges in their investigations into foreign bribery allegations. In particular, delays in the provision of MLA, including, in some cases, by Parties to the Convention, has had repercussions on investigations in the Netherlands. The Dutch authorities further explain that, in most cases, solutions were found. In at least one case, however, the foreign bribery could not be prosecuted due to a refusal from the requested country to provide MLA on the basis that there was no treaty with the Netherlands.

133. With respect to incoming foreign bribery-related MLA requests, the Netherlands indicated that, between 2007 and 2011 (inclusive), it had granted 18 requests (11 to Parties to the Convention, of which 1 was partially granted; 7 to non-Parties); that it had denied 2 requests to non-Parties; and that 1 request was closed due to lack of response from the requesting country (Party). The Netherlands explains that the two refusals were due to the lack of a treaty in one case, and the impossibility to trace the witness in the other case. A number of foreign bribery MLA requests are still pending. The timeline for responding to MLA requests has varied between four months to a few years. On one occasion, an incoming MLA request triggered the opening of an investigation in the Netherlands.

134. No requests for extradition in the context of a foreign bribery investigation were made or received by the Netherlands since its Phase 2 evaluation. One extradition request based on corruption was made before 2002 by another Party to the Convention. After the Dutch Council of State found the person in question extraditable under the law in 2003, the extradition was refused on 23 June 2008 by the Minister for Justice for undisclosed reasons. The person could not be prosecuted in the Netherlands since the bribery acts occurred in 1995, before foreign bribery was criminalised in the Netherlands. Under Dutch law, where the court decides to grant an extradition request, the Minister has the discretion to refuse the application, if he/she considers there are good grounds for believing that the person in question would be prosecuted on account of his/her religious or political convictions, and where the offence has a "political nature" or is

[60] See recommendation 3(e) of the Phase 2 Report on the Netherlands.

"connected therewith". Dutch nationals may be extradited where they are requested for a criminal investigation and the Minister of Justice is satisfied that there is an adequate guarantee that if a non-suspended custodial sentence is ordered, they will be allowed to serve the sentence in the Netherlands.[61] A decision of the Minister of Justice to refuse extradition cannot be appealed, although he/she may be asked by Parliament to provide explanations on his/her overall policy on extradition, and requests may be repeated to subsequent Ministers.

(b) Seeking MLA from the Netherlands overseas territories

135. With respect to the CN, MLA requests are processed through the Central Authority in the Netherlands in Europe. Aruba, Curaçao and Sint Maarten, which are independent countries, have their own MLA rules and central authorities. Curaçao has criminalised foreign bribery since 15 November 2011; dual criminality would therefore not be an obstacle to the provision of MLA to other countries Party to the Convention. Aruba will be similarly positioned as of January 2013, once its foreign bribery offence comes into force. Sint Maarten is expected to adopt a similar offence shortly thereafter; however, until this is the case, dual criminality may well be an impediment to the provision of MLA in foreign bribery cases.

(c) JITs and cooperation with international financial institutions

136. The Netherlands has also engaged in other forms of international cooperation in the context of foreign bribery investigations. One of the foreign bribery investigations underway was triggered on the basis of information provided by the World Bank. As a consequence, the Netherlands concluded a Memorandum of Understanding with the World Bank, to facilitate the sharing of information between the Dutch and the Bank's authorities in future investigations.

137. In the context of this same investigation, the Netherlands entered into a Joint Investigation Team (JIT) agreement with another EU country Party to the Anti-Bribery Convention.[62] The Dutch law enforcement authorities were very positive about this first attempt to work with another country in the context of a JIT in the area of investigating bribery. They indicated that, should future foreign bribery investigations arise involving other EU countries Party to the Convention, they would try to carry these out through a JIT.

Commentary

Noting that the challenge of compiling statistics on MLA is a horizontal issues among members of the Working Group, the lead examiners welcome the extensive information provided by the Netherlands with respect to mutual legal assistance. They encourage the Netherlands to make full use of this tool to effectively investigate all relevant foreign bribery allegations.

With regard to extradition, the lead examiners are concerned by the 2008 refusal of the then Minister of Justice to extradite a Dutch national, after the extradition request was initially granted by the court. However, they note that the reason the person was not prosecuted in the Netherlands was because the acts were committed before the Dutch foreign bribery offence came into force. They recommend that the Netherlands ensure that it can either extradite or

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61 Article 4(2) of the Extradition Act

62 A JIT may be established by a Member State of the European Union and allows two or more countries to form a team of law enforcement officials to conduct a single criminal investigation. It is established by mutual agreement between the designated national central authorities, and permits the sharing of information and evidence between its party countries without the need for further formal MLA requests.

prosecute its nationals for foreign bribery, in conformity with Article 10 of the Convention, and the legal principle of aut dedere aut judicare.

10. Public awareness and the reporting of foreign bribery

138. This section addresses the Netherlands' recent efforts to raise public awareness of foreign bribery. It will also consider recent developments on the reporting of foreign bribery, including whistleblowing and whistleblower protection. Efforts to improve corporate compliance, internal controls and ethics are discussed under section B.7 on accounting requirements, external audit, and company compliance and ethics programmes. The reporting obligations for the tax authorities and for those working with the disbursement of public advantages are addressed respectively under section B.8 and section B.11 of this report.

(a) Awareness of the Convention and the offence of foreign bribery

139. Since Phase 2, the Netherlands has undertaken a number of awareness-raising efforts to combat foreign bribery, particularly among officials working in overseas missions or advising Dutch companies operating abroad. In 2010, the Directorate-General for Foreign Economic Relations within the MEA conducted a workshop for government officials on the Convention and the foreign bribery offence under Dutch law. Anti-corruption training is made regularly available to officials working in overseas missions, and every newly appointed ambassador must take an anti-corruption training course, which includes information on the Convention.

