

Ratification of the Convention signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (Book of Treaties 1995, 289); the Protocol signed on 27 September 1996 in Dublin, drawn up on the basis of Article K.3 of the Treaty on European Union, accompanying the Convention on the protection of the European Communities' financial interests (Book of Treaties 1996, 330); the Protocol signed on 29 November 1996 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the interpretation, by way of preliminary rulings by the Court of Justice of the European Communities, of the Convention on the protection of the European Communities' financial interests (Book of Treaties 1997, 40); and of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 in Paris (Book of Treaties 1998, 54). (Ratification of a number of conventions concerning control of fraud and corruption).

PARLIAMENTARY BILL

We, Beatrix, by the grace of God, Queen of the Netherlands, Princess of Oranje Nassau, etc. etc. etc.

Do hereby greet all who shall see or hear this read, and do announce that:

Having considered that, pursuant to Article 91, Clause 1 of the Constitution, the Convention signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the protection of the European Communities' financial interests, the Protocol signed on 27 September 1996 in Dublin, drawn up on the basis of Article K.3 of the Treaty on European Union, accompanying the Convention on the protection of the European Communities' financial interests, the Protocol signed on 29 November 1996 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the interpretation, by way of preliminary rulings by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 in Paris, require the ratification of the States General before the Kingdom can be bound by these agreements,

We, having heard the Council of State and in consultation with Parliament, taking into consideration the provisions of the Statute for the Kingdom, have understood and approved, and do hereby understand and approve:

Article 1

The Convention signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the protection of the European Communities' financial interests, the Dutch text of which is included in the Book of Treaties 1995, 289, is ratified for the Netherlands;

Article 2

The Protocol signed on 27 September 1996 in Dublin, drawn up on the basis of Article K.3 of the Treaty on European Union, accompanying the Convention on the protection of the European Communities' financial interests, the Dutch text of which is included in the Book of Treaties 1996, 330, is ratified for the Netherlands;

Article 3

The Protocol signed on 29 November 1996 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the interpretation, by way of preliminary rulings by the Court of Justice of the European Communities, of the Convention on the protection of the European Communities' financial interests, the Dutch text of which is included in the Book of Treaties 1997, 40, is ratified for the Netherlands;

Article 4

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 in Paris, the text of which is included in the Book of Treaties 1998, 54 and the Dutch translation of which is included in the Book of Treaties 1998, ..., is ratified for the entire Kingdom of the Netherlands.

Article 5

The following reservations are approved concerning the commitment of the Kingdom to the Convention for the Netherlands referred to in Article 2:

With regard to Article 6(2), the Netherlands declares that:

- a. In respect of Dutch nationals who are not officials, Article 6(1b) shall apply only if the criminal offence is punishable under the law of the country where it is committed;
- b. Article 6(1c) shall apply only if the criminal offence is committed by a Dutch citizen and is punishable by the law of the country where the offence is committed, or if a criminal offence, pursuant to Article 3, is committed against a Dutch citizen and is punishable under the law of the country where the offence is committed.
- c. Article 6(1d) shall apply only if the criminal offence is committed by a person in the public service of an international law organisation established in the Netherlands, and the offence is punishable under the law of the country where it is committed.

Article 6

This Act shall take effect as of the day after today's date.

Do hereby charge and order that this shall be published in the State Gazette, the Official Journal of the Netherlands Antilles and the Bulletin of Acts, Orders and Decrees of Aruba, and that all Ministries, authorities, boards and officials concerned shall ensure its faithful implementation.

As given

The Minister of Justice

The Minister of Foreign Affairs

The Minister of Economic Affairs

Ratification of the Convention signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the protection of the European Communities' financial interests (Book of Treaties 1995, 289); of the Protocol signed on 27 September 1996 in Dublin, drawn up on the basis of Article K.3 of the Treaty on European Union, accompanying the Convention on the protection of the European Communities' financial interests (Book of Treaties 1996, 330); of the Protocol signed on 29 November 1996 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the interpretation, by way of preliminary rulings by the Court of Justice of the European Communities, of the Convention on the protection of the European Communities' financial interests (Book of Treaties 1997, 40) and of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 in Paris (Book of Treaties 1998, 54). (Ratification of a number of conventions concerning control of fraud and corruption).

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1. INTRODUCTION

1.1 General

This Bill serves to ratify a number of conventions relating to the control of fraud and corruption at both the national and international level.

In recent years, there has proved to be a clear association between organised crime, fraud and corruption. The greater the financial benefits that can be realised, the greater the interest of those who aim to acquire these benefits without any right to them. Obviously, they will make use of the internationalisation of society to increase their criminal gains and to remove the traces that these can bring to light. In addition, public administrations have taken a greater interest in the problems referred to by 'official integrity'. Industry is also becoming increasingly aware of the importance of effective government that aims only to serve the public interest and not the personal benefits of individual officials. Finally, we refer to the disruptive influence of countries where corruption and fraud are more or less part of society, and have also taken root in the machinery of government, on the legal order and political systems.

Countries not only have a national interest in proper government performance, but also the growing interest in the international rule of law. The alarm and concern over the scale of this criminal activity have led various international institutions to place its control high on their agendas. The relevant activities within the European Union (EU), the Council of Europe, the Organisation for Economic Cooperation and Development (OECD) and the United Nations (UN) will be discussed briefly below. The following sections cover the conventions that are now being submitted for ratification.

1.2 European Union

Prevention and control of fraud and corruption at the expense of the European Communities' financial interests have received continual attention in recent years from both the Community institutions and the EU Member States. The social and political importance of this is uncontested: European taxpayers' money must be spent well and effectively, and must not flow to all sorts of well-organised criminal groups. The credibility of, and confidence in the EU will benefit from strong action against fraud and corruption. Important results have now been realised, at both the operational level and in terms of legislation. This is thanks to more efficient controls, better performance in fraud and corruption control and improved Community legislation. Recent annual reports of the Commission of the European Communities provide a good picture of the position regarding fraud control.

There is also growing awareness that a more or less common legal order covering the entire Union is needed to address fraud and corruption. Important steps towards this have been taken in recent years.

For example, the legal framework for on-the-spot checks was strengthened considerably by the introduction of Regulation 2185/95 (EC, Euratom) of the Council of the European Union on 11 November 1996, concerning on-the-spot checks and verifications performed by the Commission to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 No. L 292). Another Regulation was introduced, providing for the protection of the European Communities' financial interests (Regulation No. 2988/95, EC, Euratom), at the Council of the European Union of 18 December 1995 (OJ 1995, No. L 312)). The EU conventions at issue here, focusing on improved compatibility of the Member States' national criminal law systems in the field of fraud and corruption, were realised as a follow-up to these developments. The conventions are discussed in more detail in Sections 2, 3 and 4 of these Notes.

1.3 Council of Europe

The meeting of the Justice Ministers of the Council of Europe in Valetta in 1994 recommended that an action programme be developed on an international level to control corruption. This programme was drawn up and approved, and its implementation is in the hands of a committee of experts, which is preparing international instruments in the fields of administrative, civil and criminal law. The 21st Justice Ministers' conference in Prague in June 1997 adopted a resolution urging early implementation of the action programme, particularly in relation to the continued preparation of the criminal law convention and the instruments in the civil law field. The issue of corruption and organised crime was also raised at the second summit meeting of the Council of Europe in November 1997. This meeting resolved to urge the Ministers Committee to adopt 20 leading principles for the control of corruption and to form a committee responsible for supervising the implementation of these leading principles in the near future (Resolution (97)24).

