

Bill for the reform of a number of penal provisions on official criminal offenses in the Criminal Code and amendment of some provisions of the Criminal Code, Article 51a of the Extradition Act and Articles 67 and 67a of the Code of Criminal Procedure, in connection with the ratification and implementation of a number of treaties on the control of fraud and corruption (corruption law reform)

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 it is desirable and necessary to reform a number of penal provisions on official criminal offenses in the Criminal Code and that it is necessary to amend some provisions of the Criminal Code, Article 51a of the Extradition Act and Articles 67 and 67a of the Code of Criminal Procedure, in connection with the ratification and implementation of a number of treaties on the control of fraud and corruption;

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 I

The Criminal Code shall be amended as follows:

A

In Article 4, the full stop at the end of Clause 9 shall be replaced by a semi-colon and the following clauses shall be added:

`10° The offenses described in Articles 177 and 177a, in as far as the offence is committed against a Dutch national and is a criminal offence pursuant to the law of the country where it is committed;

11° The offenses described in Articles 225, 227b and 323a, in as far as they are committed by a person in the public service of an international law organisation established in the Netherlands and are criminal offenses pursuant to the law of the country where they are committed.'

B

Article 6 shall read as follows:

`Dutch criminal law shall apply to:

1° Dutch officials who commit one of the crimes described in Title XXVIII of Book Two outside the Netherlands;

- 2° Persons in the public service of an international law organisation established in the Netherlands who commit the offenses described in Articles 362 to 364a outside the Netherlands.'

C

In Article 84, Clause 1, the phrase 'All persons elected in elections called pursuant to statutory requirements' shall be replaced by 'members of general representative bodies'.

D

Article 177 shall be replaced by:

Article 177

1. The following offenders shall be penalised by imprisonment of up to four years or a Category five fine:
 - 1° Persons who make or offer a promise or gift, or provide or offer a service to an official for him to act or refrain from acting in the exercise of his function, in breach of his official duties;
 - 2° Persons who make or offer a promise or gift, or provide or offer a service to an official as a result, or on the basis of that official's acts or omissions in his present or past function, in breach of his official duties;
2. Withdrawal of the rights referred to in Article 28, Clauses 1(1°), 1(2°) and 1(4°) may be ordered.

Article 177a

1. The following offenders shall be penalised by imprisonment of up to two years or a Category four fine:
 - 1° Persons who make or offer a promise or gift, or provide or offer a service to an official for him to act or refrain from acting in the exercise of his function, but not in breach of his official duties;
 - 2° Persons who make or offer a promise or gift, or provide or offer a service to an official as a result, or on the basis of that official's acts or omissions in his present or past function, but not in breach of his official duties;
2. Withdrawal of the rights referred to in Article 28, Clauses 1(1°), 1(2°) and 1(4°) may be ordered.'

E

Article 178 shall be amended as follows:

1. The following phrase shall be included in Clause 1, after the words: 'make or offer a promise or gift': 'or provide or offer a service'.
2. In Clause 1, the word '**' shall be inserted after the word 'influence'.

3. In Clause 2, the words `or who is provided with or offered that service' shall be inserted after the words `is made'.

F

After Article 178, a new Article shall be inserted, reading as follows:

`Article 178a

1. For the purposes of Articles 177 and 177a, persons in the public service of a foreign state or an international law organisation shall be deemed to be equivalent to officials.
2. For the purposes of Article 177, Clause 1(2°) and 177a, Clause 1(2°), former officials shall be deemed to be equivalent to officials.
3. The term `judge', as defined in Article 178, is deemed to include a judge of a foreign state or an international law organisation.'

G

A new Article shall be inserted after Article 223, reading as follows:

`Article 323a

A person who deliberately and unlawfully misappropriates a subsidy issues for a specific purpose by or on behalf of the European Communities for purposes other than that for which it was issued, shall be penalised by imprisonment of up to three years or a Category 5 fine.'

H

Articles 362 to 364 shall be replaced by:

Article 362

A sentence of up to two years imprisonment or a Category 5 fine shall be imposed on an official who:

- 1° Accepts a gift, promise or service, if he knows or can reasonably be expected to assume that these were made, provided or offered to him in order for him to act or refrain from acting in the exercise of his function, but not in breach of his official duties.
- 2° Accepts a gift, promise or service, if he knows or can reasonably be expected to assume that these were made, provided or offered to him as a result of, or on the basis of his acts or omissions in his current or past function, which were not in breach of his official duties.
- 3° Requests a gift, promise or service in order for him to act or refrain from acting in the exercise of his function, but not in breach of his official duties.

- 4° Requests a gift, promise or service as a result of, or on the basis of his acts or omissions in his current or past function, which were not in breach of his official duties.

Article 363

A sentence of up to four years imprisonment or a Category 5 fine shall be imposed on an official who:

- 1° Accepts a gift, promise or service, if he knows or can reasonably be expected to assume that these were made, provided or offered to him in order for him to act or refrain from acting in the exercise of his function, in breach of his official duties.
- 2° Accepts a gift, promise or service, if he knows or can reasonably be expected to assume that these were made, provided or offered to him as a result of, or on the basis of his acts or omissions in his current or past function, in breach of his official duties.
- 3° Requests a gift, promise or service in order for him to act or refrain from acting in the exercise of his function, in breach of his official duties.
- 4° Requests a gift, promise or service as a result of, or on the basis of his acts or omissions in his current or past function, in breach of his official duties.

Article 364

- 1° A judge who accepts a gift, promise or service, if he knows or can reasonably be expected to assume that these were made, provided or offered to him in order to influence his decision in a case subjected to his judgement, shall be penalised by a prison sentence of up to nine years or a Category 5 fine.
- 2° A judge who requests a gift, promise or service in order to influence his decision in a case subjected to his judgement, shall be penalised by a prison sentence of up to nine years or a Category 5 fine.
- 3° A judge who accepts a gift, promise or service, if he knows or can reasonably be expected to assume that these were made, provided or offered to him in order to obtain a conviction in criminal proceedings, shall be penalised by a prison sentence of up to twelve years or a Category 5 fine.
- 4° A judge who requests a gift, promise or service in order to persuade him to obtain a conviction in criminal proceedings shall be penalised by a prison sentence of up to twelve years or a Category 5 fine.