140. The MFA Code of Conduct also includes a specific Annex on foreign bribery and provides detailed guidance on actions embassy officials should undertake when advising Dutch companies, and when confronted with suspicions of foreign bribery. Following the on-site visit, the MFA indicated that the Annex is currently being revised and will include any relevant commentaries or recommendations emanating from this evaluation. The MFA further reported during the on-site visit that it is also in the process of establishing a website aimed at providing embassy officials with specific tools to combat corruption, including foreign bribery. At the on-site visit, representatives of the business and industry associations spoke positively of the MFA's awareness-raising efforts, and that Dutch embassies have been useful sources of information for their members. However, one representative from a Dutch company indicated that the role of the embassies could be enhanced if there was more clarity between their advisory role to companies and the duty of embassy officials to report suspicions of foreign bribery. Following the on-site visit, the Dutch authorities indicated that recent awareness-raising materials have sought to address this perceived lack of clarity.

141. The Netherlands has also taken steps to raise awareness of foreign bribery within the wider context of corporate social responsibility (CSR). In 2010, a brochure titled "CSR Passport" was developed by a cross-section of the government, including the MEA, MFA, Ministry of Social Affairs, and Ministry of the Environment. The brochure, which is in the process of being updated, contains information on the Anti-Bribery Convention and the OECD Guidelines for Multinational Enterprises (MNE Guidelines), and is distributed to Dutch embassies and trade promotion agencies. Employees with the Dutch trade promotion agency (Agentschap NL) have also received training on responsible business conduct, including foreign bribery. In its preparatory meetings with companies, Agentschap NL provides a CSR country-specific information package, which includes information on the MNE Guidelines, a chapter on Anti-Corruption, and a letter from the head of the economic mission in which companies are advised to take into account certain CSR issues, including foreign bribery.

142. Foreign bribery awareness-raising efforts have also been undertaken at the inter-departmental level. The MSJ set up a "Platform for Combating Corruption" comprised of representatives from various

Ministries and law enforcement authorities. The Platform meets four times a year to discuss topical issues on domestic and international corruption, including foreign bribery. The meetings are open twice a year to other parties, including civil society and private sector, based on the topic of the agenda.

143. Dutch authorities have also directed their awareness-raising activities to the private sector in collaboration with business and industry associations. In 2012, the MEA, MSJ and MFA collaborated with the Dutch business associations VNO-NCW, SME Netherlands and the Dutch Chapter of the International Chamber of Commerce, to develop the brochure *Honest Business without Corruption* on the foreign bribery offence. The brochure provides practical advice to companies on avoiding foreign bribery risks when doing business abroad, which include recommendations on internal control, ethics and compliance. VNO-NCW has also increased its focus on responsible business conduct and has provided information sessions for its members on resisting corruption abroad. Agentschap NL has also collaborated with MVO Nederland, a business association focusing on CSR, to provide information to companies, including SMEs, on best practices for combating corruption. MVO Nederland also organised anti-bribery workshops, which are typically attended by SMEs. The NPPC has also made efforts to raise awareness of foreign bribery by speaking at private sector seminars organized by law firms and the Dutch Compliance Institute.

144. Despite government efforts to raise private sector awareness of the foreign bribery offence, non-governmental participants at the on-site visit broadly agreed that the strong level of awareness among Dutch companies has been largely driven by enforcement concerns in the US and UK rather than in the Netherlands. As one panellist stated, "the Dutch foreign bribery offence is not on companies' radar screens". This may also explain the very weak attendance of Dutch companies in the on-site visit.

Commentary

The lead examiners commend the Netherlands' recent efforts to raise awareness of the foreign bribery offence within the public and private sectors. However, they also note that strong enforcement of the foreign bribery offence is one of the most effective ways to raise awareness, particularly among Dutch companies. The lead examiners therefore hope that the forthcoming enforcement actions will further contribute to raising awareness.

The lead examiners encourage the Netherlands to continue its awareness-raising efforts within the private sector, in co-operation with business associations, including by actively disseminating awareness-raising materials, in particular to SMEs. They also note that engagement with SMEs is a horizontal issue that affects many other Parties to the Convention.

(b) Reporting suspected acts of foreign bribery

145. In Phase 2, the Working Group recommended that the Netherlands "clarify the obligations of public servants to report suspicions of crimes, including foreign bribery, to Dutch law enforcement or prosecution authorities and raise awareness among public servants about their obligations, and the mechanisms and reporting channels available to fulfil these obligations."[63] The Working Group considered this recommendation to be partially implemented at the time of the Netherlands' Follow-up Report. In particular, the Group was concerned that the Dutch legislation was not sufficiently explicit regarding the obligation to report all suspicions of foreign bribery, including where it is committed by a private person.

146. The Netherlands has not addressed this deficiency, which may significantly limit the detection and reporting of foreign bribery. The Dutch authorities indicated that under Article 162.1(b) of the CCP, all public servants "are obliged to report serious offences *committed by a public servant*, including corruption,

63 Phase 2 Report on the Netherlands, recommendation 2(a).

that they come across in the course of their duties to the Public Prosecutor" (emphasis added). In addition, under Article 162.1(c), public servants are obliged to report "any offence (committed by anyone) which constitutes a violation of the rules *in their field of activity*" (emphasis added). Disciplinary measures may be imposed on public servants for failing to comply with the reporting obligation. However, the list of "serious offences" under article 162.1(b) triggering the reporting obligation does not expressly include the foreign bribery offences under articles 177, 177a, 178 and 178(b) of the Criminal Code, but, where bribery is concerned, only covers the receiving of bribes by public officials. In this regard, the Dutch authorities assert that the reporting obligations imposed on public servants for passive bribery necessarily imply the commission of an active bribery offence and the reporting thereof. However, this argument remains tenuous, especially in view of the fact that, to uncover the possible commission of active (foreign) bribery, the reporting of passive bribery by a foreign public official would have to occur. As to the reporting obligation under Article 162.1(c), which extends to the acts of private persons, it is limited in scope to the violation of rules within the public servant's "field of activity", and thus may exclude activities in which foreign bribery may occur.