1.4 OECD

Similar developments have taken place within the OECD. On the basis of the awareness that corruption hampers free competition and undermines administrative integrity and irreproachable official services, the OECD investigated ways to control improper payments to foreign officials in international business transactions. These activities led to a number of OECD recommendations, including working programmes to control international bribery in commercial transactions. The most recent recommendation of 27 May 1997 (C(97) - 123/FINAL) also includes an appendix with elements that should be incorporated in a criminal law convention. This convention was signed on 17 December 1997 and is known as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Book of Treaties 1998, 54). The terms of this convention, which is now presented for ratification, are discussed in more detail in Section 5.

1.5 United Nations

The General Assembly of the United Nations adopted the International Code for Public Officials (UN Code) as an appendix to the 'Action Against Corruption' Resolution (No. 51/59) on 12 December 1996. The UN Code includes a number of provisions containing principles that officials must satisfy in the performance of their duties. Among other things, these principles relate to the provisions on legal status, which provide for the commitment to comply with good official practice and to perform official duties correctly and with diligence. The Code also includes provisions on the acceptance of donations and gifts, confidentiality and political activities. Finally, it includes a number of rules relating to secondary positions, secondary activities and on commercial or other interests that are incompatible with the performance of official duties.

2. CONVENTION DRAWN UP ON THE BASIS OF ARTICLE K.3 OF THE TREATY ON EUROPEAN UNION, CONCERNING THE PROTECTION OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS (Book of Treaties 1995, 289)

2.1 General

The Convention signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the protection of the European Communities' financial interests (Book of Treaties 1995, 289, hereinafter referred to as 'the Fraud Convention'), has a fairly long development history. Details of this can be found in the Explanatory Report of the EU, attached to the Convention as Appendix I. During the preparation of the Convention, there was a regular exchange of ideas with Parliament on this issue (Second Chamber Documents, 1994/95, 23 490, No. 25, Pg. 4; 21 501-07 and 23 490, Nos. 136, 137 and 153; 23 490, Nos. 87b and 28, Pgs. 12-13, Nos. 30-32). We confine ourselves in the following sections to a brief, general review of the main points of the Fraud Convention and the Explanatory Report.

2.2 Design of the Fraud Convention

The purpose of the Fraud Convention is to realise greater compatibility between the criminal law provisions of the Member States in order to control fraud at the expense of the financial interests of the Communities more effectively, and to improve cooperation between the Member States in criminal cases. To this end, a common definition of the term 'fraud affecting the European Communities' financial interests' has been introduced. The Member States are required to impose criminal law sanctions for conduct that falls under this definition, except in the case of 'minor fraud', for which non-criminal law sanctions, such as administrative law sanctions, will suffice. The Member States must impose proportionate, effective and dissuasive criminal law sanctions for the actions defined as fraudulent. Furthermore, for fraud involving sums of more than ECU 50,000, the laws of the Member States must in any event provide for the possibility to impose penalties involving deprivation of liberty that can give rise to extradition. The Fraud Convention also commits the Member States to provide for the criminal liability of heads of businesses for fraud committed by persons acting under their authority or on behalf of the business.

Articles 4 to 7 relate to the international aspects of EC fraud control. In a number of defined situations, the Member States are required to provide for jurisdiction and Article 5 contains provisions on extradition. Article 6 commits the Member States to cooperate in detection, prosecution and enforcement. This Article also regulates consultation between Member States if both have jurisdiction in relation to criminal charges and both can institute criminal proceedings. Such consultation should lead to a decision to prosecute in one of the Member States wherever possible. Article 7 includes a provision on the application of the ne bis in idem principle.

The Fraud Convention provides for a regulation concerning the settlement of disputes between the member States by the Court of Justice of the European Communities. The Court has jurisdiction over disputes between Member States on the interpretation or application of the Convention if no solution is found for such disputes within six months, in accordance with an EU procedure regulated in the Convention.

The Fraud Convention does not contain any regulation on the interlocutory jurisdiction of the Court of Justice of the European Communities. This is provided for in a separate Protocol signed on 29 November 1996 in Brussels. This Protocol is discussed in Section 4. However, ideas were exchanged with Parliament on the regulation on the interlocutory jurisdiction of the Court of Justice of the European Communities on several occasions, including in relation to the Fraud Convention. We refer in this respect to Second Chamber Documents 1994/95, 23 490, Nos. 87b and 28, Pgs. 12-13, and to Nos. 30-32.

Article 10 of the Fraud Convention regulates the intervention of the Court of Justice of the European Communities in disputes between one or more Member States and the Commission of the European Communities. These disputes may relate to the implementation of the commitment to make EC fraud a criminal offence, or to compliance with the commitment to provide certain information on the further implementation of the Convention.

The Convention ends with some of the usual final provisions, as also found in other EU conventions.

2.3 Notes to individual Articles

Article 1

Article 1(1) defines the term 'fraud affecting the Communities' financial interests' for the purposes of the Convention. The definition shows that such fraud covers every intentional act or omission in which:

- a. False, incorrect or incomplete statements or documents are submitted or used;
- b. Information is withheld, in breach of a specific obligation;
- c. Funds from or intended for the budget of the European Communities are misappropriated by applying them for purposes other than those for which they were originally allocated or obtained.

Article 1(2) commits the Member States to make such conduct criminal offenses in their national law, unless they involve sums of less than ECU 4,000. A similar commitment applies for the conduct described in Paragraph 3, but which is not included in the common definition of fraud as such. This relates to the intentional preparation or supply of false, incorrect or incomplete statements or documents.

In principle, the criminality commitment covers only conduct with consequences for the budget of the European Communities: such conduct must be made a criminal offence to the extent that it can lead to the misappropriation, wrongful retention or illegal diminution of resources from or intended for the budget of the European Communities. However, the Member States have the discretion to adopt more stringent penalties, as shown by Article 9.

The fraudulent action or omission as described in Article 1 is already largely covered by the scope of Dutch law. This applies firstly in relation to the conduct described in Item a, namely intentional action or omission in which false, incorrect or incomplete statements or documents are submitted or used for the misappropriation, wrongful retention or illegal diminution of resources from or intended for the budget of the European Communities. Article 225 of the Criminal Code makes the intentional production, delivery or possession of false or falsified documents a criminal offence. This includes criminalising the use or submission of incorrect or incomplete statements or documents. Incorrectness or incompleteness means that the documents are inconsistent with the truth and are therefore false or falsified. Article 225 does not contain any requirement of detrimental consequences, so that the results of the conduct are not relevant for their designation as criminal offenses. Under Dutch law, therefore, it is not relevant for the purposes of criminality that the intentional production or submission of false, incorrect or incomplete statements or documents leads to the misappropriation, wrongful retention or illegal diminution of resources from or intended for the budget of the European Communities.

In certain cases, Article 225, Clause 2 of the Criminal Code also covers the conduct described in Item b. above, namely action or omission leading to the withholding of information in breach of a specific obligation, which results in the misappropriation, wrongful retention or illegal diminution of resources from or intended for the budget of the European Communities. If the information requirement is reflected in the requirements imposed for particular written submissions, then forgery is involved as a result of incompleteness, as provided by Article 225. Again, any consequences relating to the budget of the European Communities are irrelevant in terms of criminalising the failure to disclose information. Provision has therefore been made for the criminality of non-compliance with information requirements, if an intentionally incomplete or incorrect document is submitted in breach of such a requirement.

The Bill on Concentration of Fraud Criminality (Second Chamber Documents, 1997/98, 23 993, No. ..) is important in relation to non-compliance with specific information requirements by non-written means.

If the Bill is enacted, provision will be made for the criminality of non-compliance with a statutory requirement to disclose certain information, in as far as the party concerned knows, or should reasonably assume that the information is important in relation to the right to a payment or contribution, and the said non-compliance can lead to benefits for that party or another party. Non-compliance with an information requirement will be covered by this criminal provision, Article 227b of the Criminal Code, if the conduct manifests itself in ways other than through forgery.