Article 364a

1. For the purposes of Articles 362 and 363, persons in the public service of a foreign state or an international law organisation shall be deemed to be equivalent to officials.

2. For the purposes of Article 362, Clauses 2° and 4°, and Article 363, Clauses 2° and 4°, former officials shall be deemed to be equivalent to officials.
3. The term `judge', as referred to in Article 364, is deemed to include a judge of a foreign state or an international law organisation.

I

Article 380 shall be amended to read as follows:

Article 380

1. Withdrawal of the rights referred to in Article 28, Clause 1(3°), may be ordered in the event of conviction of one of the offenses described in Articles 355, 357 and 358.
2. Withdrawal of the rights referred to in Article 28, Clause 1(3°), may be ordered in the event of conviction of one of the offenses described in Articles 362 and 363 if the convicted person is a Minister, State Secretary, Queen's Commissioner, Member of a Provincial Executive, Mayor or Alderman or member of a general representative body.
3. Withdrawal of the rights referred to in Article 28, Clause 1(4°), may be ordered in the event of conviction of one of the offenses described in Articles 359, 362 to 364, 366, 373, final Clause and 379, Clause 1.

ARTICLE II

The Extradition Act shall be amended as follows:

The full stop at the end of Article 51a, Clause 2, shall be replaced by a semi-colon and the following section shall be added:

- The offenses that are criminalised pursuant to Articles 177 and 177a of the Criminal Code, in as far as they are covered by the definition contained in Article 1(1) and 1(2) of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Book of Treaties 1998, 54).

ARTICLE III

The Code of Criminal Procedure shall be amended as follows:

1. The figure `323a' shall be inserted in Article 67, Clause 1b, after the figure `321'.
2. The figure `323a' shall be inserted in Article 67a, Clause 2(3°), after the figure `322'.

ARTICLE IV

This Act shall take effect as of a date to be determined by Royal Decree.

Do hereby charge and order that this shall be published in the State Gazette and that all Ministries, authorities, boards and officials concerned shall ensure its faithful implementation.

As given

The Minister of Justice

Bill for the reform of a number of penal provisions on official criminal offenses in the Criminal Code and amendment of some provisions of the Criminal Code, Article 51a of the Extradition Act and Articles 67 and 67a of the Code of Criminal Procedure, in connection with the ratification and implementation of a number of treaties on the control of fraud and corruption (corruption law reform)

NOTES

1. GENERAL SECTION

1.1 Introduction

If a democratic society is to function well, it is important that citizens have confidence in public administration. This confidence is damaged if government employees or public officials conduct themselves reprehensively. It is precisely from these persons that a high standard of loyalty and commitment to public affairs is expected. Effective action against the existence of weaknesses in public administration must therefore be possible, at both the national and international levels.

Since the early 1990s, the government has pursued an active integrity policy. The 'Public Sector Integrity' paper of 25 October 1993 (Second Chamber Documents, 1993/94, 23 400 VII, No. 11) and the subsequent progress reports present a good picture of this. The policy is based on three means to promote integrity. Firstly, there is the personal integrity of officials, administrators and politicians. Secondly, there is the integrity within an organisation, which relates to internal processes and procedures, and finally, integrity in the relations between public administration and third parties forms a third method.

This Bill focuses on control of the personal integrity of officials and their relations with third parties. It aims to tighten and expand the rules in order to allow effective criminal proceedings against those who damage confidence in public administration, where necessary. These may be government representatives who overstep the limits of integrity for reasons of personal gain, but may also be persons outside government, who incite such reprehensible conduct and therefore require correction themselves.

There are two other, more concrete factual underlying reasons for the preparation of this Bill. Firstly, in practice, there has proved to be a need for broader criminal law instruments to address bribery cases in recent years. Particularly in the Den Bosch area of jurisdiction, where a number of sensational corruption cases have arisen in the fairly recent past, it has become clear that the current legal instruments fall short in some respects. On the basis of the experience gained in these cases, the Department of Public Prosecutions drew up a paper containing recommendations for legal reforms in relation to corruption. This paper is one source for the amendments included in this Bill. This is discussed in more detail in Section 1.2 of these Notes.

Secondly, this Bill results from a number of international conventions signed with a view of improved control of corruption and fraud (see also Second Chamber Official Reports, 1997/98, Pgs. 1047-1048). These are 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 (First) Protocol to this Convention, signed on 27 September 1996 (Book of Treaties 1996, 330) and 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). The ratification of these international instruments has consequences for Dutch law: in order to comply with the various commitments of these conventions, the Criminal Code and the Extradition Act must be amended. This Bill serves to facilitate these amendments, which are discussed in more detail in Section 1.3 of these Notes. The ratification of the conventions provides for a separate Ratification Bill which is submitted together with this Bill.

A draft version of this Bill was presented to the Netherlands Justice Association, the Board of Procurators General and the Netherlands Bar Association for advice. The recommendations of these organisations are incorporated in the Bill. Sections of the Bill or these Notes that are still at variance with the recommendations are discussed in more detail below.

1.2 Legal reforms relating to bribery from a national point of view

1.2.1 General

As mentioned in the Introduction to these Notes, this Bill contains a number of proposed amendments of Titles VIII and XXVIII of Book 2 of the Criminal Code, resulting from requirements in national enforcement practice. These amendments are largely based on an internal advisory report from the Board of Procurators General, of 3 March 1998. It appears that existing criminal provisions on bribery are not workable in all respects and that in some cases, cannot be applied in situations that are generally regarded as reprehensible and deserving of punishment. For these reasons, the recommendations of the Department of Public Prosecutions raise questions about parts of the existing criminal provisions relating to bribery. Critical reappraisal of some elements of the definition of offenses is called for, as well as for the level of criminality that currently applies for some bribery offenses. These aspects will be discussed in more detail below, together with some proposals for legal amendments. For the sake of completeness, this is preceded by a brief description of the significance of the existing Articles 177, 362 and 363 of the Criminal Code.