147. Specific foreign bribery reporting obligations have been established for officials working with the MFA under the MFA's *Code of Conduct for Bribery Abroad*. Embassy officials are required to transmit information on suspected acts of foreign bribery to the reporting office within the MFA's Financial and Economic Affairs Department who in turn inform the relevant regional director and the Consular Affairs Department. The regional director then decides whether the information is sufficient to be transmitted to the MSJ, which would then inform the law enforcement authorities. The *Code of Conduct* also provides detailed guidance to embassy staff on the reporting of foreign bribery, including on how to record the relevant information, and how to discern "hard evidence" from "indications". In this regard, the *Code of Conduct* expressly states that newspaper articles or information from a local, well-organized NGO, would amount to "hard evidence" and therefore be of interest to law enforcement authorities. MFA officials failing to comply with the reporting obligations will be considered in violation of their duties and subject to disciplinary measures. During the on-site visit, the MFA confirmed that since 2009, there have been "a few" suspicions of foreign bribery reported through embassy channels. However, the suspicions could not be substantiated and did not involve Dutch nationals or legal persons and were therefore not reported to law enforcement authorities.

Commentary

The lead examiners welcome the measures put in place by the MFA to encourage and facilitate the reporting of suspicions of foreign bribery, and encourage the Netherlands to continue to actively raise awareness of the reporting obligations of MFA officials.

However, while noting that Phase 2 recommendation 2(a) has been partially implemented, the lead examiners are concerned that the general reporting obligations imposed on public servants remain narrowly-framed in the law, and may thus limit the level of detection of foreign bribery. They therefore recommend that the Netherlands ensure that public servants have a duty to report <u>all</u> suspicions of foreign bribery, including suspected acts of private persons and companies, and that they are made aware of this duty.

(c) Whistleblowing and whistleblower protection

148. The Netherlands does not have in place measures to protect from discriminatory or disciplinary action public and private sector employees who report suspicions of foreign bribery to competent authorities, as per section IX.(iii) of the 2009 Anti-Bribery Recommendation. A *Decree Regulating the Reporting of Suspected Abuses in the Civil Service and the Police* sets out reporting procedures and protection measures for public servants, but does not include foreign bribery within the ambit of

"suspected abuses".[64] The Netherlands states that whistleblower protection is available to employees who report foreign bribery to management or government authorities under Dutch labour laws and the Civil Code. However, these provisions only provide protection from unfair dismissal and not from other forms of reprisals. There have been on-going discussions in Parliament on whistleblower protection, particularly with regard to the private sector. A private members' bill was introduced that seeks to strengthen whistleblower protection, including by establishing a Whistleblowers Centre within the National Ombudsman's Office with investigative powers. However, the outcome of this bill remains uncertain.

149. Despite this inadequate protection, the Netherlands has taken institutional steps to facilitate whistleblowing. The National Independent Advice and Information Centre for Whistleblowing (CAVK) was recently established to create a "safe haven" and provide independent advice to potential whistleblowers in both the public and private sectors. The CAVK does not have the power to investigate or examine cases, and can only advise and refer whistleblowers to the competent authorities. The MFA also has in place a separate whistleblowing system for MFA officials in which two integrity advisors are available to advise and assist whistleblowers confidentially on how to handle the reporting of any irregularities.

150. During the on-site visit, a cross-section of panellists from the private sector expressed the view that there is inadequate protection afforded to whistleblowers in the Netherlands. This position was shared by Dutch judges, who stated that "Dutch labour laws do not provide sufficient protection for whistleblowers". Noting the benefits of whistleblowers as a means to detect and remedy misconduct, a number of Dutch companies have taken steps to encourage whistleblowing by establishing internal reporting and protection mechanisms. The above-mentioned brochure, *Honest Business without Corruption*, also recommends that companies establish internal whistleblowing mechanisms.

151. Law enforcement authorities indicated that reports from whistleblowers are among the most common sources of information of alleged foreign bribery. The establishment of effective legal protections for whistleblowers could therefore help increase the level of foreign bribery detection and enforcement.

Commentary

The lead examiners recommend that the Netherlands put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts foreign bribery in good faith and on reasonable grounds to competent authorities. They further note that the implementation of effective whistleblower protection frameworks is a horizontal issue that confronts other Parties to the Convention.

11. Public advantages

(a) Official development assistance

152. The Netherlands is a significant contributor of official development assistance (ODA), which is administered by the MFA. While the government reduced spending on ODA from 0.8 per cent of GDP (approximately EUR 4.9bn) in 2010 to 0.7 per cent of GDP in 2012, the Netherlands is still the fifth largest aid donor in relative terms, and the eighth largest in absolute terms.[65] The top ten recipients of Dutch ODA

64 Article 1(e) defines "suspected abuse" as "a suspicions, based on reasonable grounds of: (1) a breach of statutory regulations or policy rules; (2) a risk to public health, public safety or the environment; (3) an improper act or omission which jeopardizes the proper functioning of the public service.

65 U.S. Department of State, Netherlands Country Profile (2012), *available at*: www.state.gov/r/pa/ei/bgn/3204.htm#foreign

are the Democratic Republic of the Congo, Indonesia, Afghanistan, Suriname, Mozambique, Ghana, Sudan, Bangladesh, Ethiopia and Mali.[66]

153. Integrity and the prevention of corruption are highlighted at the outset of the MFA's *Ethics Policy*, which is based on three pillars: i. Protect: (basic framework, rules and regulations, code of conduct, integrity risk analysis); ii. Promote: (awareness-raising, develop moral judgment by dilemma training, participation of managers as role modelling); iii. Enforce: (control, report incidents, investigations and sanctions).

154. Due diligence and consideration of a company's international controls, ethics and compliance is undertaken in deciding whether to grant an ODA-funded contract to a company or organisation through the use of "Checklists for Organisational Capacity Assessment" (COCA). These include a review of whether the organisation or company has a sound financial policy and management and an effective anti-corruption policy.[67] It also requires a review of the remedial actions and sanctions imposed by the company or organisation in corruption cases involving employees and local implementing organisations. In addition, the overall "activity appraisal document" assesses the corruption risks in the recipient country concerned, the risks associated with the sectoral nature of the project, and how the company or organisation plans to mitigate such risks with respect to the activity. During the on-site visit, MFA officials further indicated that they may consult with other donor organisations and the international financial institutions in undertaking due diligence on the contract. It is also standard practice to visit the company or organisation to verify information and ask additional questions.