Moreover, this criminality is broader than that required by the Fraud Convention. There need be no question of misappropriation, unlawful retention or diminution of resources: it is enough that there is a reasonable chance, in terms of general empirical rules, that the non-compliance will lead to someone enjoying a benefit with a financial value as a result of the withholding of information (Second Chamber Documents, 1994/95, 23 993, No. 3, Pg. 13). In order to comply with the commitment to make a criminal offence of every intentional act or every intentional omission that leads to the misappropriation of resources from or intended for the budget of the European Communities by applying them for purposes other than those for which they were originally allocated or obtained, the conduct described in Item c., the Criminal Code will have to be amended. The Criminal Code does not yet contain penalties for this type of conduct, which is why an amendment of the Code is proposed together with the ratification of the Fraud Convention. The background and contents of the amendment are explained in the Notes to the reform Bill (the Corruption Law Reform Bill).

With regard to the misappropriation of resources intended for the budget of the European Communities, the following situation must be considered. Little or no duty is paid for imported goods, because these goods are destined for transit outside the EU. The destination of the goods is then changed and they are marketed within the EU, without notification of the competent authorities, let alone payment of the additional duties. The criminal law protection against such situations, as required by the provisions of Article 1(1a), third dash, is already provided for by the Customs Act. In particular, reference is made here to Article 47 of this Act. No further legal amendments are therefore necessary.

Article 1(3) commits the Member States to make the intentional preparation or supply of false, incorrect or incomplete statements or documents leading to the misappropriation, wrongful retention or illegal diminution of resources from or intended for the budget of the European Communities a criminal offence, if this is not already the case. As explained above, the terms 'incorrect or incomplete' are already covered by the scope of Article 225 of the Criminal Code. The same applies for the terms 'to issue' (see Article 225, Clause 2: 'delivery, possession') and 'the intentional preparation or supply of false, incorrect or incomplete statements or documents' (see Article 225, Clause 1: 'fraudulent preparation of a document').

Since, moreover, the issue of whether any detrimental effects are suffered is not relevant for the criminality of the conduct covered by Article 225, the conclusion here is once again that Dutch law complies with the criminality requirement of Article 1(3) without further amendment.

Article 2

Article 2 provides that the Member States must impose proportionate, effective and dissuasive sanctions on the conduct described in Article 1. This is also required when a person knowingly assists or induces fraud, or commits attempted fraud. In addition to this more general reference to the nature of the sanctions, Article 2 requires the imposition of penalties involving the deprivation of liberty that can give rise to extradition. The latter commitment applies for cases of 'serious fraud', which term is further defined in Article 2 as (at least) every fraud involving a sum of more than ECU 50,000. Member States are free to attach the definition of 'serious fraud' to lower sums.

The provisions of Article 2 therefore aim to at least ensure that every Member State at least imposes penalties that can give rise to extradition on EC fraud involving sums of ECU 50,000 or more. Seen in conjunction with Article 2 of the European Convention on Extradition (Book of Treaties 1965, 9) signed on 13 December 1957 in Paris, this amounts to punishing at least 'serious fraud' with a penalty involving deprivation of liberty for up to one year.

Article 2(2) relates to sanctions for 'minor fraud'. This refers to fraud involving sums of less than ECU 4,000, which, pursuant to the law of the Member States, do not involve any special circumstances calling for heavier penalties. With regard to these crimes, Paragraph 2 provides that Member States can impose sanctions of a non-criminal law nature (e.g. administrative law sanctions).

With regard to the consequences for Dutch law, it should first be noted that these relate to the criminality of the conduct described in Article 1. As shown by the Explanatory Report on Article 1 of the Fraud Convention, in many cases Article 225 of the Criminal Code already applies to the conduct which is to be made a criminal offence. As penalties of up to six years' imprisonment can be imposed on the basis of this Article, the criminal courts have ample scope to take account of the severity of the offence and the circumstances of the case when handing down sentences. This therefore covers the requirement of Article 2 that proportionate, effective and dissuasive sanctions are available for the various forms of fraudulent conduct. The same applies for the criminality of participation in, instigation of or attempted fraud.

Article 2 likewise does not require the amendment of national law in respect of the imposition of sanctions for the conduct to be covered by the new Article 227b of the Criminal Code and the provisions of the Customs Act.

In these cases, too, there is sufficient provision to impose proportionate, effective and dissuasive penalties, depending on the seriousness and circumstances of the case in question.

The sanctions norms for conduct that is not yet covered by Dutch criminal law, namely the misappropriation of resources from or intended for the budget of the European Communities by applying them for purposes other than those for which they were originally allocated or obtained, are discussed in more detail in the Notes to the Corruption Law Reform Bill. Finally, we note that the distinction between 'fraud', 'serious fraud' and 'minor fraud' will carry no further significance for Dutch law. The formulation of criminal penalties in the Criminal Code makes such a distinction unnecessary.

Article 3

For an explanation of this Article, we refer to the Explanatory Report on the Fraud Convention. This Article has no consequences for Dutch law. The Criminal Code already provides for sufficient means to assign criminal liability to those who actually lead the commitment of a crime (by a subordinate).

Article 4

Article 4 relates to the establishment of jurisdiction to hear cases involving the offenses that are criminalised in accordance with Article 1 and Article 2(1) of the Convention. This relates to the establishment of jurisdiction in cases:

- a. In which the offence is committed wholly or in part within the territory of the Member State, or in which the benefits are derived on that territory;
- b. In which complicity or instigation of the crime takes place on the territory of the Member State;
- c. In which the crime is committed by a national of the Member State in another Member State, possibly confined to those cases in which the offence is also a criminal offence in the state where it is committed.

In view of Article 2 of the Criminal Code, which provides that Dutch criminal law applies to everyone who commits any crime in the Netherlands, the provisions of a. and b. require the addition of provisions in Dutch law. The same applies for the third jurisdiction provision, because Article 5, Clause 1 of the Criminal Code provides that Dutch criminal law always applies to Dutch nationals who commit an offence in another country, if that offence is deemed to be a crime under Dutch criminal law and is penalised under the law of the country where it is committed.

Article 5

For an explanation of Article 5, we refer to the Explanatory Report on the Fraud Convention. Paragraph 2 is largely based on Article 6 of the aforementioned European Convention on Extradition.

The only change with regard to the latter provision lies in the fact that a Member State which refuses to grant extradition refers the case to the prosecuting authorities without a prior request from the Member State that requests extradition. As a result of this automatic procedure, the Member State that requests extradition is also required to make the criminal file available after a refusal on the grounds of the nationality of the person in question. This change in the usual extradition rules has no consequences for the Dutch Extradition Act. However, it is relevant in policy terms. If a country wishes to prosecute the person itself, it is important to determine whether the country in question extradites its own nationals before submitting an extradition request. If this is not possible, an extradition request will be refused, with the result that the criminal proceedings must be referred on.

Paragraph 3 only has significance for Member States that refuse extradition for tax offenses as a rule, or impose restrictions on this. Generally speaking, the Netherlands is not one of them, although in the Benelux, extradition for tax offenses is possible only if they fall within the scope of Article 63 of the Convention, signed on 19 June 1990 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, for the implementation of the Accord signed at Schengen on 14 June 1985 on gradual abolition of controls at common borders (Book of Treaties 1990, 145: hereinafter referred to as the Schengen Implementing Convention). However, as a result of Paragraph 3 of the Article under discussion here, this restriction is also set aside for the criminal offenses referred to in the Fraud Convention.