1.2.2 Existing criminal provisions on bribery

The first sentence and Clause 1° of Article 177 of the Criminal Code imposes criminal penalties on all persons who make or offer a promise or gift to an official for him to act or refrain from acting in the exercise of his function, in breach of his official duties. This provision concerns active bribery, directed at an official's future action. The second variant of active corruption concerns the official's past conduct. Penalisation of this offence is laid down in the first sentence and Clause 2° of Article 177 of the Criminal Code, which imposes criminal penalties on all persons who make or offer a promise or gift to an official as a result, or on the basis of that official's acts or omissions in his present or past function, in breach of his official duties.

Articles 362 and 363 of the Criminal Code make forms of passive bribery a criminal offence. Article 362 of the Criminal Code imposes a sentence of up to three months imprisonment on an official who accepts a gift or promise, knowing that these are made or offered to him in order for him to act or refrain from acting in the exercise of his function, but not in breach of his official duties. An official who accepts a gift or promise, if he knows that these are made or offered to him in order for him to act or refrain from acting in the exercise of his function in breach of his official duties faces a heavier sentence.

The Criminal Code does not define the acceptance of gifts or promises after the event, as a result, or on the basis of an official's acts or omissions in his present or past function, but not in breach of his official duties, as a form of passive bribery which is a criminal offence. This conduct is a criminal offence if the official accepts the gift or promise, knowing that these are made as a result, or on the basis of his acts or omissions in his function and in breach of his official duties. This is laid down in the first sentence and Clause 2° of Article 363 of the Criminal Code. Finally, reference can be made here to Articles 178 and 364 of the Criminal Code. These Articles relate to specific forms of bribery involving judges.

1.2.3 Some elements of criminal offenses and amendment proposals

'gift or promise'

In the jurisprudence and the literature, the making or acceptance of a gift or promise is deemed to refer to the actual acceptance of something that has a value for the recipient (Supreme Court, 25 April 1916, Netherlands Jurisprudence 1916, 551). The making or acceptance of a promise refers to something that will be performed in favour of the official, directly or through an intermediary, in the future (Supreme Court, 21 October 1915, Netherlands Jurisprudence 1916, 1128). The advantage need not consist of money, goods or performances alone. It may also be of a non-material nature, such as the provision of a decoration or the receipt of sexual favours (Supreme Court, 31 May 1994, Netherlands Jurisprudence 1994, 673).

Two issues play a role in these elements of the criminal offence. Firstly, practice has shown that these definition cannot, or at least, not automatically, be deemed to include the offer or acceptance of services. As such, participation in 'freebie trips' providing a holiday bungalow for a 'soft price' or offering a Supervisory Board position for proven services prove to present difficulties in qualification as gifts or promises, although these forms of preferential treatment are equally reprehensible in the same circumstances. For this reason, the Bill proposes to add the term 'service' to the 'gift or promise' element of the criminal offence, to ensure penalisation of the provision, offer or acceptance of these advantages with the intention or knowledge referred to in the relevant Articles.

The second issue concerns the question of what is an is not an admissible gift or promise. There have been calls for greater transparency on this issue, for example by including a distinguishing criterion in the law between criminal gifts and the usual social 'bagatelle' gifts which are generally accepted as not being inadmissible. It is doubtful whether this would actually create greater transparency: such a criterium would have to be objective, for example by linking it with a financial (counter)value or with the use of words such as 'a gift or promise of significance'. The problems that can then arise are either of a different order (in relation to inflation, changes in standards) or of the same order (a 'bagatelle' gift versus a gift of significance). For these reasons, a decision was made not to propose any further definition of a gift or promise on the basis of which (in)admissibility could be deduced. In the Notes to the draft Bill, I notes that the Department of Public Prosecutions could, if necessary, take self-steering action by announcing guidelines on this issue. I still take the same view, despite the preference expressed by the Board of Procurators General for a further definition at the statutory level. In my view, guidelines in this field are to be preferred, because they are simpler to adjust to changing social realities. Furthermore, with regard to the detection and prosecution of corruption in the Netherlands itself, one could take the view that there is no need to draw up guidelines. After all, there are no guidelines in this area at present, and the right emphases are placed via prudent prosecution decisions by the public prosecutors.

Attention can also be drawn to the following at this point. In its recommendations on the Bill, the Netherlands Bar Association raised the point that the formulation of the proposed Articles 363 to 364 could give rise to debate on whether a favour is granted in a private capacity, for example because an official is the chairman of a pigeon racing society in his free time. According to the Bar, the nature of the crime justifies a relevant relationship with the status of the official or his official performance. In order to remove this uncertainty, the Bar recommends that the word 'official' (or judge) is moved in Articles 362 to 364, in order to create a closer relationship between the official's capacity and preferential treatment.

I have not adopted this recommendation, because in practice - after all, the sentence structure of the existing criminal provisions is exactly the same - there has been no evidence of misunderstanding. Perhaps superfluously, it should be noted that whether an official accepts a gift or promise in an official capacity is not relevant for the purposes of his criminal liability (see Supreme Court 10 April 1893, Ref. W. 6333).

`official'

The term *`official'* is broadly interpreted in the jurisprudence. It refers to every person who is appointed to a public function by public authorities, in order to perform part of the duties of the State or its bodies (see Supreme Court 30 January 1994, Ref. W 9149), Supreme Court 1 January 1992, NJ 1993, 354 and Supreme Court 4 February 1995, NJ 1995, 620). Article 84 of the Criminal Code states who is deemed to be covered by the term *`official'*. This includes persons who are elected as Members of Parliament or of municipal councils.

Despite the fact that the term *`official'* is broadly interpreted in criminal law, there prove to be situations relating to this element of an offence that obstruct criminal prosecutions. This is the case if an official changes jobs after performing the required acts, and collects the rewards after this change of job. In this case, it cannot be claimed automatically that he accepted a gift or promise *`as an official'*, i.e. in the position in which he performed the act, for which he was *`paid'* later. Likewise, a former official who has now retired can evade prosecution if he receives the rewards only after his retirement or after losing his official status. After all, at the time when he accepts the gift or promise, he is no longer an official.