155. The MFA stated that in most cases, irregularities in ODA-funded contracts are detected through audits or other forms of review during on-site visits, or through whistleblower reports. The MFA may impose sanctions where there is evidence of corruption, including foreign bribery. In such cases, a detailed audit or investigation will be carried out. Based on the outcome, the MFA can demand repayment of misappropriated funds. If the misappropriation concerns a Dutch contractor, it will be reported to the Dutch law enforcement authorities. If it concerns a local (sub-)contractor or employee, the MFA will check that either the embassy or the Dutch contractor take appropriate measures to obtain repayment of the funds and that it is reported to the local law enforcement authority. MFA officials working with ODA are also subject to the reporting obligations to Dutch law enforcement authorities (through the head office) under the *Code of Conduct for Bribery Abroad* (see discussion above under section B.10(b)). As noted above, the MFA may consult with the international donor organisations as a part of its due diligence. However, there is no legal basis to automatically exclude companies listed on the debarment lists of the international financial institutions, and the MFA itself does not maintain a debarment list. Parliament must be informed annually of all cases of corruption concerning government funds and of any decision to impose or withhold sanctions, together with the reasons. If the case involves Dutch ODA, Parliament must be informed immediately.

156. Foreign bribery prevention has also been undertaken within the "Financial Foreign Policy Instruments" of the MFA[68]; these are instruments aimed at encouraging public infrastructure development, supporting investment projects in emerging markets implemented by Dutch company with a local company, and stimulating joint business relations between companies in developing companies and Dutch companies. Measures have been undertaken to prevent foreign bribery in project contracts, which include

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66 Average figures for 2009-2010. OECD Development Cooperation Directorate, Development Assistance Committee, *Aid at a Glance*, *available at*: http://www.oecd.org/dac/aidstatistics/44285089.gif

67 Ministry of Foreign Affairs Policy Document on Development Assistance, p. 4.

68 The Ministry of Foreign Affairs' Financial Foreign Policy Instruments include: the Facility for Infrastructure Development, the Private Sector Investment Programme, and the Matchmaking Facility.

having companies sign an anti-bribery declaration; research on the reputation of the company; express mention of the prohibition of foreign bribery during the screening process; express contractual provisions on the prohibition of foreign bribery; and, follow-up questions on foreign bribery during the implementation stage. Training is also provided to project advisors on foreign bribery, including on the identification of red flags during. MFA officials dealing with the Financial Foreign Policy Instruments, as well as staff working with Agentschap NL, are under the same obligation as other MFA staff to report credible suspicions of foreign bribery committed by Dutch companies or individuals to law enforcement through the head office. To date, there have been no cases of foreign bribery found in such projects.

(b) Officially supported export credits

157. The Ministry of Finance is responsible for developing the policies on officially supported export credits, which are applied and executed by the Dutch export credit agency, Atradius DSB. Atradius DSB is a member of the OECD Working Party on Export Credits and Credit Guarantees and adheres to the 2006 Recommendation on Bribery and Officially Supported Export Credits ('2006 Recommendation').

158. Atradius DSB informs exporters and applicants requesting official export credit support of the legal consequences of foreign bribery in its publications, website and application forms. It also encourages exporters and applicants to develop, apply and document appropriate internal control systems to combat bribery. A declaration is required from applicants that neither they, nor anyone acting on their behalf in connection with the transaction, have engaged in bribery in the transaction. Due diligence measures prescribed by the 2006 Recommendation are also undertaken, including verifying whether exporters and applicants are listed on the publicly available debarment lists of the international financial institutions. Enhanced due diligence is undertaken if the exporter or applicant is listed on any international debarment lists; is currently under charge in a national court for foreign bribery; has been convicted of foreign bribery within a five year period, or; where there is reason to believe bribery may have been involved in a transaction. If agents are used, details on agents and their commissions must also be provided.

159. Where credible evidence of bribery is uncovered, Atradius DSB will hand over the information to the Ministry of Finance. The Ministry of Finance exercises discretion in deciding whether to share information with law enforcement authorities. However, Ministry officials confirmed during the on-site visit that, while there have been no cases thus far, credible evidence of bribery would always be shared with law enforcement authorities in practice. In addition, if there is credible evidence that bribery was involved in the award of the export contract before credit or other support has been approved, Atradius DSB will deny support for the transaction.

(c) Public procurement

160. In re-implementing EC Directives 2004/17/EC and 2004/18/EC, the Netherlands established under Article 2.86 of the Public Procurement Act the mandatory exclusion of tenderers convicted of corruption and financial crime offences, including foreign bribery. Under Article 2.88 of the Act, a contracting authority may choose not to apply mandatory exclusion for "compelling public-interest reasons; or if, in the contracting authority's judgment, the contractor or tenderer has taken adequate measures to restore the betrayed confidence; or if, in the contracting authority's judgment, exclusion is not a proportional sanctions, in light of the time which has passed since the conviction and given the subject matter of the contract." Both articles are directly implemented from the EC Directives.

161. Contracting authorities do not typically consult the debarment lists of the international financial institutions in assessing a tenderer's application. However, a statement by the company expressly indicating whether they are subject to any grounds for exclusion from the procedure is required. The winning tenderers must also submit a "certificate of good conduct" which is issued by the MSJ. The MSJ

maintains a database of convictions of legal and natural persons, which is referred to in assessing the application for the certificate. If a natural or legal person has been subject to a final conviction for foreign bribery in the past four years, a certificate of good conduct will not be issued

Commentary

The lead examiners note that agencies dealing with the disbursement of public advantages may exclude companies convicted of corruption offences, which can be a significant deterrent for companies to engage in bribery. However, there is no systematic approach whereby all of these agencies consult the MSJ database of convictions. The lead examiners therefore recommend that the Netherlands promote the use of this database more widely among such agencies to allow for more thorough due diligence, as well as effective and efficient application of exclusion rules, where appropriate.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

162. The Working Group on Bribery commends the Netherlands for its recent efforts to raise awareness of the foreign bribery offence within the public and private sectors. It also welcomes the measures put in place within the Ministry of Foreign Affairs to facilitate the reporting of suspicions of foreign bribery, as well as the Netherlands' commitment to an efficient confiscation regime. However, the Working Group remains seriously concerned that the overall results of foreign bribery investigations and prosecutions are too low, with no convictions to date. Furthermore, the Working Group finds that the current level of financial sanctions for legal persons for foreign bribery is not sufficiently effective, proportionate and dissuasive, although draft legislation may soon remedy this. The Working Group will also closely monitor foreign bribery enforcement actions involving Dutch mailbox companies.