Article 6

With its rules on cooperation between the Member States, Article 6 develops one of the aims of the Fraud Convention. Paragraph 1 provides for the common situation in which a case of EC fraud involves two or more Member States. These Member States are then required to work together effectively in the investigation, prosecution and punishment of the criminal offence. Cooperation can be realised by means including the provision of mutual legal assistance, extradition, the transfer of prosecution or the enforcement of a court decision handed down in another Member State. The procedural requirements that apply for each of the said legal assistance instruments are laid down in existing treaties, the most important being the European Treaty on Mutual Legal Assistance in Criminal Cases (Book of Treaties 1965, 10) signed in Strasbourg on 20 April 1959, the European Treaty on the Transfer of Criminal Prosecutions (Book of Treaties 1973, 84) signed in Strasbourg on 15 May 1972, the Treaty on the Transfer of Convicted Persons (Book of Treaties 1983, 74) signed in Strasbourg on 21 March 1983, the Treaty on Extradition and Legal Assistance in Criminal Cases between the Kingdom of Belgium the Grand Duchy of Luxembourg and the Kingdom of the Netherlands (Book of Treaties 1962, 97) signed in Brussels on 27 June 1962 and the relevant sections of the Schengen Implementing Accords.

Paragraph 2 is included in relation to fraud offenses that are committed in several Member States. In this case, more than one Member State will have jurisdiction institute criminal proceedings. In order to avoid this leading to fragmentation of settlement, it is desirable that the competent authorities of the Member States involved consider whether it is possible to centralise criminal prosecution for the entire complex of offenses in a single Member State as soon as the transnational nature of the crimes is discovered. Preference should go here to the Member State in which the crimes were focused or where most of the suspects are arrested. Other aspects may also play a role in such a decision.

Article 7

This Article provides rules aimed at avoiding repeated prosecution of offenders for the same offence. These rules comply with the provisions of the Schengen Implementing Accord and the Convention between the Member States of the European Communities on the application of the ne bis in idem principle, signed in Brussels on 25 May 1987 (Book of Treaties 1987, 167).

Article 8

For an explanation of this Article, we refer to the Explanatory Report on the Fraud Convention.

3. PROTOCOL DRAWN UP ON THE BASIS OF ARTICLE K.3 OF THE TREATY ON EUROPEAN UNION, ACCOMPANYING THE CONVENTION ON THE PROTECTION OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS (Book of Treaties 1996, 330)

3.1 General

The Council of the European Union reached agreement on the form and content of the Fraud Convention in the spring of 1995. This agreement was to the effect that key provisions relating to fraud control under criminal law would first be laid down in a convention, and that the sections of the convention requiring further development would be considered at a later stage (see also Second Chamber Documents 1994/95, 23 490, No. 25, pg. 25). The above Protocol, hereinafter referred to as the Corruption Protocol, is a supplement to the Fraud Convention aimed specifically at criminal law protection of the European Communities' financial interests against corrupt conduct by or on behalf of officials of the European Communities or the EU Member States.

This Protocol is accompanied by an Explanatory Report, which is attached to these Notes as Appendix II. The report provides further details on the underlying reasons for the preparation of this Protocol. We confine ourselves here to a reference to this report. Parliament was regularly informed on the preparation of the Protocol (Second Chamber Documents 1995/96, 23 490, Nos. 90 and 37, Pg. 4, No. 38, Pg. 4, No. 39, No. 90a, Pg. 4, No. 90b, Pg. 8, No. 41, Pg. 5 and Nos. 52, 54 and 55, Pg. 4).

3.2 Design of the Corruption Protocol

The design of the Corruption Protocol is largely similar to that of the Fraud Convention. In accordance with the same system, provisions are first included on the conduct to be criminalised and the penalties for this. The Member States are required to make the forms of active and passive corruption described in the Corruption Protocol criminal offenses. The criminality must cover not only national officials, but also officials of the European Communities, officials of the other Member States and Members of the Commission of the European Communities, the European Parliament, the Court of Justice of the European Communities and the European Community Court of Auditors (Articles 1 to 4). The Member States must impose proportionate, effective and dissuasive penalties for the conduct defined as active and passive corruption, a definition of the penalties that is also contained in the Fraud Convention (Article 5).

The rules on extradition and prosecution, cooperation between the Member States and the application of the ne bis in idem principle that apply on the ground of the Fraud Convention are declared similarly applicable (Article 7). This does not apply for the establishment of jurisdiction. A separate, fairly detailed provision is included for this purpose. The Corruption Protocol ends with a provision on the jurisdiction of the Court of Justice of the European Communities.

Competence to hand down decisions, by way of preliminary rulings, relating to the Corruption Protocol are regulated in the Court Protocol mentioned above.

3.3 Notes to individual Articles

Article 1

Article 1 provides definitions of the terms 'official', 'Community official', 'national official' and 'Convention'. Where these terms are not self-explanatory, we refer to the Explanatory Report for a more detailed explanation.

Article 2

Article 2 defines the term 'passive corruption' for the purposes of the Corruption Protocol. The definition shows that this refers to a situation in which an official, as referred to in Article 1:

- a. deliberately, directly or through an intermediary,
- b. requests or receives advantages of any kind whatsoever, for himself or for a third party,
- c. or accepts a promise of such an advantage,
- d. to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties
- e. in a way which damages or is likely to damage the European Communities' financial interests.

The second Paragraph requires the Member States to take the necessary measures to ensure that conduct of the type referred to in Paragraph 1 is made a criminal offence. For further details of the passive corruption which is to be made a criminal offence, we refer firstly to the Explanatory Report on Article 2. Taking account of this report and the provisions of Article 363 of the Criminal Code, which makes passive corruption by Dutch officials a criminal offence, we note the following with regard to the consequences of this provision for Dutch law.

The term 'official' in Article 363 of the Criminal Code refers to Dutch officials. In view of the definition of 'official' in Article 1 of the Corruption Protocol, the definition of this term must be expanded. In any event, Article 363 must also cover officials of the European Communities, officials of the other European Member States and persons referred to in Article 4 of the Corruption Protocol. The Corruption Law Reform Bill and the accompanying Notes show how these officials will be placed on a par with Dutch officials. This scope of this equivalence provision will be broader than that required by the Protocol. The reasons for this are described in more detail in Section 5, which covers the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The ratification of this Convention will mean that corruption provisions should not only apply (in short) to European officialdom, but also to other foreign officials.

The elements 'advantages of any kind whatsoever', 'directly or through an intermediary' and 'for himself or for a third party' do not require amendments of the Criminal Code: the nature of the gift or promise is not defined in any further detail in Article 363 and therefore, in principle, covers any advantage, regardless of who receives it with the official's knowledge. The elements 'requests or receives' and 'accepts a promise of such an advantage' can likewise be found in Dutch criminal law. The acceptance of a promise of an advantage is not included as an element of Article 363. This conduct can constitute a criminal offence as extortion by a public servant (Article 366) or as incitement to active corruption (Article 177). Nevertheless, partly in view of the legal cooperation with the other EU Member States, we do not consider it desirable to amend criminal law on this point. The Corruption Law Reform Bill provides for this.

The elements 'in breach of his official duties' and 'to act or refrain from acting in accordance with his duty or in the exercise of his functions' can be found in Article 363, albeit in slightly different terms. Because there are no material differences, no amendment of the Act is needed on this point. Likewise, the element 'in a way which damages or is likely to damage the European Communities' financial interests' requires no further provisions. It follows from Article 7 of the Corruption Protocol, in conjunction with Article 9 of the Fraud Convention, that Member States have the discretion not to include this damage requirement from their national criminal law.

Article 3

Article 3 provides a definition of active corruption. This refers to a

- a. deliberate action of whosoever
- b. promises or gives, directly or through an intermediary,
- c. an advantage of any kind whatsoever to an official for himself or for a third party
- d. for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties
- e. in a way which damages or is likely to damage the European Communities' financial interests.

The second Paragraph requires the Member States to take the necessary measures to ensure that conduct of the type referred to in Paragraph 1 is made a criminal offence. For further details of the elements of the active corruption which is to be made a criminal offence, we refer firstly to the Explanatory Report. We note the following with regard to the consequences of for Dutch criminal law.