Similar problems arise in the case of future officials who can be bribed in advance, without being liable to criminal prosecution, providing that they accept the rewards before they enter into service as an official. However, there is also a difference, because these people are not in a position, when they accept a promise or gift, to violate in an official capacity the legal benefits of the bribery provisions to be protected, namely the preservation of confidence in objective governance. It is still uncertain that they will be in that position, while in view of the structure of the existing provisions, bribery becomes a criminal offence at the moment that a promise or gift is accepted. However, it is not entirely inconceivable that gifts will be made during election campaigns, with a view of influencing the conduct of candidates for a specific office. Nevertheless, I do not think the time is ripe for such an expansion of criminality at present. I prefer to await the debate on the desirability of the regulation of election campaigns.

Criminality of the latter kind - the bribery of a future official - can only involve a limited relationship to the nature of the criminal offence that punishes reprehensible conduct by a serving official.

This also applies to some extent for the criminalisation of the conduct of a former official, but one can argue against this that such an official can justifiably be accused of accepting rewards for official acts after the event, when he knew or should reasonably have assumed that no payment is due or justified for the relevant official acts on the basis of his former official status.

As a result of the above considerations, this Bill includes amendments that serve to make the acceptance of gifts or promises for past official acts by former officials, and officials who have since changed jobs, a criminal offence. Therefore, no criminal provision that penalises persons who have never been entrusted with a public official position is proposed here.

However, this is at variance with the recommendations of the Board of Procurators General on this Bill. With reference to its earlier paper on criminal provisions concerning bribery, this Board once again voices its objections to the limited scope of Article 328t of the Criminal Code (which relates to non-official bribery) and to the lack of a provision that makes the bribery of future officials a criminal offence.

With regard to the criminality of private corruption, I first want to await the outcome of the current talks on this issue within the European Union (EU), the Organisation for Economic Cooperation and Development (OECD) and the Council of Europe before considering support for a legal amendment in this area. Within the fora mentioned, the value and need for treaty provisions that commit Parties to make private corruption a criminal offence (with a broader scope than the current Article 328t of the Criminal Code) has been under discussion for some time. Any amendment of Article 328t resulting from these international developments can also be used to consider whether the bribery of future officials should not also be covered by that provision. Since this involves persons who are not yet officials, seeking a link with the criminality of non-official corruption is a more obvious choice than broadening the provisions focusing on the conduct of persons who know, or should reasonably have assumed on the basis of their (former) official status that accepting (personal) benefits in connection with their official service is not acceptable.

`if he knows that these were made in order to persuade him'

A conviction on the grounds of Articles 362 and 363 of the Criminal Code will require proof of the official's knowledge of the fact that the gift or promise were intended for the performance of certain acts (in the case of Article 363 of the Criminal Code, in breach of his official duties). Because the briber will have little interest in admitting bribery, this creates a fairly heavy burden of proof.

Furthermore, prior to a number of recent rulings (see, among others, Den Bosch Court of Appeal, 19 August 1994, Roll No. 22.002512.93, confirmed by the Supreme Court ruling of 24 October 1995, and Den Bosch Court of Appeal, 13 December 1997, Roll No. 20.002589.96) it was assumed that a demonstrable (causal) relationship should exist between the gift or promise and the official's specific act or omission; the finding of proof could not be made if the gift was made for official acts that could not be directly proven. Since the above rulings, it has become clear that this relationship can be both direct or indirect.

This easing of the interpretation does not alter the fact that an official must be aware of the relationship between the gift or promise and the conduct that is required of him, or for which he is rewarded. Until recently, it was often assumed that a reasonable degree of certainty regarding such knowledge was required: provisional intent was not considered sufficient for this purpose. However, jurisprudence is also changing on this point. The rulings of the Den Bosch Court of Appeal mentioned above show that a conviction can also follow if the official should have recognised the provision of a benefit as a gift and should have understood that it was made in order for him to benefit the giver for reasons other than business ones, in breach of his official duty.

Further to this development, Articles 362 and 363 are amended in this Bill in the sense that the acceptance of gifts, promises or services is also a criminal offence if the official should reasonably have assumed that they were made or provided to him in connection with the performance of certain official acts. This now lays down in law that it is enough to prove that the official should have understood that the advantages were provided to him with a specific purpose. I consider it desirable that criminal prosecution should also be possible in cases of culpable or more probably, feigned naivety on the official's part, and therefore expect that these amendments, too, will enable more effective action against such forms of reprehensible conduct.

The Netherlands Justice Association raised an objection based more on legal principles in its recommendations on this Bill: the fact that the proposed Articles 362, 363 and 364 mention the intention and culpability variants in one breath. One can concede to the Netherlands Justice Association that the regime of the Criminal Code is based on alternatives in the subjective elements of intent and culpability. This distinction was also expressed in the original draft of the Code in the various types of penalties imposed for criminal offenses: imprisonment for offenses involving malicious intent and detention for those involving culpability. Because of problems in the definitions of intent and culpability, this distinction between penalties was not preserved in its entirety in the final Criminal Code. After all, offenses involving culpability can be penalised with imprisonment as well as detention.

In modern opinion (e.g. W. Nieboer in his inaugural address 'Knowingly and Willingly'), the distinction between intent and culpability is placed in perspective and the emphasis is laid on the scale on which these subjective elements lie. This is partly due to the problem of proof which can sometimes arise in relation to the subjective elements. In view of the nature of bribery offenses, I have decided to follow this opinion in this case. The nature of these crimes, in which those involved work in league with each other, means that it will not always be possible to prove definitively whether intent or culpability is involved, and this distinction is not necessary in terms of the reprehensibility of the conduct. If it emerges in court that the alleged conduct involves the culpability variant of the offence, the court can take this into consideration in its overall consideration of the factors that are important for sentencing, in terms of the type and weight of the sentence.