163. Regarding outstanding recommendations from previous evaluations, the Netherlands has not fully implemented recommendations 2(a) on public servants' reporting obligations, and 5(a) on increasing the maximum level of sanctions for legal persons. Recommendation 7 is no longer relevant in view of the dissolution of the Netherlands Antilles. A revised *Instruction* by the Board of Procurators General should enter into force on 1 January 2013, with amendments addressing the Working Group's concerns in Phase 2 recommendation 3(f).

164. In conclusion, based on the findings in this report on the Netherlands' implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2.

165. The Working Group invites the Netherlands to report in writing on implementation of recommendations 2(a), 3 and 4(a), as well as its foreign bribery enforcement efforts in one year (i.e., by December 2013). The Working Group invites the Netherlands to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by December 2014). The Working Group will closely re-examine foreign bribery enforcement efforts when the Netherlands makes its Phase 3 Follow-up Report in 2013 and its Written Follow-up Report in 2014.

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. Regarding the offence of bribing a foreign public official, the Working Group recommends that the Netherlands:

    a. Keep the Working Group on Bribery informed of developments concerning the adoption of amendments to the foreign bribery offence in the Dutch Criminal Code [Convention, Article 1];

    b. Periodically review its policy and approach on small facilitation payments, and continue to encourage Dutch companies to prohibit or discourage their use and in all cases, accurately record them in companies' accounts [Convention, Article 1; 2009 Recommendation III. (ii) and VI.(i) and (ii)];

    c. Continue to encourage Aruba and Sint Maarten to adopt a foreign bribery offence and assist them in their efforts to do so, in line with the rules governing its relationship [Convention, Article 1].

2. Regarding the criminal liability of legal persons, the Working Group recommends that the Netherlands:

   a. Take all possible measures to ensure that mailbox companies are considered legal entities under the Dutch Criminal Code and that cases of foreign bribery involving mailbox companies can be effectively investigated, prosecuted and sanctioned [Convention, Article 2; 2009 Recommendation V];

   b. Draw the attention of prosecutors to the importance of applying effectively the criminal liability of legal persons in foreign bribery cases, including for acts by intermediaries and related legal persons [Convention, Article 2; 2009 Recommendation V];

   c. Continue to maintain detailed yearly statistics on the number of prosecutions of legal persons [Convention, Article 2; 2009 Recommendation V];

   d. Develop guidance on the application of probationary periods in foreign bribery cases [Convention, Article 2; 2009 Recommendation V].

3. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that the Netherlands:

   a. Proactively gather information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations [Convention, Article 5; 2009 Recommendation V];

   b. Proactively investigate cases of foreign bribery involving legal persons, including mailbox companies [Convention, Article 5; 2009 Recommendation V];

   c. Exercise its jurisdiction in foreign bribery cases concerning Dutch natural or legal persons, and, where relevant, consult with other jurisdictions to determine the most appropriate jurisdiction for prosecution or consider undertaking concurrent or joint investigations [Convention, Articles 4 and 5; 2009 Recommendation V, XIII.(i) and (iii)];

   d. Proceed with the adoption and implementation of the revised *Instruction on the Investigation and Prosecution of Foreign Corruption* to ensure in no uncertain terms that it cannot be interpreted contrary to Article 5 of the Convention [Convention, Article 5; 2009 Recommendation, Annex I(D)];

   e. Provide adequate resources to Dutch law enforcement authorities to effectively examine, investigate and prosecute all suspicions of foreign bribery [Convention, Article 5; 2009 Recommendation V and Annex I(D)].

4. Regarding sanctions in cases of transnational bribery, the Working Group recommends that the Netherlands:

   a. Promptly proceed with the adoption of the proposed amendments to the Criminal Code which would significantly increase the level of sanctions [Convention, Article 3];

   b. Consider introducing the possibility of additional sanctions against legal persons, such as suspension from public procurement or other publicly-funded contracts [Convention, Article 3; Commentary 24].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding money laundering, the Working Group recommends that the Netherlands raise awareness and provide training to the FIU, law enforcement officials and reporting entities on foreign bribery as a predicate offence to money laundering. Such awareness-raising could also include the sharing of typologies on money laundering related to foreign bribery [Convention, Article 7; 2009 Recommendation III.(i)].

6. Regarding accounting and auditing requirements, the Working Group recommends that the Netherlands:

   a. Ensure that the foreign bribery offence and the accounting and auditing requirements of the Convention are covered in training programmes and related guidelines for the accounting and auditing professions, in order to facilitate their more active role in detecting foreign bribery [Convention, Article 8; 2009 Recommendation III.(i)];

   b. Promptly proceed with the adoption of the proposed amendments to the Criminal Code which would significantly increase the level of financial sanctions on legal persons for the false accounting offence [Convention, Article 8; 2009 Recommendation X.A.(iii)].

7. With respect to tax-related measures, the Working Group recommends the Netherlands encourage law enforcement authorities to promptly share information on foreign bribery enforcement actions with the tax administration to verify whether bribes were impermissibly deducted [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)].

8. Regarding awareness-raising, the Working Group recommends that the Netherlands: (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in cooperation with business associations; (ii) continue to encourage companies, especially SMEs, to develop internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation III.(i), X.C.(i) and (ii); Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance].

9. With respect to the reporting of foreign bribery, the Working Group recommends that the Netherlands:

   a. Ensure that public servants report all suspicions of foreign bribery, including by private persons and companies, irrespective of whether it constitutes a violation of the rules in the public servants' field of activity, and that they are made aware of this duty [2009 Recommendation IX.(ii)];

   b. Put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities [2009 Recommendation IX.(iii)].