Active corruption is made a criminal offence by Article 177 of the Criminal Code, to the extent that Dutch officials are involved. As with passive corruption, compliance with the obligations of the Convention means that the definition of this term (Dutch officialdom) must be expanded.

In any event, Article 177 must also cover officials of the European Communities, officials of the other European Member States and persons referred to in Article 4 of the Corruption Protocol (see also the Notes to Article 2).

The element 'deliberate' has no consequences for Article 177. This requirement follows from the definitions of the conduct which is made a criminal offence. Items b, c, d and e have already been discussed in the Notes to Article 2.

Article 4

Implementing of the Convention's provisions on the criminality of active and passive corruption may also have consequences for offenses involving Ministers, Members of Parliament, members of the highest judicial instances or the Court of Audit. This depends on whether Member States have special regulations in which the conduct described in Articles 2 and 3 is a criminal offence when committed by these persons. If this is the case, for example because these persons are equated with officials for the purposes of criminal law, Article 4 requires that the descriptions of the offenses apply similarly in cases involving Members of the Commission of the European Communities, the European Parliament, the Court of Justice of the European Communities or the Court of Auditors of the European Communities.

Members of the Commission of the European Communities need not be ranked with Ministers of national governments if a Member State has enacted special legislation concerning acts or omissions for which government Ministers are responsible by reason of their special political position in that Member State. In that case, a Member State must ensure that the Members of the Commission are covered by the criminal legislation implementing Articles 2 and 3. Article 4 also contains an assimilation provision relating to EC fraud. The Member States must ensure that the regulation of criminal liability for EC fraud committed by national officials also applies to offenses involving officials of the European Communities.

For the implementation of the provisions of Article 4, the Criminal Code must be amended. It should first be noted that Paragraphs 3 and 4 can be disregarded in the Dutch situation: after all, the 'ordinary' Dutch criminal law provisions on corruption and fraud apply equally to Dutch Ministers, Members of Parliament, members of the Supreme Court and the General Chamber of Audit. If these provisions are also made applicable to officials of the European Communities (see the Notes to Articles 2 and 3), in view of the definition of the term 'official' in Dutch criminal law (see Article 84 of the Criminal Code), the provisions of Article 4 will be met.

The following can be noted with regard to Article 4(4). Pursuant to Article 92 of the Judiciary (Organisation) Act, the Supreme Court hears cases involving official misdemeanours and breaches of official duties committed by Members of Parliament, government Ministers and State Secretaries in the first and last instance.

The jurisdiction of the Supreme Court as the court of first and last instance in relation to the offenses is confined to the said officials by Article 119 of the Constitution. Pursuant to Article 4(3), these rules need not apply, in the sense that Members of the European Parliament and of the Commission of the European Communities will be covered by the regulations of Article 92 of the Judiciary (Organisation) Act.

Article 5

Article 5 requires the Member States to ensure that the conduct referred to in Articles 2 and 3, and participating in and instigating the conduct in question, are punishable by effective, proportionate and dissuasive criminal penalties. This requirement is without prejudice to the exercise of disciplinary powers by the competent authorities against national officials or Community officials. In determining the penalty to be imposed, the national criminal courts may, in accordance with the principles of their national law, take into account any disciplinary penalty already imposed on the same person for the same conduct. With regard to the implementing aspects of this Article, we note the following.

Articles 177 and 363 of the Criminal Code were related above with the obligations resulting from Articles 2 and 3 of the Convention. As is usual in general Dutch criminal law, Articles 177 and 363 not only define the criminal offenses, but also lay down the maximum penalties that can be imposed. Penalties can be imposed of a maximum of two and four years imprisonment, respectively. These penalties allow an opportunity to take account of the severity and the circumstances on the case when sentences are handed down, as well as with any disciplinary penalties already imposed. Dutch criminal law therefore complies with the requirements of Article 5: effective, proportionate and dissuasive criminal penalties are available, including for the punishment of participation in, instigation of and attempted offenses.

Article 6

Article 6 concerns the establishment of jurisdiction over the criminal offenses established in accordance with Articles 2, 3 and 4, where:

- a) the offence is committed in whole or in part within its territory (Article 6(1a))
- b) the offender is one of its nationals or one of its officials (Article 6(1b))
- c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the institutions referred to in Article 4(2) who is one of its nationals (Article 6(1c))
- d) the offender is a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State concerned (Article 6(1d)).

Article 2 of the Criminal Code provides that Dutch criminal law applies to everyone who commits any criminal offence within the Netherlands. Article 6(1a) therefore has no consequences for Dutch law.

With regard to Article 6(1b), we note the following. Pursuant to Article 6 of the Criminal Code, Dutch criminal law applies to Dutch officials who commit one of the criminal offenses described in Title XXVIII of Book Two of the Criminal Code, including Article 363, outside the Netherlands. It follows from this that no further provisions are required in order to establish jurisdiction over Dutch officials, in as far as they commit passive corruption.

Pursuant to Article 5, Clause 1(2°) of the Criminal Code, Dutch criminal law applies to Dutch nationals who commit offenses outside the Netherlands that are criminal offenses under Dutch law, and which are subject to penalties under the law of the country where they are committed. For jurisdiction over cases that do not fall within the scope of Article 6 of the Criminal Code, this means that Dutch law complies with Article 6(1b) of the Corruption Protocol in as far as the relevant offenses are criminal offenses in the country where they are committed (the dual criminality requirement). Within the EU, this will always be the case: after all, the provisions of the Corruption Protocol serve this purpose. Naturally, the criminality of such offenses outside the Union will vary from one country to another. Nevertheless, abandoning the requirement of dual criminality for these cases does not appear to serve any special purpose. Furthermore, Article 6 of the Corruption Protocol does not require this. Paragraph 2 makes it possible to retain the provisions of Article 5, Clause 1(2°) for the implementation of the jurisdiction provisions of Article 6(1b). The Secretary General of the Council of the European Union will be notified accordingly, in compliance with Article 6(2) of the Corruption Protocol.

Article 6(1c) relates to jurisdiction over cases of active corruption committed by a Dutch official, an official of the European Communities, an official of another Member State or a Dutch national that performs a function as referred to in Article 4 of the Corruption Protocol. The rules of Article 5, Clause 1(2°) of the Criminal Code have already been discussed above. These provisions in any event mean that the Dutch courts have jurisdiction over cases of active corruption (after Article 177 has been amended in the sense required by the Corruption Protocol) committed by Dutch nationals outside the Netherlands against the persons referred to in Article 6(1c), providing that the dual criminality requirement is met.

With regard to active corruption committed by non-Dutch nationals, we propose to confine the establishment of jurisdiction to those cases in which active corruption is directed against Dutch nationals among the persons referred to in Article 6(1c). Further expansion of jurisdiction is not an obvious choice: neither the offence nor the person can then be related to the Dutch system. For the establishment of jurisdiction in the latter situation, the Criminal Code must be amended in order to implement Article 6(1c) of the Corruption Protocol. To this end, proposals to amend Article 4 of the Criminal Code have been included in the Corruption Law Reform Bill.

As mentioned above, Article 6(2) of the Corruption Protocol affords the possibility of conditional application of the jurisdiction rules. The Dutch conditions relating to the jurisdiction provisions of Article 6(1c) therefore mean that (a) the active corruption must be committed by a Dutch national in a country where this is a criminal offence or (b) committed against a Dutch national. The Secretary General of the Council of the European Union will be notified of these conditions accordingly, in compliance with Article 6(2) of the Corruption Protocol.