The Netherlands Justice Association also noted that the subjective elements (intent and culpability) are not included in the provisions of Clauses 3 and 4 of Articles 362 and 363. However, in my view the aim is sufficiently well-expressed in the element 'requests', as requesting a gift, promise or service is hardly conceivable without intent on the part of the person making the request. The inclusion of an extra definition of intent is therefore unnecessary.

'without acting in breach of his official duties'

As explained above, Article 362 of the Criminal Code imposes penalties on an official who accepts a gift or promise, knowing that these are made in order to persuade him to act or refrain from acting in the exercise of his function, without acting in breach of his official duties. Under the current Article 362 of the Criminal Code, an official cannot be penalised for accepting gifts or promises as a result of, or on the basis of former acts or omissions. The legislators of 1881 defined the latter conduct as the acceptance of tips, which is difficult to control under criminal law.

In my opinion, the view that this form of preferential treatment requires no punishment under criminal law can no longer be justified today. It leads to cases in which criminal law cannot be applied in situations that, generally speaking, should be regarded as criminal. A promise preceding a performance is often very difficult to prove; if payment takes place after the performance, then this can usually be proven, but without enough evidence concerning the promise made, the official will remain unpunished under present law, which is regarded as highly unsatisfactory. It should also be borne in mind that an official who is rewarded for such actions can be placed in a dependent and vulnerable position. This increases the risk of further deterioration and further incidences of the same offence.

Taking the above into consideration, I propose to amend Article 362 in this Bill, in the sense that accepting gifts, promises or services will also be made a criminal offence when such acceptance follows official acts or omissions that are not in breach of official duties. Because there is equally no demonstrable justification for allowing those who intentionally give an official an opportunity to accept advantages to remain unpunished, this Bill also includes a new Article 177a of the Criminal Code. The proposal for this Article is also based on the implementation of an international commitment (see Section 1.3.2b below). Just as Article 177 of the Criminal Code now serves as the active counterpart of Article 363, Article 177a must serve the same purpose as the counterpart of Article 362.

1.2.4 Penalties and additional penalties

The maximum penalty pursuant to Article 177 of the Criminal Code is now two years imprisonment or a Category 4 fine. An official who has proved to be receptive to the conduct of a person who violates Article 177 of the Criminal Code can be sentenced to up to four years imprisonment or a Category 5 fine (Article 363 of the Criminal Code). This Bill eliminates this fairly sharp distinction between the main penalties; it is proposed that violation of Article 177 should also carry a penalty of up to four years imprisonment or a Category 5 fine, as there are not enough demonstrable grounds in this day and age for the existing differences between the penalties for active and passive bribery.

Nevertheless, it remains desirable for the penalty for passive bribery to reflect the fact that this conduct is seen as more serious in terms of criminal law than the conduct of the active briber. Cases involving abuse of the power attached to the position of a public official which serves an important exemplary purpose, are particularly repugnant. These include positions of government Minister, State Secretary, Queen's Commissioner, Member of a Provincial Executive, Mayor, Alderman or member of a general representative body. The special public offices that such persons hold justify appropriate penalties if they are convicted of bribery offenses. For this reason, the Bill defines offenses involving a relationship between conduct that harms administrative integrity and the exemplary function in which this takes place as criminal offenses, for which an additional sentence of disenfranchisement may be imposed on those convicted of them (the officials mentioned above). Article 380 of the Criminal Code is amended to this effect.

The penalty for violation of Article 362 of the Criminal Code is also amended. The reason for this amendment is the existing discrepancy between the penalty of Article 362 and Article 363 of the Criminal Code (three months imprisonment versus four years). From both a preventive and a repressive point of view, it is desirable that violation of Article 362 of the Criminal Code should also be punishable by a heavier confinement penalty. This Bill therefore proposes to increase the maximum penalty to two years imprisonment or a Category 5 fine.

Finally, with regard to the proposals for the maximum penalties in Article 177a, it is noted that these are also based on the principle that they should be in proportion to the penalties that can be imposed for violation of the related Articles 177, 362, 363 and 364.

1.3 Legal amendments on the grounds of international commitments

1.3.1 General

The legal amendments required in relation to the approval and ratification of the conventions mentioned in Section 1.1 are also discussed in the Notes to the Ratification Bill, particularly in the Notes to individual Articles and in Section 6. For the sake of brevity, we refer to these sections here.

Among other things the treaty commitments mean that Dutch criminal law must be applicable to those who bribe a Dutch national in another country or to officials of an international law organisation established in the Netherlands who commit bribery in another country. Ratification of the conventions also requires expansion of the application of the definitions of the offenses of active and passive bribery. These criminal law provisions must also extend to the conduct of persons in the public service of a foreign state or an international law organisation. Provision must also be made to make it a criminal offence to bribe officials to take action or refrain from action in the exercise of their function which is not in breach of their official duties.

A full list of the required amendments is presented in summarised form below. Further details of the exact content of the proposals is given in the Notes to Individual Articles, directly or indirectly through reference to the relevant passages in the Notes to the Ratification Bill. The following should also be noted here. The Notes to the Ratification Bill refer to the conventions to be ratified by abbreviated names. 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) is referred to as the 'Fraud Convention', the First Protocol to this Convention, signed on 27 September 1996 (Book of Treaties 1996, 330) is referred to as the 'Corruption Protocol' and 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) is referred to as the OECD Corruption Convention. These abbreviated names will also be used in the remainder of these Notes.

1.3.2 The international commitments

- Article 6 of the Corruption Protocol requires a number of amendments of Title I of the Criminal Code, Book One. These amendments are included in Article I, Sections A and B of the Bill.

- As a result of the commitments pursuant to 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 362, that also (like the amended Articles 177 and 178 of the Criminal Code) should cover bribery of foreign public officials and international officials. Sections D, E and F of Article I of the Bill implement these commitments.
- 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. Section G of Article I provides for this.
- Articles 362 to 364 in Title XXVIII of the Criminal Code must be amended, partly to extend their scope for foreign public officials and international officials (as required by the Corruption Protocol). These amendments are incorporated in the proposals included in Section H of Article I.
- Article 10(2) of the OECD Corruption Convention requires an addition to the Extradition Act. This is necessary in order to show that the powers extend to granting extradition requests from Parties to the Convention with which no extradition treaty is in force. This necessary amendment of the Extradition Act is realised with Article II of this Bill.