10. Regarding public advantages, the Working Group recommends that the Netherlands promote the use of the Ministry of Security and Justice's database of convictions more widely among public agencies to enhance due diligence and the application of exclusion rules, where appropriate [2009 Recommendation XI.(i)].

2. Follow-up by the Working Group

11. The Working Group will follow-up the issues below as case law and practice develops:

    a. The results of the analysis carried out by the Netherlands on the reasons for the decline in prosecutions of legal persons [Convention, Article 2];

    b. The use of out-of-court settlements in foreign bribery cases [Convention, Article 5];

    c. The application in practice of sanctions and confiscation measures in on-going and future foreign bribery investigations [Convention, Article 3];

    d. That the Netherlands takes any measures necessary to assure either that it can extradite its nationals for foreign bribery or that it can prosecute its nationalsfor foreign bribery. If the Netherlands declines a request to extradite a person for foreign bribery solely on the grounds that the person is its national, it shall submit the case to its competent authorities for the purpose of prosecution [Convention, Article 10.3].

ANNEX 1 PHASE 2 RECOMMENDATIONS TO THE NETHERLANDS AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY IN 2008

Phase 2 Recommendations – 2006 [69]	*Written Follow-Up – 2008* [70]
1) Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery	
Text of Recommendation 1(a) With respect to awareness raising and prevention related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that the Netherlands: (a) integrate additional training, information and awareness-raising activities about combating foreign bribery in relevant anti-corruption initiatives of the Dutch government (Revised Recommendation, Paragraph I).	*Satisfactorily implemented*
Text of Recommendation 1(b) With respect to awareness raising and prevention related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that the Netherlands: (b) encourage the accounting and auditing professions to develop initiatives to raise awareness of the foreign bribery offence and the accounting and auditing requirements under the Convention, and encourage both professions to develop specific training on foreign bribery in the framework of their professional education and training programmes (Revised Recommendation, Paragraph I).	*Satisfactorily implemented*
Text of Recommendation 2(a) With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands: (a) clarify the obligations of public servants to report suspicions of crimes, including foreign bribery, to Dutch law enforcement or prosecution authorities and raise awareness among public servants about their obligations, and the mechanisms and reporting channels available to fulfil these obligations (Revised Recommendation, Paragraph I).	*Partially implemented*

69 This column sets out the recommendations of the Working Group on Bribery to the Netherlands, as adopted in June 2006 Phase 2 Report of the Netherlands.

70 This column sets out the findings of the Working Group on Bribery on the Written follow-up to Phase 2 by the Netherlands, as adopted by the Working Group in December 2008.

Text of Recommendation 2(b) With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands: (b) implement guidelines for the personnel of diplomatic missions, export credit agencies, and other institutions who are in a position to have privileged contacts with Dutch enterprises active abroad on specific measures to be taken if suspicions of foreign bribery should arise. Guidelines should include specific reporting channels and a reminder of the applicable obligations to report serious offences (Revised Recommendation, Paragraph I).	*Satisfactorily implemented*
Text of Recommendation 2(c) With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands: (c) following the enactment of the new legislation prohibiting the tax deductibility of bribes in April 2006, develop clear guidelines and provide training for tax officials as a matter of priority in order to maximise the detection of potential criminal conduct relating to foreign bribery, and to promote the reporting of suspicions to law enforcement or prosecution authorities (Revised Recommendation, Paragraph I, II).	*Satisfactorily implemented*
Text of Recommendation 2(d) With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands: (d) continue to take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system (Revised Recommendation, Paragraph I).	*Satisfactorily implemented*
Text of Recommendation 2(e) With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands: (e) review, in the light of recent amendments to the Reporting Act and Identification Act, whether accountants in the Netherlands have adopted a restrictive application of their obligation to report STRs under the Unusual Disclosures Act, and assess whether further measures are required to ensure that accountants (and all reporting entities) in the Netherlands report unusual or suspicious transactions to the FIU Netherlands/MOT-BLOM in accordance with the Unusual Disclosures Act (Convention, Article 5; Revised Recommendation, Paragraph I).	*Satisfactorily implemented*

2) Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials	
Text of Recommendation 3(a) With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands: (a) investigate proactively foreign bribery allegations and monitor and evaluate on an on-going basis the performance of law enforcement authorities, including the *Rijksrecherche*, the National Public Prosecutor for Corruption (NPPC), and other relevant agencies, with regard to the initiation and conduct of investigations, as well as concerning decisions whether or not to prosecute foreign bribery cases (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).	*Satisfactorily implemented*
Text of Recommendation 3(b) With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands: (b) clarify the competence of the Rijksrecherche and of the NPPC over foreign bribery cases, as well as ensure that other law enforcement agencies are aware of the coordinating role of the NPPC in this regard, and accordingly duly report all cases of foreign bribery to the NPPC (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).	*Satisfactorily implemented*
Text of Recommendation 3(c) With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands: (c) ensure that sufficient training and resources, including specialised expertise, are made available to law enforcement authorities, including the Police, the *Rijksrecherche* and the NPPC for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).	*Satisfactorily implemented*
Text of Recommendation 3(d) With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands: (d) encourage law enforcement authorities to make full use of the broad range of investigative measures available to Dutch investigative authorities to effectively investigate suspicions of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).	*No longer relevant*