Finally, Article 6(1d) provides that jurisdiction must be established over cases in which corruption or EC fraud is committed by officials in the service of an institution of the European Communities or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Netherlands. With regard to this jurisdiction provision, we first note that it is only significant in the case in which the official concerned is not a Dutch national (see above: Article 5, Clause 1(2°) of the Criminal Code). For this type of case, amendments will be proposed to the effect that the Criminal Code no longer distinguishes between the said category of Community officials and Dutch officials. However, in relation to this, a condition will again be imposed and notified in compliance with Article 6(2) of the Corruption Protocol, namely that concerning the dual criminality requirement in the case of involvement of EC fraud.

Articles 7 - 11

As mentioned in Section 3.2, the rules on extradition and prosecution, cooperation between the Member States and the application of the *ne bis in idem* principle in effect under the Fraud Convention are declared to apply likewise in Article 7 of the Corruption Protocol. Article 7 similarly regulates the application of Article 3. This means that Articles 3, 5, 6 and 7 of the Fraud Convention apply likewise to offenses that must be made criminal offenses pursuant to the Corruption Protocol. Notes to these provisions of the Fraud Convention are presented in Section 2.3.

Articles 8 to 11 of the Corruption Protocol provide no reasons for comment over and above those made in the Explanatory Report to the Protocol in question.

4. PROTOCOL DRAWN UP ON THE BASIS OF ARTICLE K.3 OF THE TREATY ON EUROPEAN UNION, CONCERNING THE INTERPRETATION, BY WAY OF PRELIMINARY RULINGS BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, OF THE CONVENTION ON THE PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN COMMUNITIES (Book of Treaties 1997, 40)

4.1 General

In the discussions on the draft Fraud Convention, a number of Member States, including the Netherlands, repeatedly called for the inclusion of a provision on the conferral of competence on the Court of Justice of the European Communities to issue preliminary rulings of the Convention (see also Second Chamber Documents 1994/95, 23 940, Nos. 87b and 28, Pg. 12, Nos. 30 and 31, 1995/96, 23 490, Nos. 90h and 47, Pgs. 8-9; No. 51, Pgs. 5-6 and No. 62, Pg. 11). The reason for this was always the desire to realise a provision that would ensure uniform interpretation of the Convention as far as possible. However, no agreement could be reached on the content of such a provision, mainly because the United Kingdom took the view that every competence of the Court of Justice would be undesirable.

The problem concerning the assignment of competence to issue preliminary rulings to the Court of Justice of the European Communities was not confined to the Fraud Convention. It was also an issue during the preparation of the Convention, signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, on the formation of a European Police Force (Book of Treaties 1995, 282, hereinafter referred to as the Europol Convention) and the preparation of the Convention, signed on 26 July 1995 in Brussels, drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology in the customs field (Book of Treaties 1995, 287, hereinafter referred to as the DIS Convention). For these instruments too, it did not prove possible to assign the Court of Justice of the European Communities the competence to issue preliminary rulings in the text of the Convention itself.

The Benelux partners, supported by Germany, Italy and Austria, continued to fight for a satisfactory solution on the competence of the Court of Justice of the European Communities to issue preliminary rulings even after these Conventions were signed. This position ultimately led to the creation of Court Protocols for these Conventions. The Court Protocols provide for the possibility that Member States issue declarations recognising the competence of the Court of Justice of the European Communities to issue preliminary rulings.

4.2 Design of the Court Protocol

The Protocol concerning the interpretation, by means of preliminary rulings of the Court of Justice of the European Communities, of the Convention on the protection of the European Communities' financial interests, hereinafter referred to as 'the Court Protocol' for short, not only relates to the Fraud Convention but also to the Corruption Protocol. Each Member State regulates the competence to issue preliminary rulings by submitting a declaration stating which legal institutions may request preliminary rulings from the Court of Justice. In the declarations, the Member States may stipulate that this (1) can be every legal institution or that (2) this provision only covers legal institutions when national law prohibits appeals against their decisions.

The Netherlands chose the first option, so that every legal institution can request a preliminary ruling from the Court of Justice on the interpretation of the Fraud Convention or the Corruption Protocol. The Netherlands also issued a declaration reserving the right to stipulate in its national law that if a question on the interpretation of one of these instruments is raised in a case pending before a 'final' legal instance, the relevant instance is required to submit the case to the Court of Justice of the European Communities. Similar declarations were also issued for the Court Protocols of the Europol Convention and the DIS Convention mentioned above.

4.3 Notes to individual Articles

Article 1

Article 1 confers on the Court of Justice of the European Communities the competence to issue rulings on the Fraud Convention and the Corruption Protocol, under the conditions laid down in the Court Protocol. The Article does not specify which provisions are covered by the Court's jurisdiction. This means that in principle, the Court can, on request, issue preliminary rulings on all the provisions of the Fraud Convention and the Corruption Protocol. However, only a number of provisions are expected to qualify for preliminary rulings in practice. Nevertheless, it was decided not to include a comprehensive enumeration of provisions. The advantage of this is that any non-competence of the Court of Justice of the European Communities is avoided if preliminary questions are asked on rules which did not, at first glance, qualify for this.

Article 2

Article 2 concerns the recognition by the Member States of the competence of the Court of Justice of the European Communities to issue preliminary rulings. A Member State may recognise this competence by issuing a declaration stating which national legal institutions may request preliminary rulings from the Court. Article 1(2) offers a choice of two alternatives here.

The first (Paragraph 2a) means that the Member State declares that every legal institution against the decisions of which there is no appeal in national law may submit requests to the Court of Justice of the European Communities. The issue of a declaration pursuant to Paragraph 2b means that preliminary rulings may also be requested by legal institutions against the decisions of which appeal is still possible.

As stated in Section 4.2, the Netherlands opted for the broadest alternative when signing this Protocol, by means of the declaration referred to in Paragraph 1. This means that all legal institutions may request preliminary rulings from the Court of Justice.

Article 3

Article 3(1) lays down that the Protocol on the Statute of the Court of Justice and the Regulations on the Court's procedures apply. This ensures that, on the basis of the Court Protocol, the procedures for preliminary rulings are consistent with the procedure that applies for preliminary rulings concerning the application of Community law.

Paragraph 2 provides that every Member State, regardless of whether it has issued a declaration pursuant to Article 2, has the right to present memoranda or written comments to the Court of Justice of the European Communities, relating to a case pending before the Court. This means that Member States whose legal institutions are not authorised to request preliminary rulings still have the opportunity to intervene in a case. The possibility that the need for this may arise results from the fact that a decision by the Court of Justice on the interpretation of the Fraud Convention or the Corruption Protocol may also carry consequences for the Member State that has not issued either of the declarations provided for in Article 2. After all, rules on which the Court of Justice of the European Communities has issued an interpretation must also be applied in compliance with the Court's interpretation by these Member States. The fact that every Member State has the right to submit memoranda and written comments also ensures that the Court of Justice can be informed as fully as possible.

5. CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (Book of Treaties 1998, 54)

5.1 General

In order to outline a picture of the history of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 in Paris (hereinafter referred to as the OECD Corruption Convention), one must go back to the end of the 1980s. At that time, the OECD began talks on corruption in international business transactions. It investigated how improper payments in trade could be controlled through the cooperation between the OECD Member States. This resulted in the preparation of the OECD recommendation on bribery in international business transactions (C(94) 75/FINAL).

In the course of 1996, a start was made on a review of this recommendation, primarily because it was found that the OECD Member States did not see enough reason in the original recommendation to make early reforms of their criminal law to the effect that bribery of foreign officials became a criminal offence. Various arguments were put forward for this. For some Member States (France, Germany and Mexico), the fact that the recommendation had more political than legal significance was a major obstacle. In the view of these countries, there were no solid guarantees that all OECD Member States would actually implement the required criminality: there were fears of unfair competition due to the lack of a 'level playing field'. Other Member States (including the Netherlands) took the view that, although they were prepared to implement the recommendation, they would first await clarity on the developments on control of corruption within the EU (see also: Second Chamber Official Reports, 1996/97, Pgs. 2887-2888 and Second Chamber Official Reports, 1997/98, Pgs. 1047-1048).