To avoid duplication, reference is made here to the Notes to the Parliamentary Bill on ratification of a number of treaties on the control of fraud and corruption for further background information on the realisation of the conventions.

1.4 Personnel and financial consequences of the Bill

The proposed amendments of the Criminal Code give rise to the expectation that the workload of the district courts, courts of appeal and the Department of Public Prosecutions will increase somewhat, mainly due to the expansion of Dutch jurisdiction. The Board of Procurators General called for attention to this point in its recommendations on this Bill. In the near future, talks will start on how specialised detection and prosecution capacity can be freed for actual and effective enforcement of the proposed legislation. The question of whether and to what extent compensation must be provided for any, more closely calculated increase in workload will also be considered in these talks. The financial consequences of such compensation will be absorbed within the existing estimates of the Justice Ministry budget.

2. NOTES TO INDIVIDUAL ARTICLES

Article I, Sections A and B (Articles 4 and 6 of the Criminal Code)

These amendments follow from Article 6 of the Corruption Protocol. The background and effects of this treaty provisions and its consequences for Dutch criminal law are discussed in detail in the Notes to individual Articles of the Bill on ratification of a number of treaties on the control of fraud and corruption (Section 3.3, Notes to Article 6). We confine ourselves here to reference to this passage, apart from in respect of the following.

Article 6(1d) of the Corruption Protocol requires expansion of the possibility to exercise jurisdiction in respect of the offenses, as described in that Paragraph, which are committed outside the Netherlands by officials of the European Communities who are established in the Netherlands. The expansion of jurisdiction, confined solely to officials of the European Communities, is not incorporated in this Bill. It is undesirable to create additional judicial provisions solely for this category of international officials employed in the Netherlands. After all, there is no justification for the legal inequality which would then result in respect of the other international officials employed in the Netherlands. The amendments of Articles 4 and 6 of the Criminal Code therefore relate to criminal conduct in other countries by all persons employed in the public service of an international law organisation established in the Netherlands. The description 'person in the public service of an international law organisation established in the Netherlands' is taken from Article 185a of the Criminal Code.

Article I, Section C (Article 84 of the Criminal Code)

By an Act of 27 March 1986, Statute Book 139, Article 28, Clause 1(3°) of the Criminal Code was amended in the sense that the definition of the group of persons it referred to was no longer determined by the term 'elections called pursuant to statutory requirements' but by the term 'members of general representative bodies', which complies more closely with the Constitution. According to the Notes to this Act, the reason for the amendment was the question raised in the literature of which elections were covered by the former definition (Second Chamber Documents, 1984/85, 19 973, Nos. 2-5, Pg. 25). This confusion exists in respect of Article 84, Clause 1 to this day, which is why, as a purely technical amendment, it is proposed that the phrase 'all persons elected in elections called pursuant to statutory requirements' included in the Article be replaced by 'members of general representative bodies'.

Article I, Section D (Article 177 of the Criminal Code)

Article 177 of the Criminal Code is amended on three important points. Firstly, the penalty is increased from a maximum of two years imprisonment to a maximum of four years imprisonment. The background for the increase in the penalty has already been discussed in Section 1.2.4 in the General section of these Notes. It can be added that, as a result of this amendment, in the event of a suspected offence, pre-trial detention and the other associated means of enforcement can be applied. This will provide detection officers with more powers to conduct investigations on the basis of indications of bribery practices.

The second amendment involves the insertion of the element 'the provision or offer of a service' in the parts of Clause 1 of Article 177. The reasons for this addition have already been explained in Section 1.2.3.

Obviously, the insertion of this element is not proposed for Article 177 of the Criminal Code alone: all other criminal law provisions concerning bribery will be similarly amended.

Thirdly, Article 177 is amended in order to bring preferential treatment of former officials or officials who have since changed their jobs within its scope (see Section 1.2.3). The application of Article 177 to officials who have changed jobs can be drawn from the text of the description of the offence itself; the person concerned is still an official, and it is in that capacity, therefore, that he is provided with or promised benefits of any kind as a result of or on the basis of his acts or omissions in his previous service (job), in breach of his official duty. The application of Article 177 to bribery of a formal official becomes clear after reading the new Article 178a, Clause 2 of the Criminal Code. This shows that the term 'official' in Article 177, Clause 1(2°) also covers former officials.

Further to a comment in the advisory report of the Netherlands Justice Association, it should be emphasised here that benefits are also promised or provided to an official when this takes place indirectly, for example through an intermediary. The term 'make or offer a gift or promise or provide a service' should be broadly interpreted: it is conceivable, for example, that a mandatory takes receipt of the payment or that the benefit is deposited into a specific account which is accessible to the official in question, in the sense that he can dispose of the balance.

Article I, Section D (Article 177a of the Criminal Code)

The inclusion of this new Article implements the provisions of Article 1, Paragraphs 1 and 2 of the OECD Corruption Convention. Reference is made here to Section 1.3.2b of these Notes, and in particular, to the Notes to the Bill on ratification of a number of treaties on the control of fraud and corruption (Notes to Article 1 of the OECD Corruption Convention). The proposal for this Article is also related to requirements in national enforcement practice, including with regard to the application of Article 362 of the Criminal Code. This has already been discussed in Section 1.2.3 of these Notes.

The design and text of the new Article speak for themselves: Article 177a largely corresponds to Article 177, although it contains the element 'but not in breach of his official duties' in place of 'in breach of his official duties'. The penalty is matched to the (amended) maximum penalty that can be imposed for a conviction of violation of Article 362 of the Criminal Code, on the understanding that in the latter case, the additional penalty of Article 28, Clause 1(3°) of the Criminal Code can be imposed in some circumstances.

Article I, Section E (Article 178 of the Criminal Code)

In Article 178, too, the definition of benefits in Clauses 1 and 2 is expanded by the term 'service'.

For an explanation of these amendments, we refer to the comments on the amended Article 177 of the Criminal Code (Section D).