Text of Recommendation 3(e) With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands: (e) encourage Dutch authorities to request MLA to obtain and assess evidence available abroad of allegations of foreign bribery over which the Netherlands has jurisdiction, and ensure that this is reflected in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials* (or subsequent Directives) and is underpinned by renewed efforts to raise awareness and, where necessary, training of police and prosecutors in relation to the need to obtain MLA (Convention, Articles 5, 9; Commentary 27; Revised Recommendation, Paragraph I, II).	*Satisfactorily implemented*
Text of Recommendation 3(f) With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands: (f) review and amend the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*, issued by the Dutch Board of Procurators General, to ensure that the information contained therein may not be interpreted contrary to the Convention and the bribery offences\ in the Dutch Penal Code (Convention, Article 5; Commentary 7; Commentary 27; Revised Recommendation, Paragraph I, II).	*Not implemented*
Text of Recommendation 4 With respect to the offence of foreign bribery, in order to prevent misinterpretations of the offence that are contrary to the Convention, the Working Group recommends that the Netherlands take appropriate measures to further clarify the application of the law in relation to small facilitation payments and the information in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*. (Convention, Articles 1, 5; Commentary 9).	*Satisfactorily implemented*
Text of Recommendation 5(a) With respect to adjudication by courts and sanctions for foreign bribery, the Working Group recommends that the Netherlands: (a) increase the maximum levels of monetary sanctions for legal persons, and compile statistical information on fines imposed by the courts to allow for adequate assessment of whether sanctions are proportionate, dissuasive and effective in practice (Convention, Article 3.1).	*Not implemented*
Text of Recommendation 5(b) With respect to adjudication by courts and sanctions for foreign bribery, the Working Group recommends that the Netherlands: (b) ensure that judges are trained to deal with foreign bribery offences, and draw their attention to the importance of applying sanctions that are sufficiently effective, proportionate and dissuasive for foreign bribery offences (Convention, Article 3.1; Revised Recommendation, Paragraph I).	*Satisfactorily implemented*

Text of Recommendation 6 With respect to the related money laundering offence, the Working Group recommends that the Netherlands continue to compile statistics on the offence, including the level of sanctions and the confiscation of the proceeds of crime (Convention Article 7).	*Satisfactorily implemented*
Text of Recommendation 7 Given the economic role of the Netherlands Antilles and Aruba, the Working Group strongly recommends that the Netherlands in Europe continue to encourage Aruba and the Netherlands Antilles to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and assist them in their efforts, within the rules governing their relationship, and report to the Working Group on these processes on an ongoing basis (Convention Article 1).	*Partially implemented*

2. Follow-up by the Working Group

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

a) given the recent entry into force of the new law prohibiting the tax deductibility of bribes to foreign public officials, whether its application in practice allows for the effective implementation of the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (Revised Recommendation, Paragraph I, II and IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);

b) whether the Netherlands can effectively rely on its territorial or nationality jurisdiction to prosecute foreign bribery offences, notably (1) where a Dutch legal person uses a non-Dutch national to bribe a foreign public official while outside the Netherlands 71; (2) where the bribing of the foreign public official occurs in a third country where there is no foreign bribery offence; and (3) where the foreign bribery offence is committed by a company incorporated in the Netherlands Antilles or Aruba (Convention Articles 2 and 4; Commentary 25, 26);

c) recent amendments that allow for greater flexibility to suspend the statute of limitations, to confirm whether the statute of limitations in the Netherlands allows for an adequate period of time for the investigation and prosecution of foreign bribery cases (Convention Article 6);

d) the prosecution of legal persons for foreign bribery cases, to review how the jurisprudence developed by the Hoge Raad broadening possibilities to trigger liability of legal persons is applied by the courts in practice, and to evaluate whether this allows for the effective prosecution of legal persons (Convention Article 5; Commentary 27, Revised Recommendation, Paragraph I, II);

e) the new provisions governing special confiscation introduced by the Act of Parliament of 8 May 2003, to ensure that full use is made of these measures in the enforcement of foreign bribery legislation, particularly in view of the low level of criminal sanctions for legal persons for foreign bribery in the Netherlands. To allow for this assessment, the Netherlands could usefully compile statistical information illustrating the use of confiscation measures by the prosecution and the courts (Convention, Article 3);

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71 The Working Group notes that this is a general issue for many Parties.

f) the use of out-of-court transactions for foreign bribery offences, as governed by article 74 of the Dutch Penal Code, to ensure that they result in the imposition of effective, proportionate and dissuasive sanctions (Convention, Article 3.1);

g) the application in practice of false accounting offences. To this end, the Netherlands could usefully provide information on the number of prosecutions and sanctions imposed under article 1.4 of the Economic Offences Act for contravention of article 361, et seq. of Book 2 of the Civil Code; article 225 of the Penal Code; and article 336 of the Penal Code (Convention, Article 8, Revised Recommendation, Paragraph V).

ANNEX 2 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- BOOM (Prosecution Service Criminal Assets Deprivation Bureau)
- FIOD-ECD (Fiscal Information and Investigation Service / Economic Investigation Service)
- Financial Intelligence Unit
- Ministry of Economic Affairs
- Ministry of Finance
- Ministry of Foreign Affairs
- Ministry of Interior
- Ministry of Security and Justice
- Public Prosecutors Office
- Rijksrecherche
- Tax Administration

Government-Funded Bodies

- EVD (Agency for International Business and Cooperation)

Civil Society

- One representative from civil society

Private Sector

Private enterprises

- Four representatives from four companies

Business associations

- Three representatives from three business and industry associations

Legal profession and academics

- Six representatives from four law firms

Accounting and auditing profession

- Four representatives from three accounting and auditing firms
- One representative from the accounting and auditing association

ANNEX 3 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

BLOM	Special Police Unit
BOOM	Criminal Assets Deprivation Bureau of the Public Prosecution Service
CAVK	National Independent Advice and Information Centre on Whistleblowing
CCR	Coordination Committee Rijksrecherche
CN	Caribbean part of the Netherlands (Bonaire, Saba, Sint Eustatius)
COCA	Checklist for Organisational Capacity Assessment
CPC	Code of Criminal Procedure
CSR	Corporate Social Responsibility
DTAs	Double Taxation Agreements
EU	European Union
EUR	Euro currency
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FIOD-ECD	Fiscal and Economic Intelligence and Investigation Service
FIU	Financial Intelligence Unit
ISA	Clarified International Standards on Accounting
JIT	Joint Investigation Team
MEA	Ministry of Economic Affairs
MFA	Ministry of Foreign Affairs
MSJ	Ministry of Security and Justice
MLA	Mutual Legal Assistance
MOT	Office for the Disclosure of Unusual Transactions (within the Ministry of Justice)
NBA	Netherlands Institute of Chartered Accountants
NPPC	National Public Prosecutor for Corruption
ODA	Official Development Assistance
PPO	Public Prosecutors Office
TCSP	Trust and Company Service Providers
TIEAs	Tax Information Exchange Agreements
UK	United Kingdom
US	United States
UTR	Unusual Transaction Report
Wet-BOB	Special Powers Investigation Act