In order to bring an end to this unsatisfactory situation, the OECD Ministers Conference of 26-27 May 1997 approved a revised recommendation (C(97) 123/FINAL), which included the decision to make an immediate start on the preparation of a Convention that would be ready for signing at the end of 1997, as part of a modified working programme on combating corruption. The decision also contained ambitious target dates for the completion of the national ratification procedures. The OECD Corruption Convention was signed within the term set for this by the OECD Ministers. After three very smooth negotiating rounds, the Convention was signed on 17 December 1997 in Paris.

The Convention is accompanied by Commentaries which are attached to these Notes as Appendix III. After a brief general discussion of the main points of the Convention, we supplement these commentaries with notes to the various Articles, particularly where they have consequences for Dutch legislation.

5.2 Design of the OECD Corruption Convention

The core of the OECD Corruption Convention is the obligation to make the bribery of foreign public officials in international business transactions a criminal offence. The definition of the bribery that is to be made a criminal offence also covers official acts or omissions that are not in breach of official duties. In this respect, the OECD Corruption Convention differs from the Corruption Protocol, which provides only for official acts or omissions that are in breach of official duties. With regard to the officials covered, the OECD Corruption Convention is also broader: the Convention makes the bribery of every foreign public official is made a criminal offence, while the Corruption Protocol only commits the signatories to take measures against bribery of officials who come from an EU Member State or are employed by one of the institutions of the European Communities.

While the Corruption Protocol in principle confines itself to conduct that affects the European Communities' financial interests in terms of criminal offenses, the OECD Corruption Convention confined itself to rules on the criminality of corruption in relation to international business transactions. Again, however, the Member States need not adopt this restriction in their national law and can therefore opt for more stringent provisions. In view of the existing penal provisions, this restriction is not reasonable for the Netherlands (see also Section 3.3, Notes to Articles 2 and 3 and the Item 2 of the Commentaries on the OECD Corruption Convention).

The design of the OECD Corruption Convention is largely similar to that of the Fraud Convention and the Corruption Protocol. Articles 1 to 3 contain provisions on the conduct that is to be made a criminal offence, the sanctions to be imposed for this and the liability of legal persons. Article 4 then provides rules on the establishment of jurisdiction and Articles 5 and 6, unlike the Fraud Convention and the Corruption Protocol, explicitly provide that the OECD Member States should comply closely and effectively with the rules resulting from the Convention. With regard to money laundering, Article 7 provides that the legislation of countries where money laundering in relation to the bribery of national public officials is a criminal offence must be amended to the effect that money laundering in relation to the bribery of foreign public officials is also made a criminal offence.

Article 8 follows from the 1997 OECD Recommendation referred to above. Pursuant to this Article, the Member States are required to take effective measures to control the falsification of books and records in order to disguise expenditure or reservations relating to the bribery of foreign public officials.

Articles 9 and 10 relate to international cooperation. Article 9 provides for a commitment to provide legal assistance and Article 10 contains rules on extradition and the exercise of jurisdiction in cases where an extradition request cannot be met. Article 11 was included in order to secure an effective exchange of information between the Member States.

To this end, the Member States must notify the Secretary General of the OECD of the national authorities that act as a channel of communication in relation to making and receiving requests for legal assistance and extradition.

Article 12 requires the Parties to cooperate in carrying out a programme on the basis of which the effects of the OECD Corruption Convention and its implementation will be monitored. This will take place within the OECD Working Group on Bribery in International Business Transactions which was previously made responsible for drawing up the Convention. The Member States can decide to place the activities in the hands of another body. At present, the above OECD Working Group still holds responsibility for this task, and has already met on a number of occasions in relation to this. The Convention concludes with the usual provisions on signature, ratification and entry into force.

5.3 Notes to individual Articles

As already mentioned in Section 5.2, this Article requires that the bribery of foreign public officials in international business transactions be made a criminal offence. More specifically, Article 1(1) provides that it shall be a criminal offence for any person

- a. intentionally to offer, promise or give
- b. any undue pecuniary or other advantage, whether directly or through intermediaries,
- c. to a foreign public official, for that official or for a third party,
- d. in order that the official act or refrain from acting in relation to the performance of official duties,
- e. in order to obtain or retain business or other improper advantage in the conduct of international business.

For a more detailed explanation of the significance of these elements, we refer firstly to the Commentaries on Article 1. Taking account of this commentary and the provisions of Article 177 of the Criminal Code, which makes (active) corruption by Dutch officials a criminal offence, we note the following with regard to the consequences of this provision of the Convention for Dutch law.

Article 177 of the Criminal Code relates to acts or omissions by an official in breach of his (official) duties. So far, the Criminal Code has not included an (active) counterpart to Article 362. Because element e. above, read in conjunction with the provisions of Article 1(4b) show that conduct which is not in breach of official duties should also be included within the scope of criminal law, the Corruption Law Reform Bill contains proposals to this effect.

In view of element c., read in conjunction with the provisions of Article 1(4a), the criminality of active corruption must also cover foreign officials, judges and persons employed by international public law organisations. As already explained in Section 3.3, the necessary amendment proposals are likewise included in the Corruption Law Reform Bill.

With regard to any consequences of elements a. and b., we refer to our Notes to Articles 2 and 3 of the Corruption Protocol and with regard to element f., to our comments in Section 5.2. Finally, we note that Article 1(2) (making attempted bribery and forms of participation criminal offenses) does not carry any consequences for Dutch law: the general provisions of Titles IV and V of the Criminal Code make adequate provision for this.

Article 2

This Article concerns measures to provide for the liability of legal persons in relation to the conduct that is to be made a criminal offence pursuant to Article 1. This provision has no consequences for Dutch law: we refer to Article 51 of the Criminal Code.

Article 3

Pursuant to Article 3(1), the Parties must ensure that the offenses described in Article 1 are punishable by effective, proportionate and dissuasive criminal penalties. A similar provision is included in the Corruption Protocol (Article 5(1)). For further details of any consequences of this Paragraph for Dutch law, we therefore refer to our Notes to Article 5 of the Corruption Protocol. We also make note of the following.

Only a partial link with Article 177 of the Criminal Code can be made for the implementation of Article 1(1), namely when an official does not act in breach of his duties. As already mentioned, as a result of this Convention, the Corruption Law Reform Bill contains new criminal offenses that can be described as a counterpart of Article 362 of the Criminal Code. The criminal offenses covered by the latter provision will also carry penalties that meet the requirements of this Paragraph.

For an explanation of the other Paragraphs of this Article, we refer to the Commentaries on the OECD Corruption Convention. The provisions do not require amendments of Dutch law.

Article 4

Article 4(1) commits the Parties to establish jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part in its territory. Apart from criminality in compliance with Article 1 of the Convention (through the Corruption Law Reform Bill), this provision does not entail any further implementing legislation: Article 2 of the Criminal Code, which provides that everyone who commits any criminal offence in the Netherlands is subject to Dutch criminal law, will then apply.

With regard to the consequences of Article 4(2) (extraterritorial jurisdiction, the same applies as for the first Paragraph. In this respect, Article 5, Clause 1(2°) of the Criminal Code is the important provision.

This provides that Dutch nationals are subject to Dutch criminal law if they commit offenses outside the Netherlands that are deemed to be crimes under Dutch criminal law and that are punishable by criminal penalties under the law of the country where they are committed.

Article 5

For an explanation of this Article, we refer to the Commentaries on Article 5.