Article I, Section F (Article 178a of the Criminal Code)

The equivalence of persons in the public service of a foreign state or an international law organisation with officials within the meaning of Articles 177 and 177a, as proposed here, has already been discussed in Section 1.3.1 in the General section of these Notes. The provision serves to implement Articles 1, 3 and 4 of the Corruption Protocol and Article 1 of the OECD Corruption Convention. As explained in the Notes to Sections A and B, the term 'person in the public service of an international law organisation established in the Netherlands' is taken from Article 185a of the Criminal Code. An international law organisation refers to a form of partnership between countries, originating in international law, with common objectives and at least one body to fulfil the functions of the organisation (see also the Notes to Article 2 of the Corruption Protocol).

Clause 2 equates persons who have been officials with officials within the meaning of Article 177, Clause 1(2°) and 177a, Clause 1(2°) of the Criminal Code. This provision also makes preferential treatment, as provided for in the said Articles, a criminal offence if the beneficiary is no longer an official at the time when the benefits are accepted. See also Section 1.2.3 of the General section of these Notes, under the heading 'official', in this respect.

Clause 3 equates foreign judges and judges employed by international organisations (such as the International Court of Justice and the Court of Justice of the European Communities) with judges within the meaning of Article 178 of the Criminal Code. This equality provision is also included to implement the above Articles of the Corruption Protocol and the OECD Corruption Convention.

Article I, Section G (Article 323a of the Criminal Code)

Article 1 of the Fraud Convention requires the Member States to make some forms of fraudulent conduct defined in the Article criminal offenses. As explained in the Notes to the Bill on ratification of a number of treaties on the control of fraud and corruption (Notes to Article 1), only the provisions of Article 1(1a), third dash, call for amendment of Dutch criminal law. This concerns the penalisation of misappropriation of EC subsidies for purposes other than those for which they are issued. Because the conduct which is to be made a criminal offence has the closest affiliations with the crime of embezzlement, it is proposed that this provision be included in Title XXIV of Book Two of the Criminal Code.

For Dutch subsidies, the third tranche of the General Administrative Law Act came into force on 1 January 1998, with an administrative law enforcement regime.

In the creation of this Act, the view was taken that the appropriation of subsidies for purposes other than those agreed can be sanctioned satisfactorily under administrative law. However, it was noted that in some cases, there could be a need for the possibility of a response that went beyond the withdrawal or reduction of benefits unlawfully enjoyed from a subsidy. However, in view of the short period for which this section of the General Administrative Law Act has been in force, little can yet be said about the effectiveness of the existing provisions.

In view of the above and also the limited purport of the Article proposed here, the question of whether it is desirable to bring misappropriation of Dutch subsidies within the scope of the new Article 323a of the Criminal Code will be considered in the evaluation study of the third tranche of the General Administrative Law Act. For the time being, this provision is confined to criminal law protection of EC subsidies, as a compulsory implementation of a treaty provision.

In its advisory report on this Bill, the Netherlands Bar Association noted that the distinction between sanctions, particularly where provision is made for a confinement penalty, would be hard to justify by the status of the subsidy provider. In response to this, I refer yet again to the commitment under treaty law which underlies this criminality provision. Furthermore, prudent prosecution policy means that a plea for a confinement penalty is only reasonable if the facts and circumstances of the case indicate that very serious abuse of EC funds is involved. Similar fraud cases involving subsidies issued by the Dutch government will normally also be prosecuted under criminal law, for example through application of the fraud and deception Articles. After all, in practice, serious misappropriation of subsidies often not only involves the intentional misappropriation of funds alone, but also the intentional provision of inaccurate and incomplete information in applications for, or on receipt of the subsidy, or in controls on its application.

With regard to the constituent elements of Article 323a of the Criminal Code, the following is also noted. The term 'subsidy issued by or on behalf of the European Communities' is not intended to impose restrictions concerning the categories of financial contributions issued for the Union. This refers to every expenditure from the general budget of the European Communities or of the budgets managed by or on behalf of the European Communities (see also Article 1 of the Fraud Convention). The purpose which the subsidy serves must be adequately defined, however. As a rule, this will be shown by the written conditions, with which the recipient of the subsidy should be familiar. The editing of the Article ensured that in itself, application for a purpose other than that for which the subsidy is issued alone is not enough to warrant criminal prosecution. The party concerned must intentionally do so, without having the right to do so.

Finally, it is noted here that in determining the penalty, the position regarding penalties in Article 321 of the Criminal Code was taken into account: the penalty for this offence will be the same as for the offence of embezzlement, which means a maximum penalty of three years imprisonment or a Category 5 fine.

Article I, Section H (Article 362 of the Criminal Code)

The first amendment of Article 362 of the Criminal Code concerns the expansion of the definition of benefits. As in the other criminal law provisions on bribery, the term 'service' is included in the definition of the offence.

The second amendment results from Article 2 of the Corruption Protocol. The definition of the offence in this treaty Article not only requires that 'acceptance of benefits' be made a criminal offence, but also 'requesting benefits'. Although, strictly speaking, the Protocol does not require this amendment of Article 362 of the Criminal Code - the definition of the offence in Article 2 relates only to the acceptance of benefits in relation to official acts that are in breach of official duties - the amendment has nevertheless been made for reasons of consistency.

It should be noted that requesting benefits can already be a criminal offence at this moment. This will be the case for conduct that can be qualified as extortion (Article 366 of the Criminal Code), or incitement to active bribery. Nevertheless, it is desirable that this conduct be described separately in the criminal law provisions relating to passive bribery (see the proposed Clauses 3° and 4°), particularly to avoid potential complications in international cooperation in criminal cases.

The third amendment concerns the insertion of the phrase 'or can reasonably be expected to assume' after 'knows'. The reason for the proposal of this addition has already been discussed in the general section of these Notes. A reference to this explanation (Section 1.2.3, under the heading 'if he knows that these were made in order to persuade him') will therefore suffice here.