ANNEX 4 IMPORTANT TEXTUAL EXTRACTS

Foreign bribery offences under the Criminal Code

Article 177 Penal Code (Bribery, in violation of official duty)

1. Punishment in the form of a prison sentence of no more than four years or a fine in the fifth category will be imposed on:
    1°. Whoever makes a gift or a promise to a civil servant or provides or offers him a service with a view to getting him to carry out or fail to carry out a service in violation of his duty;
    2°. Whoever makes a gift or a promise to a civil servant or provides or offers him a service in response to or in connection with a service, past or present, that the official carried out or failed to carry out in violation of his duty.
2. The same punishment will apply to anyone who commits an offence as described in the first paragraph, under 1°, against a person who has prospects of an appointment as a civil servant, if the appointment as a civil servant is followed.
3. Removal of the rights states in Article 28, first paragraph, under 1°, 2 ° and 4° can be pronounced.

Article 177a Penal Code (Bribery, not in violation of official duty)

1. Punishment in the form of a prison sentence of no more than two years or a fine in the fifth category will be imposed on:
    1°. Whoever makes a gift or a promise to a civil servant or provides or offers him a service with a view to getting him to carry out or fail to carry out a service that is not in violation of his duty;
    2°. Whoever makes a gift or a promise to a civil servant or provides or offers him a service in response to or in connection with a service, past or present, that the official carried out or failed to carry out, without this being in violation of his duty.
2. The same punishment will apply to anyone who commits an offence as described in the first paragraph, under 1°, against a person who has prospects of an appointment as a civil servant, if the appointment as a civil servant is followed.
3. Removal of the rights states in Article 28, first paragraph, under 1°, 2 ° and 4° can be pronounced.

Article 178 Penal Code (Bribery of a judge)

1. Whoever makes a gift or a promise to a judge or provides or offers him a service with a view to exerting influence on his decision in a case that is subject to his judgment will be punished with a prison sentence of at most six years or a fine in the fifth category.
2. If the gift or promise is made or the service is provided or offered with a view to obtaining a conviction in a case, the guilty person will be punished with a prison sentence of at the most nine years or a fine in the fifth category.
3. Removal of the rights stated in Article 28, first paragraph, under 1°, 2 ° and 4° can be pronounced.

Article 178a Penal Code (Extended definition of a civil servant)

1. With regard to Articles 177 and 177a, persons working in the public service of a foreign state or an organisation governed by international law are equivalent with civil servants.
2. With regard to Articles 177, first paragraph, under 2°, and 177a, first paragraph, under 2°, former civil servants are equivalent to civil servants.
3. With regard to Article 178, judges in a foreign state or an organisation governed by international law are equivalent to judges.

Draft foreign bribery offence – Proposed revisions to the Criminal Code

Offences against public authority:

Art. 177 (Bribery in violation of official duty) – ***AMENDMENTS TO CURRENT PROVISION SHOWN IN BOLD ITALICS***

1. Punishment in the form of a prison sentence of no more than **SIX** years or a fine in the fifth category will be imposed on: 1st: whoever makes a gift or a promise to a civil servant or provides or offers him a service with a view to getting him to carry out or fail to carry out a service ***~~in violation of his duty~~***; 2nd: whoever makes a gift or a promise to a civil servant or provides or offers him a service in response to or in connection with a service, past or present, that the official carried out or failed to carry out ***~~in violation of his duty~~***;
2. The same punishment will apply to anyone who commits an offence as described in the first paragraph, under 1st, against a person who has prospects of an appointment as a civil servant, if the appointment as a civil servant is followed.
3. Removal of the rights stated in article 28, first para., under 1st, 2nd and 4th can be pronounced (Sr 84, 328ter, 362v.) (13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

Art. 177a (Bribery not in violation of official duty) – ***PROPOSED TO BE REPEALED***

Article 51 of the Criminal Code (Criminal Liability of Legal Persons)

1. Offences may be committed by natural persons and legal persons.
2. If an offence is committed by a legal person, criminal proceedings may be instituted and the punishments and other measures provided for by law may be implemented where appropriate:
    a. against the legal person; or
    b. against those who ordered the commission of the offence, and those who were in control of such unlawful behaviour; or
    c. against the persons mentioned under (1) and (2) together.
3. For the purpose of the application of the above paragraphs legal persons shall be deemed to include an unincorporated company, a partnership and a special fund

Article 43c of the General State Taxes Act – No confidentiality duty
Extract

1. The confidentiality referred to in Article 67, first paragraph of the Act, Article 67, first paragraph, of the Collection Act 1990 and Article 10, first paragraph, of the Registration Act 1970 does not apply to disclosure to the following governing bodies insofar as it concerns the following data for the following public duties:
    […]

e. the Minister of Security and Justice:
    1. data on possible unusual transactions for the implementation and enforcement of the Act on Prevention of Money Laundering & Terrorist Financing by the Financial Intelligence Unit Netherlands;
    2. data that may be of importance in the exchange of requests in the context of addressing cross-border serious crime by the National Police / IPOL;
    3. data used for the implementation of the Police Act 1993 by the National Police;
    […]

h. the Director of the FIOD: data being used by the FIOD in the context of the enforcement of criminal law under Article 3 of the Act on Special Investigation Units;
    […]

l. the public prosecutor:
    1. data that may be important for bringing actions for dissolution of legal persons;
    2. data on income and assets of the person against whom a criminal financial investigation has been initiated as referred to in Article 126 of the Code of Criminal Procedure for the implementation by the criminal financial investigators investigating officer;
    3. data on criminal offences for which any person is authorized to report under Article 161 of the Code of Criminal Procedure;
    4. data on income and assets of the person against whom a criminal investigation is set, for a confiscation order under Article 36e of the Criminal Code;
    5. data relevant to the enforcement of court rulings under Article 553 of the Code of Criminal Procedure;