Article 6

Article 6 stipulates that the Parties that apply a statute of limitations to the offence of bribery of a foreign public official, must provide for an adequate period of time for the investigation and prosecution of this offence. This provision carries no consequences for Dutch law. Article 70 of the Criminal Code contains a general provision on a statute of limitations for criminal offenses.

Article 7

This provision relates to the law of Parties which makes the laundering of money obtained through the bribery of a national official a criminal offence. These countries must ensure that such offenses are punishable in the same way if the gains are obtained by bribing a foreign public official. In view of Articles 416, 417 and 417b of the Criminal Code, the Netherlands falls within this category of countries. However, in view of the purport of the said Articles, no further legal amendments are required apart from implementation of Article 1(1) of the OECD Corruption Convention.

Article 8

For an explanation of this Article, we first refer to the Commentaries on the OECD Corruption Convention. These show that the inclusion of this Article is based on the desire to ensure that businesses maintain transparent accounts, with a view to combating international corruption. To this end, some forms of conduct that make it difficult, if not impossible to identify (improper) payments or reservations for the bribery of foreign public officials, must be prohibited.

The Article has no consequences for Dutch law. The acts described relate to the forgery or fraudulent use of documents or their inclusion or otherwise in the business administration in order - and herein lies the requirement of intent - to conceal the fact that foreign public officials have been or will be bribed. Adequate action can be taken against such offenses pursuant to Article 225 of the Criminal Code.

Article 9

Pursuant to Article 9, the Parties are required to provide legal assistance in relation to offenses covered by this Convention.

The Article does not require any amendments of Dutch law. Where Dutch law requires the existence of treaty provisions as a condition for consenting to requests for legal assistance (see Articles 552m, 552n and 552o of the Criminal Code), this Article provides for those grounds.

Article 10

This Article covers extradition and the exercise of criminal law jurisdiction if extradition is refused. Unlike Article 9, this provision confines itself to the offenses criminalised in accordance with Article 1. The structure of this Article is familiar: the Paragraphs largely follow the conventional pattern of the multilateral criminal law treaties (See Article 6 of the United Nations Treaty Against Illicit Trafficking in Narcotics and Psychotropic Substances signed on 20 December 1988 in Vienna (Book of Treaties 1989, 97)).

Article 10(2) is important for the Netherlands now that, pursuant to Dutch law, extradition is conditional on the existence of an extradition treaty. A supplement to Article 51a of the Extradition Act included in the Corruption Law Reform Bill is designed to implement this Paragraph. The third Paragraph expresses the well-known *aut dedere, aut judicare* rule.

Finally, we refer to the first sentence of Article 10(4), which makes reference to domestic law and the applicable treaties concerning the terms on which extradition is permissible. In this respect, in as far as an extradition request is not subject to any special extradition treaty, the Netherlands can have recourse to the grounds for refusal of the Extradition Act and the European Extradition Treaty (Book of Treaties 1965, 97) signed in Paris on 13 December 1957 (see Article 51a, Clause 3 of the Extradition Act).

Article 11

On the basis of this provision, Parties are required to notify the OECD Secretary General of the authorities responsible for consultation, within the meaning of Article 4(3) of the Convention, and for making and receiving requests for legal assistance and extradition on the grounds of Articles 8 and 9. The Ministry of Justice will be appointed as the responsible authority for the Netherlands.

Article 12

This Article provides for a tried and tested mechanism within the OECD for mutual evaluation of the implementation and application of the OECD Corruption Convention. The actual implementation of the evaluation programme is placed in the hands of the OECD Working Group on Bribery in International Business Transactions, unless otherwise decided by consensus of the Parties. We also refer to the Commentaries on this Article.

Articles 13-17

Apart from Article 15, these are fairly standard final provisions. The text of Article 15 is based on the desire to enable the OECD Corruption Convention to take effect as quickly as possible and is related to the OECD Recommendation of 20-21 May 1997. Please see the general section of the Notes to this Convention (Section 5.1). The other final provisions require no further explanation.

6. CONSEQUENCES FOR DUTCH LAW

The approval and ratification of the conventions discussed here must be coupled with a number of amendments of Dutch law. These legal amendments have been combined in the Corruption Law Reform Bill mentioned on several occasions above. Although the relevant amendments have already been discussed, above, they are once again listed below.

- Article 6 of the Corruption Protocol requires a number of amendments of Title I of the Criminal Code, Book One.
- As a result of the Corruption Protocol and the OECD Corruption Convention, Articles 177 and 178 of Title VIII, Book Two of the Criminal Code must be amended. Provision must likewise be made for a counterpart to Article 36, that also covers bribery of foreign public officials.
- A penal provision must be added to Title XXV of Book Two of the Criminal Code, based on the definition of offenses in Article 1(1a), third dash, of the Fraud Convention.
- Articles 362 to 364 in Title XXVIII of the Criminal Code must be amended, partly to extend their scope for foreign public officials (as required by the Corruption Protocol).
- Article 10(2) of the OECD Corruption Convention requires an addition to the Extradition Act. This is necessary in order to define the extent of the powers to grant extradition requests from Parties with which no extradition treaty is in force.

7. POSITION OF THE KINGDOM

With regard to the Kingdom of the Netherlands, the Fraud Convention, the Corruption Protocol and the Court Protocol shall apply only to the Netherlands.

The governments of the Netherlands Antilles and Aruba shall consider whether the OECD Corruption Convention shall also apply for their countries. In order to make such co-application possible in due course, provision is made for ratification for the entire Kingdom.

The Minister of Justice

The Minister of Foreign Affairs

The Minister of Economic Affairs

APPENDIX III

COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

General

1. This Convention deals with what, in the law of some countries, is called 'active corruption' or 'active bribery', meaning the offence committed by the person who promises or gives the bribe, as contrasted with 'passive bribery', the offence committed by the official who receives the bribe. The Convention does not utilise the term 'active bribery' simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.
2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re Paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this Paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments 'to induce a breach of the official's duty' could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an 'autonomous' definition not requiring proof of the law of the particular official's country.
4. It is an offence within the meaning of Paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. `Other improper advantage' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.
6. The conduct described in Paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.
7. It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.
8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.
9. Small `facilitation' payments do not constitute payments made `to obtain or retain business or other improper advantage' within the meaning of Paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.
10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offenses described in Article 1, Paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offenses covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re Paragraph 2:

11. The offenses set out in Paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorization, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re Paragraph 4:

12. `Public function' includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A 'public agency' is an entity constituted under public law to carry out specific tasks in the public interest.
14. A 'public enterprise' is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.
15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.
16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.
17. 'Public international organisation' includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.
18. 'Foreign country' is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.
19. One case of bribery which has been contemplated under the definition in Paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office, though acting outside his competence, to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re Paragraph 3:

21. The `proceeds' of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.
22. The term `confiscation' includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This Paragraph is without prejudice to rights of victims.
23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re Paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re Paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re Paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offenses, the reference to `principles' includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.

Article 5 is complemented by Paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, '1997 OECD Recommendation'), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, 'bribery of its own public official' is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This Paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offenses referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through Paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re Paragraph 1:

31. Within the framework of Paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re Paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offenses described in this Convention.

Article 10. Extradition

Re Paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:
 - i) Receipt of notifications and other information submitted to it by the (participating) countries;
 - ii) Regular reviews of steps taken by (participating) countries to implement the Recommendation and to make proposals, as appropriate, to assist (participating) countries in its implementation; these reviews will be based on the following complementary systems:
 - A system of self evaluation, where (participating) countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

- A system of mutual evaluation, where each (participating) country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the (participating) country in implementing the Recommendation.
- iii) Examination of specific issues relating to bribery in international business transactions;
 - ...
 - v) Provision of regular information to the public on its work and activities and on implementation of the Recommendation.
35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.
36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.