Article 362 of the Criminal Code is also expanded by a new second section that forms the counterpart to the new Article 177a, Clause 1(2°). The background to this section of the Article has already been discussed in the general section of these Notes (Section 1.2.3, under the heading 'without acting in breach of his official duties'). The General section of these Notes also reported the reasons for the proposal to increase the penalties imposed in Article 362 of the Criminal Code to a maximum sentence of two years imprisonment or a Category 5 fine. Reference is made here to Section 1.2.4.

Finally, it should also be noted here that the first sentence and Clauses 2° and 4° of Article 362 (together with the provisions of Article 364a, Clause 2 of the Criminal Code) can also apply if the benefits are accepted or requested by an official who has since changed jobs, or a former official. See the Notes to Article 177 of the Criminal Code in this respect.

Article I, Section H (Article 363 of the Criminal Code)

As in the provisions discussed above, a number of elements are added to Article 363 of the Criminal Code. The term 'service' is added to 'gift or promise' and as an alternative to 'accepting' benefits in relation to acts or omissions in the exercise of a function, in breach of official duties, 'requesting' such benefits is also made a criminal offence (Clauses 3° and 4°). Here, too, the criminality in the second and third Clauses not only covers the conduct of an official in service, but also that of an official who has changed jobs or a former official. Furthermore (as with the other passive bribery provisions), Article 364a of the Criminal Code makes Article 363 applicable to persons in the public service of a foreign state or of an international law organisation, taking account of the provisions of Title I, Book 1 of the Criminal Code. Finally, the phrase 'or can reasonably be expected to assume' is added to the text of Article 363 after 'knows'. This amendment, too, has already been discussed.

Article I, Section H (Article 364 of the Criminal Code)

In Article 364 of the Criminal Code, the definition of benefits is expanded by the term 'service' and the phrase 'or can reasonably be expected to assume' is added to the first Clause and is included in the new third Clause. Article 364 is also amended in the sense that requesting a benefit is made a criminal offence, in addition to accepting a benefit. This variant of an offence was not included in the preliminary draft of this Bill, but was incorporated on the advice of the Netherlands Justice Association.

The Association also called for an expansion of the third and fourth Clauses. It argued that these Clauses should relate not only to criminal cases, but to all court cases, because no support could be found for the restriction to criminal cases in the conventions that would lead to amendment of this Article. However, I take the view that the current proposals adequately implement the provisions of the conventions. After all, these require that allowing oneself to be bribed by a third party, in return for an act or omission in the exercise of an official function, be made a criminal offence. In themselves, the first and second Clauses make adequate provision for this. Because the law already contains a separate provision for even more serious cases, namely the acceptance of benefits made available to obtain convictions in criminal cases, I opted to add a new fourth Clause to this Article, which - as a variant of the new Clause 2 - relates to the criminality of requesting benefits in exchange for which convictions in criminal cases are facilitated.

Article I, Section H (Article 364a of the Criminal Code)

For an explanation of this Article, reference is made to the comments on the new Article 178a of the Criminal Code. The contents and effects of both provisions are similar, on the understanding that they are declared applicable to different Articles.

Article I, Section H (Article 364a of the Criminal Code)

This amendment has already been discussed in Section 1.2.4 in the General section of these Notes; it is based on the desire to provide for the possibility of imposing the additional penalties of Article 28, Clause 1(3°) of the Criminal Code (disenfranchisement) on certain officials if they commit crimes involving a relationship between the conduct that harms administrative integrity and the exemplary function in which this takes place.

In view of the principles for the Constitutional reforms of 1983, the Criminal Code now contains a limited number of offenses for which disenfranchisement can be imposed as an additional penalty. These are criminal offenses that constitute serious damage to the foundations of the structure of the Kingdom of the Netherlands. With regard to official offenses, disenfranchisement is now possible for the offenses referred to in Articles 355, 357 and 358 of the Criminal Code. This amendment expands the category of criminal offenses to include the offenses of Articles 362 and 363, in as far as these are committed by a government Minister, State Secretary, Queen's Commissioner, Member of a Provincial Executive, Mayor, Alderman or member of a general representative body (such as a Member of Parliament or Municipal Councillor).

In order to continue to do justice to the principles of the 1983 Constitutional reforms, this expansion is confined to cases of true corruption, in the form of acceptance of promises, gifts or services. This conduct has an impact on the entire society: after all, such benefits are offered with the aim of persuading the official to take certain actions or refrain from certain actions in the exercise of his function, in breach of his official duties or otherwise, or represents a reward for his actions or omissions in the exercise of his function. The other official crimes do not have that effect, nor are they characterised by receptiveness to outside influence. For this reason, these cases cannot be said to involve offenses that represent damage to the foundations of the structure of the Kingdom of the Netherlands.

It should also be noted here that this amendment was announced in the progress reports to Parliament on the integrity of public administration. On these occasions, the main emphasis lay on the fact that this addition creates more possibilities to expel members of general representative bodies if they are convicted of official offenses.

Article II (Article 51a of the Extradition Act)

Article 10 of the OECD Corruption Convention gives rise to the proposal of this addition to Article 51a of the Extradition Act. See firstly Section 5.3 of the Notes to the Bill on ratification of a number of treaties on the control of fraud and corruption (Notes to Article 10 of the OECD Corruption Convention).

This proposal follows the pattern of earlier legislation serving (partly) to implement treaties similar to the OECD Corruption Convention.

As is known, the Netherlands is one of the countries that can only grant extradition requests on the basis of a treaty (see Article 2 of the Extradition Act). Article 10(2) of the OECD Convention allows such states the opportunity to allow the Convention to serve as the basis for extradition. This takes place explicitly through the proposed addition to Article 51a of the Extradition Act.

Article III (Articles 67 and 67a of the Code of Criminal Procedure)

The Notes to Article I, Section G have already explained that the proposed Article 323a has the closest affiliations with the crime of embezzlement in relation to the conduct which is to be made a criminal offence. Partly in response to comments on this point by the Netherlands Justice Association, because Article 67 of the Code of Criminal Procedure allows pre-trial detention for the offence of embezzlement, this amendment serves to make this provision possible in the case of suspected offenses under the new Article 323a as well.

The Minister of Justice.